

Reproduced with permission from The United States Law Week, 72 U.S.L.W. 2403, 1/20/04. Copyright © 2004 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

**Campaign Finance**

**Tax Code Section 527 Groups Not an End-Run Around McCain-Feingold**

BY EDWARD B. FOLEY AND DONALD TOBIN

In the aftermath of the U.S. Supreme Court's recent decision in *McConnell v. Federal Election Commission*, 72 U.S.L.W. 4015 (U.S. Dec. 10, 2003), upholding the constitutionality of the Bipartisan Campaign Reform Act, known as the McCain-Feingold law, large-dollar donors seeking to influence federal elections are looking for ways other than through soft-money contributions to political parties.

*Edward B. Foley is the Robert M. Duncan/Jones Day Designated Professor of Law, Mortiz College of Law at Ohio State University in Columbus, Ohio. Foley served as a consultant to the attorneys representing the intervenor-defendants in **McConnell v. FEC** and published numerous previous articles concerning campaign finance regulation.*

*Donald Tobin is an assistant professor of law, Mortiz College of Law at Ohio State. Professor Tobin examined the intersection of election law, tax law, and Section 527 organizations in his recent article, **Anonymous Speech and Section 527 of the Internal Revenue Code**, 37 *GEORGIA LAW REVIEW* 611 (2003).*

*Both Foley and Tobin wish to thank, in particular, Marty Lederman for his thoughtful exchange of ideas concerning the topic of this article.*

Particular attention has focused on so-called 527 organizations, named after the section of the Internal Revenue Code that grants tax-exempt status to political organizations whose primary purpose is to influence elections.

Widely publicized, for example, is the announcement of George Soros, the wealthy financier who supports a variety of liberal causes, that he intends to donate \$10 million to a newly created 527 organization called America Coming Together, or ACT, whose self-declared purpose is "to defeat George W. Bush and elect progressive candidates all across America."<sup>1</sup>

Similarly, big-money conservative donors have created a corresponding 527 organization called Americans for a Better Country (ABC) with the explicit purpose of facilitating "President Bush's reelection, the defeat of the eventual Democratic Presidential nominee, and the election of Republican candidates to the United States Senate and House."<sup>2</sup>

But there is a huge potential hitch in the idea that 527 organizations can serve as repositories of large-dollar donations for the purpose of influencing federal elections. If these 527 organizations also count as "political committees" under the Federal Election Campaign Act

<sup>1</sup> Interestingly, ACT has created a "nonfederal" account that provides disclosure with the Internal Revenue Service as a Section 527 organization, and a federal account that is registered as a political action committee with the FEC. Its Web site indicates that amounts donated exceeding \$5,000 will be placed in the organization's "nonfederal" account.

<sup>2</sup> FEC Advisory Opinion Request 2003-37.

(FECA), then contributions to them are capped at \$5,000 per donor.

---

**There is a huge potential hitch in the idea that  
527 organizations can serve as repositories of  
large-dollar donations for the purpose of  
influencing federal elections.**

---

In other words, Soros and others like him would not be permitted to give seven-figure contributions to a 527 organization in order to elect or defeat a federal candidate, including President Bush.

This article, therefore, will analyze both the statutory and constitutional questions concerning whether 527 organizations are “political committees” under FECA and thus subject to the \$5,000 cap on the contributions they receive from each donor. The article will also consider whether other forms of tax-exempt organizations besides 527s—most notably so-called 501(c)(4) organizations—provide an alternative means of circumventing this \$5,000 contribution limit.

In the end, however, any organization whose “major purpose” is to influence federal elections will be subject to this limit, which the Supreme Court is likely to uphold.

**Definition of ‘Political Committee’ Under FECA.** The express terms of FECA, 2 U.S.C. § 431(4)(A), encompass within its definition of “political committee” any group that receives “contributions” or makes “expenditures” exceeding \$1,000 per year.

Because FECA in turn defines “contribution” or “expenditure” to apply whenever any gift or payment is made “for the purpose of influencing any election for Federal office,” a literal reading of FECA would mean that any group that spends more than \$1,000 in a year to influence a federal election would be a “political committee” under the act.

To obviate the far-reaching implications of this literal reading, however, the Supreme Court has stated that a group will not fall within FECA’s definition of “political committee” unless its “major purpose” is to influence federal elections.<sup>3</sup> As we shall explain, any organization with such a major purpose will be classified as a “political committee” under FECA, and all 527 organizations that focus on federal rather than state elections will do so.

**Debate Over ‘Major Purpose’ Test.** In recent years, there has been considerable debate and uncertainty concerning how this “major purpose” test operates in practice. A key question has been whether, in calculating the portion of a group’s spending devoted to the purpose of influencing federal elections, the only spending that counts is money used for “express advocacy,” meaning messages containing “Vote for Smith,” “Defeat Jones” or the equivalent.

In 2001, the FEC began a rulemaking proceeding to consider this and other questions but suspended the ef-

fort, in large part to await the enactment and judicial review of the McCain-Feingold revisions to FECA.<sup>4</sup> Now that the McCain-Feingold legislation has been upheld by the Supreme Court, it is time to revisit the definition of “political committee”—as indeed the FEC is likely to do when ruling upon a request for an advisory opinion submitted by ABC, the conservative 527 organization mentioned at the outset.

In *Buckley v. Valeo*, the Supreme Court developed the “major purpose” limitation on the definition of a “political committee” as an alternative to its “express advocacy” test. The court discussed both in the context of construing FECA’s disclosure requirement applicable to groups that are not political committees but that make some expenditures to influence federal elections.

The court said that, with respect to these (non-PAC) groups, it was necessary to construe disclosure requirements as limited to express advocacy, so that the statutory term “for the purpose of influencing a federal election” was not too vague or broad. But with respect to “political committees,” the same statutory term could be protected from such problems by the alternative means of the “major purpose” test. As long as the category of “political committees” is limited to those groups whose “major purpose” is to influence federal elections, the court explained, then the expenditures of such groups “can be assumed to fall within the core area sought to be addressed by Congress.” They are, the court added, “by definition, campaign related.”

Thus, because of the “major purpose” test, a political committee’s spending is subject to regulation under FECA whether or not this spending is for “express advocacy.” Given this fact, it would make little sense to say that the only spending that determines whether a group is a political committee is spending for express advocacy. Instead, any spending that shows the “major purpose” of the group to be influencing federal elections would so qualify. This conclusion stems from considering *Buckley* alone.

**‘McConnell’ Confirms ‘Buckley’ Approach.** *McConnell* clearly confirms this point and puts the matter to rest. There the court squarely held that the “express advocacy” test was not a constitutional requirement, but only an exercise of statutory construction.

Using different statutory language, including specifically McCain-Feingold’s new definition of “electioneering communications,” Congress has the authority to reach different categories of activities designed to influence federal elections. Moreover, in *McConnell*,<sup>5</sup> the Supreme Court specifically invoked the category of “political committee,” as narrowed by the “major purpose” test, as an example of a constitutionally permissible scope of regulation.

Thus, at a minimum, the portion of a group’s spending devoted to the new category of “electioneering communications” would count in determining whether the group’s “major purpose” is to influence federal elections.

---

<sup>4</sup> 66 Fed. Reg. 13,682 (March 7, 2001).

<sup>5</sup> Slip opinion at 62.

<sup>3</sup> *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

---

**At a minimum, the portion of a group's spending devoted to the new category of "electioneering communications" would count in determining whether the group's "major purpose" is to influence federal elections.**

---

Even so, it would make more sense to consider the portion of a group's spending on what the McCain-Feingold law specifically defines as "federal election activities." These include public communications that "promote, support, oppose, or attack" a federal candidate, as well as voter registration and get-out-the-vote activities designed to benefit federal candidates.

As the court in *McConnell* explicitly recognized, large-dollar donors give to support these activities precisely because they affect the outcome of federal elections: "federal candidates reap substantial rewards from any efforts that increase the number of like-minded registered voters who actually go to the polls."<sup>6</sup> Accordingly, if a majority of a group's spending falls within the statutorily defined category of "federal election activities," then the group should be considered a "political committee" under FECA.

Of course, there should be no need for the FEC to conduct an audit of a group's spending if the group publicly declares that its major, or exclusive, purpose is to influence federal elections. Such a declaration, by itself, should trigger the obligation to register with the FEC as a "political committee" and comply with the relevant rules, including the \$5,000 cap on contributions to the group.

In the case of ACT and ABC, the two 527 organizations that have prompted so much inquiry, it would appear that they have both made such public declarations. Indeed, as we shall discuss, eligibility for tax-exempt status under Section 527 would seem to require such a declaration.

**527s and Other Tax-Exempt Organizations.** To qualify as a 527 organization under the federal tax code, an entity must have influencing elections as its primary purpose. The tax code reads specifically that 527 status applies when an organization is "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function."<sup>7</sup>

In turn, the tax code defines "exempt function" as "the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office."<sup>8</sup>

Putting aside for the moment the important qualification that the primary purpose of a 527 organization may be to influence state (or local)—rather than federal—elections, this primary purpose test under the tax code

is essentially the same as the "major purpose" test under FECA. In other words, if an organization qualifies as a 527 group because its "primary purpose" is to influence federal elections, then it follows that the organization is a "political committee" under FECA, with its "major purpose" being to influence federal elections.

Indeed, the Supreme Court itself has equated the adjectives "primary" and "major" when discussing the "major purpose" test under FECA—in *Massachusetts Citizens for Life Inc. v. FEC (MCFL)*, the court observed that the organization there would be a "political committee" if the ratio of its electoral to non-electoral spending shows that "its primary objective is to influence political campaigns."<sup>9</sup>

Despite this congruence of the adjectives "major" and "primary," it might have been argued before *McConnell*, based on the "express advocacy" concept, that the scope of the "major purpose" test under FECA was much narrower than the scope of the "primary purpose" test under 527 of the tax code. In other words, if "express advocacy" were the only kind of activity that counted in determining whether influencing elections is an organization's "major purpose" under FECA, then (according to this argument) an organization that never engages in "express advocacy" could still have its "primary purpose" under 527 be influencing elections, because the term "influencing" under 527 applies to a broader class of activities than just "express advocacy."

In fact, the Internal Revenue Service has specifically ruled that such activities as partisan get-out-the-vote (GOTV) and voter registration drives count as having the purpose of influencing an election in order to determine an organization's primary purpose under 527.<sup>10</sup>

**Gap Disappeared With 'McConnell' Decision.** After *McConnell*, however, any gap that arguably might have existed between the meaning of influencing elections under FECA and 527 has disappeared.

As we have seen, the best reading of FECA after *McConnell* is that an organization that devotes a majority of its spending to "federal election activities," as defined by McCain-Feingold and discussed in *McConnell*, has influencing federal elections as its major purpose and thus is a political committee under FECA.

Yet the kind of activities that count as "federal election activities" under this definition—voter registration, GOTV, and communications supporting or opposing a candidate even though they lack "express advocacy"—are just the sort of activities that qualify as seeking to influence an election under 527. Thus, any organization that devotes itself primarily to this category of activities is both a 527 organization under the tax code and a political committee under FECA.

There remains to consider, however, state-oriented 527 organizations—ones devoted primarily to influencing state (or local), rather than federal, elections. If an organization were to devote itself exclusively to influ-

<sup>9</sup> 479 U.S. 238, 262 (1986).

<sup>10</sup> See IRS Private Letter Ruling 1999-25051 (March 29, 1999) (partisan registration and get-out-the-vote drives qualify as attempting to influence an election under Section 527); but see Treas. Regs. § 1.527-6(b)(5) (nonpartisan registration and get-out-the-vote drives are not expenditures for an exempt function). The IRS, however, has a very liberal definition of what is partisan, see P.L.R. 1999-25051 (finding activities are partisan if they are designed "to increase the election prospects of pro-issue candidates as a group").

<sup>6</sup> Slip op. at 59.

<sup>7</sup> I.R.C. § 527(e)(1).

<sup>8</sup> I.R.C. § 527(e)(2).

encing state races and never spend a penny of its funds on “federal election activities,” then quite clearly it would still qualify as a 527 group and yet not be a “political committee” under FECA. The same point is true of organizations that devote most of their spending to influencing state elections and only a minor portion of their resources to “federal election activities.”

Thus, a 527 organization—like the Soros-supported ACT—could escape being a “political committee” under FECA if the major part of its efforts were devoted to state-specific activities rather than “federal election activities.” Determining whether a 527 organization is successful in this regard requires assessing the ratio of its spending on “federal election activities” in comparison to its spending on state-specific electoral activities—if the former is greater than the latter, then the 527 is a political committee under FECA, but otherwise not.

Since the big advantage of evading the “political committee” designation is the ability of a 527 organization to receive contributions in amounts greater than \$5,000 per donor, there is an enormous incentive to keep this ratio lower than 50-50. But for those 527 organizations that do so, they are entitled to this prize. After all, the inevitable consequence of the “major purpose” test is that those organizations whose spending on “federal election activities” remains only a minor part of their mission need not comply with the extra strictures that FECA imposes on political committees.<sup>11</sup>

It becomes especially important, however, that the FEC keep an eagle eye on these organizations, to see if they cross the 50-50 threshold, so that those 527 organizations that should be classified as political committees are properly regulated.<sup>12</sup>

**Comparison to 501(c)(4) Groups.** There is another kind of tax-exempt organization that needs discussion: the so-called (c)(4) organizations, named after I.R.C. § 501(c)(4). In contrast to 527 organizations, (c)(4) organizations are not permitted to have influencing elections as their primary purpose, although they may engage in electioneering as a secondary activity.<sup>13</sup> This

<sup>11</sup> In focusing on the ratio of spending devoted to state and federal electoral activities, we do not mean to preclude the possibility that it might be necessary to examine also some other measure of an organization’s relative commitment to federal and state activities, such as the ratio of time spent on these two categories. This caveat applies throughout our analysis of the “major purpose” test.

<sup>12</sup> This analysis does not address the separate question whether “state 527 organizations” that are not “political committees” under FECA nonetheless are prevented from receiving contributions from corporations or unions under separate provisions of FECA that specifically constrain electioneering by corporations and unions. Likewise, this analysis assumes that, to avoid designation as a “political committee,” a “state 527 organization” must itself remain unincorporated.

<sup>13</sup> See Treas. Regs. § 1.501(c)(4)-1(a)(2)(i) (as amended in 1990) (providing that organization qualifies as Section 501(c)(4) organization if “it is primarily engaged in promoting in some way the common good and general welfare of the people of the community”); Treas. Regs. § 1.501(c)(4)-1(a)(2)(ii) (as amended in 1990) (providing that “the promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office”); see also Revenue Ruling 81-95, 1981-1 Cumulative Bulletin 332 (providing that Section 501(c)(4) organization may participate in political

kind of organization, then, would seem a useful vehicle for escaping the designation of a “political committee” under FECA. By contrast, 501(c)(3) organizations—which have additional tax benefits beyond those available to (c)(4) groups pursuant to I.R.C. Section 501(c)(3)—are not permitted to participate either directly or indirectly in political campaigns and thus cannot serve as a vehicle for electioneering.<sup>14</sup>

But the same sort of ratio analysis as described above would apply to organizations seeking to maintain (c)(4) status. If an organization spends more of its funds on “federal election activities” than it does on the non-electoral “social welfare” functions that make it eligible for tax exemption under (c)(4), then the organization would not qualify for (c)(4) treatment—and also would be a political committee under FECA.

Conversely, however, if an organization spends less on “federal election activities” than on these other “social welfare” functions, then it would be entitled to (c)(4) status and would not be subject to “political committee” designation under FECA.

Again, therefore, policing this spending ratio is crucial to determining whether the organization may receive donations in excess of \$5,000.

**Two Options for Spending.** Thus, there are two ways for tax-exempt organizations to spend a substantial portion of their funds on “federal election activities,” to influence federal elections, without suffering the strictures of being a political committee under FECA. One is to spend more on state-specific electoral activities, while the other is to spend more on non-electoral activities that qualify as “social welfare” functions under (c)(4).

Because this second category of activities may prove more attractive to some donors than the first—some donors may be uninterested in state elections but interested in sponsoring the kind of generic “public policy” discourse that counts as a “social welfare” function under (c)(4)—one would expect to see some political organizations exercising the (c)(4) option, rather than becoming a “state 527 organization,” even though there are extra tax advantages associated with being a 527 organization rather than a (c)(4) organization.<sup>15</sup>

campaign as long as its primary function is promotion of social welfare).

<sup>14</sup> Section 501(c)(3) organizations may, however, engage in voter education activities and attempt to influence legislation as long as it is not a substantial part of their activities. See also Treas. Regs. § 1.501(c)(3)(ii) (as amended in 1990) (noting that organization is action organization and does not qualify for Section 501(c)(3) status if a “substantial part of its activities is attempting to influence legislation by propaganda or otherwise”); DANIEL SIMMONS, *An Essay on Federal Income Taxation and Campaign Finance Reform*, 54 FLORIDA LAW REVIEW 1, 107-108 (2002) (arguing that Section 501(c)(3) and (c)(4) organizations may be used as a conduit for campaign activities because the definition of political intervention is very vague and the IRS is slow to revoke an organization’s tax exempt status).

<sup>15</sup> Most notable is the fact that contributions to 527 organizations are exempt from the federal gift tax that the donor otherwise would be required to pay, whereas contributions to (c)(4) groups do not receive a similar exemption from the gift tax. See I.R.C. § 2501(a)(5). For a thorough discussion of the gift tax issue see TOBIN, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 GEORGIA LAW REVIEW 611 (2003), at 648-651, 653-655.

To be sure, some organizations may engage in both of these “nonfederal” categories of spending, and if their combination of spending on “federal election activities” and state-specific electoral activities exceeds their non-electoral spending, they may qualify as a 527 organization without being a political committee under FECA, even though their state-specific electoral spending is a small fraction of the total.

An example helps to illustrate this point. Suppose an organization spends 45 percent of its funds on “federal election activities,” only 10 percent on state-specific electoral activities, and 40 percent on non-electoral “public policy” discourse. Because it spends a majority of its funds to influence both federal and state elections collectively, it qualifies as a 527 organization. Yet because it spends less on “federal election activities” than it does on its other political activities (i.e., its state-specific and non-electoral “public policy” activities), it arguably does not have influencing federal elections as its “major purpose” under FECA.

To avoid this result, one might say that the “major purpose” of an organization is influencing federal elections whenever it spends more on “federal election activities” than on either state-specific electoral activities or non-electoral “public policy” activities. This approach is not foreclosed by the Supreme Court’s discussion of the “major purpose” test in *Buckley* and *MCFL*. But, in the absence of legislative clarification from Congress, it would seem that the better understanding of the “major purpose” gloss that the court imposed on FECA would be that a majority of an organization’s spending for political purposes must come within the category of “federal election activities” rather than on the combined “nonfederal” category of both state-specific electoral activities and non-electoral “public policy” discourse.

**Constitutional Question.** In considering whether it is constitutional to impose a \$5,000 ceiling on contributions to an organization that devotes a majority of its spending to “federal election activities,” we begin by observing that George Soros, or any other wealthy individual, has a First Amendment right to spend unlimited amounts of money on “federal election activities,” and this point is true regardless of the particular type of “federal election activity”: voter registration, GOTV, or communications supporting or opposing a candidate (whether “express advocacy,” “electioneering communications,” or otherwise).<sup>16</sup>

If Soros has this right as an individual, then—the argument goes—several individuals should be equally entitled to get together to pool their resources to exercise the same First Amendment right.

It is a powerful argument. Indeed, it persuaded Justice Blackmun, who adopted it in his separate concurrence in *California Medical Association v. FEC*, 453 U.S. 180 (1981), parting company with the plurality opinion, which expressly left the issue undecided. The court in *California Medical* confronted only the situa-

tion in which a “political committee” itself makes donations directly to the campaigns of federal candidates, thereby falling within the special category of a “multi-candidate political committee” under FECA, and thus the *California Medical* court did not need to resolve the key question of whether the same \$5,000 limit on contributions to a political committee is constitutional if and when the committee confines itself to activities that are uncoordinated with any candidate’s own campaign.

---

**Under the Supreme Court’s consistent campaign-finance jurisprudence—including *McConnell*—contributions to third-party organizations receive significantly less First Amendment protection than an individual’s own spending.**

---

Despite the force of the argument that persuaded Justice Blackmun to offer dicta on this issue in his *California Medical* concurrence, the fact remains that a contribution to a political committee is a contribution, and not an individual’s own spending.

Under the court’s consistent campaign-finance jurisprudence—including *McConnell*—contributions to third-party organizations receive significantly less First Amendment protection than an individual’s own spending. “Because the communicative value of large contributions inheres mainly in their ability to facilitate the speech of their recipients,” the court in *McConnell* confirmed that “contribution limits impose serious burdens on free speech only if they are so low as to ‘preven[t] candidates and political committees from amassing the resources necessary for effective advocacy.’”<sup>17</sup> The fact that contribution limits cause recipient organizations to raise money from more rather than fewer donors, in the court’s view, is not a negative.

**McCain-Feingold Limits Upheld.** Moreover, in *McConnell*, the court specifically upheld the new limits that McCain-Feingold imposes on contributions received by state political parties for “federal election activities.” By confining state parties to so-called “hard money” under FECA whenever they engage in “federal election activities” (subject to the qualification that state parties may also use so-called Levin funds for these activities under certain circumstances and restrictions), McCain-Feingold imposed a \$10,000 contribution limit to state parties for these federal election activities. The court held that this contribution limit was justified by the potentially corrupting effect on federal candidates resulting from large-dollar donations to state parties.

As the court explained, this contribution limit “is premised on Congress’ judgment that if a large donation is capable of putting a federal candidate in the debt of the contributor, it poses a threat of corruption or the appearance of corruption.”<sup>18</sup> The court further observed that contributions to state parties for “federal election activities” are precisely the category of contributions

<sup>16</sup> The right to spend unlimited funds on voter registration or GOTV activities presumably would be limited to advocacy in this regard and would not extend to any form of quid pro quo payments to promote registration or voting. In other words, Congress could prohibit financial inducements to individuals paid in exchange for registering to vote, or going to the polls, but could not limit expenditures advocating that individuals register or that they go to the polls.

<sup>17</sup> Slip op. at 25 (quoting *Buckley*, 424 U.S. at 21).

<sup>18</sup> Slip op. at 58.

“that can be used to benefit federal candidates directly.”<sup>19</sup>

Political committees, of course, are not the same thing as political parties. The court in *McConnell* itself observed this fact, noting that political parties are unique in their connection to candidates, in large part because only parties “select slates of candidates for elections” and only parties “determine who will serve on legislative committees, elect congressional leadership, [and] organize legislative caucuses.”<sup>20</sup>

Nonetheless, political committees are also distinct from other forms of political interest groups, because political committees have as their “major purpose” the election or defeat of federal candidates. Consequently, large-dollar donations to political committees present risks of corrupting federal candidates similar to large-dollar donations to state parties for their “federal campaign activities,” and greater risks of corruption than donations to interests groups that are not devoted primarily to winning elections.

**Political Indebtedness.** Both donors and candidates see political committees—precisely because their primary purpose is to win elections—as vehicles for spending that benefits candidates. Therefore, candidates will be especially indebted to political committees, and donors seeking special leverage over candidates once in office (the kind of “undue influence” that the Supreme Court in recent cases, including *McConnell*, has recognized that Congress is entitled to combat) will be especially attracted to political committees as a way to secure this special leverage.

Accordingly, for the same reason that Congress has the power to cap contributions to state parties for “federal election activities,” Congress should have the same power to cap contributions to political committees, which have these same “federal election activities” as their predominant focus, because their major purpose is to influence federal elections.

Moreover, with respect to the need to accommodate the competing interests of free speech and electoral integrity, the dividing line between political committees and other interest groups is a sensible one. As long as an interest group refrains from making winning elections its “major purpose,” then individuals (including George Soros) can donate funds to the group in unlimited amounts in order to exercise jointly their First Amendment rights.

But once an interest group crosses the line, and devotes the major portion of its activities to winning federal elections, then the compelling congressional interest in protecting the integrity of federal elections—and the integrity of the legislative process that depends upon these elections—takes over and permits limits on the amount of money an donor can give to the interest group.

A close reading of the footnotes in *McConnell*, while not resolving the issue, supports this analysis. In footnote 51 of its opinion, the court expresses its agreement with Chief Justice Rehnquist “that Congress could not regulate financial contributions to political talk show hosts or newspaper editors on the sole basis that their activities conferred a *benefit* on [a federal] candidate.” (Emphasis in original.)

Neither talk shows nor newspapers are political committees whose major purpose is to win federal elections. Instead, to the extent they engage in “federal election activities,” they do so as incidental to their primary media-related purposes. Consequently, money given to them does not raise the distinctive risks of corruption associated with large-dollar donations to political committees, which (like political parties) are inherently electoral in nature given their primary purpose.

**Constitutional Cap on Contributions.** By contrast, footnote 48 of the court’s opinion indicates that it is constitutional to cap the contributions received by political committees, even if those contributions are used for spending independent of a candidate’s campaign, rather than for coordinated spending or direct contributions to a candidate.

After citing the \$5,000 limit on contributions to “multicandidate political committees” upheld in *California Medical*, as well as the \$25,000 limit on aggregate contributions to parties, PACs, and candidates upheld in *Buckley*, footnote 48 states that “[these] limits restricted not only the source and amount of funds available to parties and political committees to make candidate contributions, but also the source and amount of funds available to engage in express advocacy and numerous other noncoordinated expenditures.” In the same footnote, the court continues: “If indeed the First Amendment prohibited Congress from regulating contributions to fund the latter, the otherwise easy-to-remedy exploitation of parties as pass-throughs (e.g., a strict limit on donations that could be used to fund candidate contributions) would have provided insufficient justification for such overbroad legislation.”

What the court is saying here is that money received by political committees may be subject to limits not only when that money is used to make direct contributions to candidates, but also when used for independent activities. While this language cannot be taken as a dispositive ruling on the question expressly left open in *California Medical*, it is a strong hint at how that question should be answered.

Perhaps, however, the ultimate lesson to take away from *McConnell* on this constitutional question is that the answer might depend on the strength of the evidence before the court concerning the risks of corruption at the time the question is under review.

*McConnell* upheld the contribution limits on state parties because the evidence there overwhelmingly showed that the risk of corruption was real, not merely theoretical.

If, whenever the court considered the constitutionality of the \$5,000 cap on contributions to political committees that confine themselves to spending independent from candidates, the evidence regarding the risks of corruption is thin, then there is a much greater chance that the court would invalidate the limit. Conversely, were the government to develop a record comparable to the one in *McConnell*, it is likely that the limit would be upheld.

**Conclusion.** Forming a 527 or (c)(4) tax-exempt organization as a vehicle for receiving large-dollar donations to spend on influencing federal elections is not an easy end-run around McCain-Feingold.

Many 527 organizations that attempt to influence federal elections are also political committees and thus

<sup>19</sup> Id. at 59.

<sup>20</sup> Id. at 81.

---

subject to the \$5,000 contribution cap that comes with the “political committee” designation under FECA.

To be sure, if the tax-exempt organization spends less on “federal election activities” than on both state-specific election activities and non-electoral functions, then the organization can escape the political committee designation and the contribution cap.

But wealthy donors seeking to influence federal elections may be somewhat deterred by the fact that more than 50 percent of their contributions must be devoted to activities other than for what they wish to give their money.

Accordingly, we can expect a 527 organization that wishes to spend most of its money on “federal election activities” to challenge the constitutionality of this cap

as applied to any organization that meets the definition of “political committee” under FECA, even if all the organization’s “federal election activities” are uncoordinated with a candidate’s own campaign.

Although the outcome of this constitutional challenge ultimately depends on the strength of the evidence that the government can develop regarding the potential risk of corruption resulting from large-dollar donations to “political committees,” as distinct from other politically motivated interest groups, the reasoning of *McCormell* points to the conclusion that “political committees,” like “political parties,” may be subject to contribution limits that would not be permissible if imposed on other organizations.