Show Us Your Money: Halting the Use of Trade Organizations as Covert Conduits for Corporate Campaign Contributions

Shayla Kasel*

I. INTRODUCTION ........................................................................................................ 298

II. HISTORY OF CORPORATE POLITICAL CONTRIBUTIONS: CORPORATIONS ALWAYS HAVE AND ALWAYS WILL INFLUENCE POLITICS................................................................. 300
   A. Turn of the Century: Ban on Corporate Contributions ........................................ 301
   C. Buckley v. Valeo: The Case that Determined the Course of Campaign Finance .......................................................... 304
      1. The Level of Scrutiny for Limiting Political Speech ........................................ 304
      2. “Magic Words” ............................................................................................. 305
      3. Soft Money Loophole ..................................................................................... 306
   D. 2002 Bipartisan Campaign Reform Act and the Judicial Aftermath .................. 306
      1. Changing Levels of Scrutiny .......................................................................... 307
      2. Issue Ads Are Here to Stay ............................................................................. 308
      3. The Elimination of Soft Money ...................................................................... 309
   E. 527s .................................................................................................................... 309
   F. Trade Organizations ........................................................................................... 311
   G. Regulating Corporate Speech ............................................................................ 313

III. TRADE ORGANIZATIONS: CORPORATIONS’ NEWEST LOOPHOLE FOR CORPORATE POLITICAL EXPENDITURES .................................................................................... 314

IV. CONGRESS SHOULD REQUIRE TRADE ORGANIZATION DISCLOSURE WITH IRS OVERSIGHT ........................................................................................................... 317
   A. Contributions and Expenditures Should be Disclosed......................................... 317

* J.D. Candidate, The University of Iowa, College of Law, 2008; B.A. University of California, Los Angeles, 2001. Special thanks are due to Neil Reiff of Sandler, Reiff & Young, PC for his guidance and suggestions; to Professor Hillary Sale for introducing me to the topic; and to the JCL board (former and current) for their hard work and editing advice. I am especially indebted to John McCormally for his ideas, ongoing support and edits of many drafts, and to my parents for their support, without which I would not have made it this far. All remaining errors are my own.
I. INTRODUCTION

The U.S. Chamber of Commerce (the Chamber) is the “world’s largest business federation,”1 and the most financially influential trade organization,2 representing three million large and small businesses and thousands of smaller trade associations.3 The Chamber is not only the nation’s strongest business advocate and the top spender on lobbying efforts in Washington, D.C., but also is one of the top independent organizational contributors to state and federal political campaigns.4 The national Chamber alone spent $30 million in both the 2004 and 2006 elections.5 However, the public will never know who is funding the Chamber’s attack ads and get-out-the-vote efforts because the Chamber is a registered 501(c)(6) trade organization, and therefore is not required to itemize its political activities or comply with federal election donor limits.6

The Chamber’s campaign activities extend across the country to every level of

---

2. Lisa Caruso & Bara Vaida, One Big Lobbying Tab, NAT’L J., May 20, 2006, at 64; Matthew DoBias, Out of the Running; Healthcare Is a Back-Burner Issue This Election Year, MOD. HEALTHCARE, Sept. 4, 2006, at 8. For the purposes of this Note, “trade organization,” “trade association,” and “501(c)(6) organization” are synonymous.
5. Lou Dobbs Tonight: Latest Exit Polls; Democrats Confident of Winning Control of House of Representatives; E-Voting Problems Seen in Many Parts of U.S. (CNN television broadcast Nov. 7, 2006). The Chamber’s President and CEO stated in a letter to the board that “the Chamber put 215 people on the ground in 31 states; sent 3.7 million pieces of mail and more than 30 million e-mails; made 5.6 million phone calls,” which resulted in winning 20 of 28 tough House races and seven of nine tough Senate races in the 2004 elections. BEACHAM, supra note 4, at 6.
6. BEACHAM, supra note 4, at 9-11. 501(c)(6) organizations are defined as “[b]usiness leagues, chambers of commerce, real estate boards, boards of trade, or professional football leagues . . . not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.” I.R.C. § 501(c)(6) (2000).
2007]  

Show Us Your Money 299

election, and it acts as a conduit for corporate donations. When companies have exhausted their federal political action committee (PAC) contribution limits or wish to remain anonymous, they can turn to the Chamber or other trade organizations to hide their campaign contributions. In 2006, the Chamber poured money into the effort to reelect Democratic Congresswoman Melissa Bean, financing $700,000 in independent advertisements, almost doubling the amount spent in the average congressional race. However, the full extent of the Chamber’s involvement in political campaigns remains unclear. Despite its claim of victories from 2000 to 2004, and admissions of political spending, the Chamber and its affiliate, Institute for Legal Reform, claimed zero political expenditures on their 2000 tax form and reported only half of their claimed election spending in 2004. The growth of trade organizations as a vehicle for covert political contributions is a consequence of recent campaign finance reform. Despite legislative efforts to limit campaign contributions, election costs continue to rise: the 2006 election was the most expensive midterm election ever, with an estimated $2.8 billion spent.

Historically, campaign finance reforms have not decreased or slowed the amount of money flowing into politics. Congress began limiting corporate political contributions 100 years ago, prohibiting direct donations from corporate treasury funds to federal candidates. While this prohibition remains in place, corporations utilize loopholes to make political contributions and to independently run “issue ads” that directly influence


8. See John D. McKinnon, Upping the Dosage: Fearing a Democratic Victory, Drug Makers Fund Key Races, WALL ST. J. ONLINE, Oct. 25, 2006 (discussing how pharmaceutical companies funneled contributions through the Chamber).


10. Press Release, Public Citizen, supra note 7; Letter from Joan Claybrook, President, Public Citizen, to Mark Everson, Comm’t, IRS (Oct. 31, 2006), available at http://www.citizen.org/documents/ACF1F3E.pdf. Trade organizations’ only disclosure requirement is on their annual tax form, where they must list a total spent on political expenditures on line 81 of Form 990. Id.

11. See infra Part II.F (documenting the development of trade organizations).

12. Press Release, Center for Responsive Politics, supra note 9. The $2.8 billion includes money spent by candidates, political parties, and issue advocacy groups. Id. This figure, however, may not account for unreported spending by trade organizations, social advocacy groups, or labor unions. In 2006, the candidates who spent the most money won in 93% of House of Representative races and 67% of the Senate races. Id.

13. See infra Part II.A (discussing the first ban on corporate contributions). The Federal Election Committee (FEC) regulates money that is used in federal elections, and each state has separate laws that regulate local and statewide elections. See generally STATE CAPITAL LAW FIRM GROUP, LOBBYING, PACS, AND CAMPAIGN FINANCE: 50 STATE HANDBOOK (Peter C. Christianson et al. eds., 9th ed. 2003) (listing campaign finance laws by state). State election laws vary widely. Id. For example, some states allow corporate contributions, while others prohibit them. Id. Some impose strict caps on contributions, while others allow unlimited contributions. Id.
elections.\textsuperscript{14} In 2002, Congress sought to eliminate some of these loopholes by passing the Bipartisan Campaign Reform Act (BCRA).\textsuperscript{15} However, “[m]oney, like water, will almost instantly find its way undiluted into the cracks, no matter how the law changes.”\textsuperscript{16} As the cost of elections continues to rise, money finds new outlets and new ways to influence elections.\textsuperscript{17} One of those outlets is 501(c)(6) trade organizations.

While political organizations, like 527s\textsuperscript{18} and PACs, attract media scrutiny, less attention is paid to the trade organization loophole because little is known about trade organizations’ activities.\textsuperscript{19} Trade organizations are sometimes called “stealth PACs” because they only report their total amount spent on election activities and are not required to itemize their donors or expenditures.\textsuperscript{20} This Note argues that the political activities of trade organizations should be disclosed to the public through the Internal Revenue Service (IRS). Part II outlines the history of corporate political contributions and the development of trade organizations. Part III lays out the problem of trade organizations acting as covert conduits. Part IV advocates that Congress should require trade organizations to disclose federal political donors and expenditures to the IRS because it has a working system in place for similar disclosures by 527 organizations and can uncover both donations and expenditures.\textsuperscript{21}

II. HISTORY OF CORPORATE POLITICAL CONTRIBUTIONS: CORPORATIONS ALWAYS HAVE AND ALWAYS WILL INFLUENCE POLITICS

The campaign finance system has continuously evolved since the 1830s,\textsuperscript{22} with each new change prompted by finger pointing and partisan concerns.\textsuperscript{23} The regulatory system developed through reactionary legislation enacted in response to each new scandal and

\textsuperscript{14} See infra Part II.C.2 (stating political ads that do not use certain “magic words” are not regulated).

\textsuperscript{15} Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-55, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C. and 47 U.S.C. (Supp. II 2002)). One loophole allowed large sums of money from prohibited sources, such as corporations, to circumvent the law by giving to party organizations. Id.

\textsuperscript{16} Michael J. Malbin, \textit{Thinking About Reform, in LIFE AFTER REFORM} 3 (Michael Malbin ed., 2003).

\textsuperscript{17} See Frank J. Favia, Jr., \textit{Enforcing the Goals of the Bipartisan Campaign Reform Act: Silencing Nonprofit Groups and Stealth PACs in Federal Elections}, 2006 U. ILL. L. REV. 1081, 1086-90 (discussing the rise of nonprofits, including 527s and 501(c)s, as recipients of soft money for campaign activities).

\textsuperscript{18} See infra Part II.E (discussing the creation and regulation of 527 organizations).

\textsuperscript{19} Nicholas Confessore, \textit{Bush’s Secret Stash: Why the GOP War Chest Is Even Bigger than You Think}, WASH. MONTHLY, May 1, 2004, at 17. “‘When it comes to 501(c)s, the information is so sparse that hardly anyone has ventured into this area,’ says Craig Holman of Public Citizen, one of the few groups that tries to keep tabs on 501(c) political activity.” Id. at 22. Reporters from the \textit{Washington Post} estimated that trade organizations spent $70 to $100 million on the 2004 election, based on interviews and available records, but any estimate is just a guess. Thomas B. Edsall & James V. Grimaldi, \textit{New Routes for Money to Sway Voters: 501c Groups Escape Disclosure Rules}, \textit{WASH. POST}, Sept. 27, 2004, at A1.

\textsuperscript{20} Marie Price, \textit{Business Group’s Campaign Activities in OK Questioned}, J. REC., July 31, 2006, at 12.


\textsuperscript{22} See infra Part II.A-E (chronicling the development of campaign finance regulations).

\textsuperscript{23} See, e.g., Troy Newmyer, \textit{527 Shift Muddles Conference}, ROLL CALL, May 11, 2006, at 6 (chronicling the recent partisan fighting over campaign finance regulations to ensure each political party is affected equally by any changes).
public outcry. Often, the remedy for the appearance of corruption was a new disclosure system. Each law addressed the most recent problems, but with every enacted law new loopholes were uncovered and exploited.

A. Turn of the Century: Ban on Corporate Contributions

Benjamin Harrison’s campaign for President in 1888 marked the “full scale development” of corporate contributions. A department store magnate donated $50,000 to Harrison’s campaign, the equivalent of $500,000 in 2000. Even as campaign costs rose rapidly in the 1890s, no laws limited how much money candidates could take from corporations or business leaders. William McKinley’s use of contributions from “large Wall Street Corporations” garnered $3 million dollars for each of his presidential campaigns in 1896 and 1900. Mark Hanna, who organized McKinley’s campaigns, “asked each company to ‘pay according to its stake in the general prosperity of the country and according to its special interest in a region where . . . a large amount of expensive canvassing had to be done.’”

McKinley’s corporate fundraising alarmed progressives, who demanded reform, claiming there was corruption in the form of favors exchanged for contributions. The only response was four states banning corporate contributions in 1897. Theodore Roosevelt’s campaign for president increased progressive concern because 73% of his 1904 campaign was funded by corporate donations and a quarter of his contributions came from four corporate leaders. Additionally, three large life insurance companies made substantial contributions to the Republican National Committee, sparking a scandal.

25. See infra Part II.A-B (explaining corruption that resulted in campaign finance regulation).
26. See infra Part II.B-E (outlining the cycle of campaign finance laws and the successive exploitation of loopholes).
27. BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 21-22 (2001) [hereinafter UNFREE SPEECH]. Business leaders were interested in the government’s policy on the development of oil, railroads, steel, and finance. Id.
28. Id.
29. Id.
31. Anthony Corrado, Money and Politics: A History of Federal Campaign Finance Law, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 7, 10 (Anthony Corrado et al. eds., 2005) [hereinafter Corrado, Money and Politics]. The three million dollars was more than twice the amount used by Harrison in 1888, but unofficial estimates speculate McKinley’s total campaign fund was over ten million dollars. UROFSKY, supra note 30, at 10.
33. Id.
34. UNFREE SPEECH, supra note 27, at 23. The four states to ban corporate contributions were Nebraska, Missouri, Tennessee, and Florida. Id.
35. Id.; UROFSKY, supra note 30, at 8-9. While Roosevelt ran on a “clean government” platform, he accepted $100,000 from Standard Oil, owned by John Rockefeller, and $150,000 from J.P. Morgan, each equivalent to two million dollars or more today. RODNEY A. SMITH, MONEY, POWER, & ELECTIONS: HOW CAMPAIGN FINANCE REFORM SUBVERTS AMERICAN DEMOCRACY 85 (2006) [hereinafter MONEY, POWER, & ELECTIONS].
and public outrage. An organized movement grew and lobbied Congress for campaign finance reform. Ironically, President Roosevelt subsequently became a strong supporter of reform, calling on Congress to pass strict campaign finance laws in his 1905 and 1906 State of the Union addresses.

In 1907, Congress passed the Tillman Act, which prohibited political contributions from corporate treasury funds. Congress articulated concerns that corporations were using their concentrated wealth to distort and corrupt the democratic government. However, the Act allowed gaping loopholes for contributions and was so easy to “evade” that there was never an occasion for the Act to be challenged in court. In 1910, the Act was superseded by the Federal Corrupt Practice Acts, also known as the Publicity Act of 1910, which required some post-election disclosure of contributions in congressional campaigns. However, the Act had little effect and corporate political contributions continued, easily circumventing the prohibitions.

The next congressional action on campaign finance was a response to the Tea Pot Dome Scandal in 1925. The Federal Corrupt Practices Act of 1925 tried again to stop corporate contributions by requiring quarterly disclosure reports. However, the Act contained no enforcement mechanism or penalties for noncompliance, and the disclosure requirements did not include publishing the reports or public access to the reports. Thus, it was wholly ineffective.


The current election regulatory system was established by the 1971 Federal Election

36. See Mary Ann Liebert & Robert E. Mutch, Before and After Bellotti: The Corporate Political Contributions Cases, 5 Election L.J. 293, 293-95 (2006); People ex rel. Perkins v. Moss, 80 N.E. 383, 386 (N.Y. 1907). New York, Equitable, and Mutual Life Insurance made campaign contributions to the Republican National Committee through executives. Id. While the court ruled for the defendants, it held that political contributions were “beyond the purpose[] for which [the] corporation exists and [were] wholly unjustifiable and illegal.” Id. at 388; UNFREE SPEECH, supra note 27, at 24.
38. Id.
40. UNFREE SPEECH, supra note 27, at 24.
41. Liebert & Mutch, supra note 36, at 300 (discussing scholarly views on why the Tillman Act was enacted, but not enforced).
42. UNFREE SPEECH, supra note 27, at 24.
43. Corrado, Money and Politics, supra note 31, at 14; MONEY, POWER, & ELECTIONS, supra note 35, at 87.
44. See Amanda S. LaForge, The Toothless Tiger–Structural, Political and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations, 10 Admin. L.J. Am. U. 351, 353 n.13 (1996); UNFREE SPEECH, supra note 27, at 25-27 (describing exclusive oil leases that were granted by the Secretary of the Interior in exchange for substantial contributions to the Republican Party).
45. UNFREE SPEECH, supra note 27, at 26-27.
46. Corrado, Money and Politics, supra note 31, at 14-15. Corporations circumvented the limits by reimbursing employees for contributing to candidate committees. Id. Under President Roosevelt’s New Deal legislation, Congress prohibited contributions by contractors trying to bid on the lucrative projects, but contractors evaded the prohibition by contributing money to state and national parties, which in turn benefited candidates. Id. at 16.
47. Id. at 16.
Campaign Act (FECA), and its amendments in 1974, 1976, and 1979. FECA was intended both to correct the inadequacies from the Federal Corrupt Practices Act of 1925 and to halt growing campaign costs. FECA required meaningful disclosure and reporting of campaign contributions and expenditures for the first time. However, the Watergate Scandal highlighted the limitations of the new regulations, as Nixon’s campaign committee attempted to circumvent FECA’s restrictions. Subsequent amendments to FECA were the most sweeping reforms ever in campaign finance, and they left little of the 1971 law intact. The goal was to ban corporate and union contributions and to end illegal corporate gifts and hidden “slush funds”—which were already prohibited—by adding penalties for candidates who accepted such money.

The 1974 Amendment created the Federal Election Commission (FEC), a regulatory board to enforce the Act and strengthen the disclosure system. However, while the FEC was empowered to enforce contribution limits and to oversee disclosure of contributions and expenditures used in federal elections, its effectiveness was undermined from the moment of its creation. Congress vetoed FEC actions when the agency conducted random audits of campaign committees and Congress ensured that the Commission was continually understaffed and under budgeted. Congress also established the FEC as a six person commission, evenly divided on party lines, ensuring that no controversial actions could be taken. The FEC is the only board that Congress has ever set up with


49. Corrado, Money and Politics, supra note 31, at 20-21. Advances in technology, including radio, television, and polling ability, led to substantial increases in campaign spending. Id. at 18-21; UROFSKY, supra note 30, at 24-25.

50. Corrado, Money and Politics, supra note 31, at 20-21; UNFREE SPEECH, supra note 27, at 32. The strict disclosures required quarterly reports of receipts and expenditures of any contribution over $100 (later amended to $200) including a donor’s name, address, and occupation; in addition, a contribution over $5000 had to be reported within 48 hours. Corrado, Money and Politics, supra note 31, at 21.

51. Sablatura, supra note 48, at 817-18; UNFREE SPEECH, supra note 27, at 31-32. The Watergate Scandal included an attempt to collect campaign contributions and deposit them into secret accounts on the eve of FECA’s implementation. Sablatura, supra note 48, at 817. When Nixon’s campaign was forced to disclose the contributions, Congress discovered $11 million stuffed into attaché cases and deposited in secret campaign accounts. Thomas E. Mann, The Rise of Soft Money, in INSIDE THE CAMPAIGN FINANCE BATTLE: COURT TESTIMONY ON THE NEW REFORMS 17, 18 (Anthony Corrado et al. eds., 2003). The events resulted in the indictment of 40 government officials and the 1974 amendment. MONEY, POWER, & ELECTIONS, supra note 35, at 1-4; UNFREE SPEECH, supra note 27, at 32.


53. Corrado, Money and Politics, supra note 31, at 22, 30; Mann, supra note 51, at 19.

54. UROFSKY, supra note 30, at 78-83.

55. Id. at 78-79. The FEC was given authority to investigate, supervise disclosures, write advisory opinions, make rules to carryout the provisions of the Act, and determine civil penalties. See Buckley v. Valeo, 424 U.S. 1, 109-13 (1976) (discussing the authority granted to the FEC as well as affirming the constitutionality of the grant of power).

56. UROFSKY, supra note 30, at 78-79.

57. Id. at 78-80.
the intention of creating an inter-agency stalemate.\textsuperscript{58} For most of the 1980s and 1990s, the FEC was simply a housekeeping body that did not engage in any controversial investigations.\textsuperscript{59}

Corporate political contributions found a new outlet following the 1976 FECA amendments, which established lower contribution limits for individuals and higher limits for PAC contributions, encouraging the growth of PACs.\textsuperscript{60} Although the first PAC was created in 1943, it was not until the 1980s that corporations took full advantage of this avenue to influence federal elections.\textsuperscript{61} An additional benefit of PACs was that corporations and unions were permitted to use treasury funds to organize the PAC and to fund contribution solicitation.\textsuperscript{62} However, PACs were limited because they were subject to contribution and expenditure limits set by FECA and had to disclose their financial activities to the FEC.\textsuperscript{63} Once corporations and unions reached their PAC contribution limits, they looked for other avenues to contribute money; they found a new loophole to exploit, in an exception carved out by the Supreme Court in \textit{Buckley v. Valeo}.\textsuperscript{64}

C. \textit{Buckley v. Valeo}: The Case that Determined the Course of Campaign Finance

Critics of the reform challenged FECA’s constitutionality, culminating in the Supreme Court decision \textit{Buckley v. Valeo}.\textsuperscript{65} The influence of \textit{Buckley} on campaign finance cannot be overstated.\textsuperscript{66} In \textit{Buckley}, the Court articulated three modifications to FECA that affect this Note’s discussion: the level of scrutiny for limiting political speech, the “magic words” test, and the ability to use “soft money.”\textsuperscript{67}

\textbf{1. The Level of Scrutiny for Limiting Political Speech}

In \textit{Buckley}, the Court determined campaign contributions were subject to “exacting scrutiny” because electioneering invoked the First Amendment rights of individuals and organizations.\textsuperscript{68} The government can regulate campaign finance, including requiring disclosure, if it demonstrates a compelling governmental interest sufficient to justify an

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{59} \textit{Id. at 83. In 1981, Congress tried to cut the FEC’s funding entirely and refused to allow random audits. Id. at 79}
\item \textsuperscript{60} \textit{Urofsky, supra note 30, at 74. Contribution limits given by PACs to candidates were the highest contributions allowed, leading to the explosion in the growth of PACs. Id. The number of PACs increased four fold from 608 in 1974 to 2601 in 1988, and 3835 in 1999. Id. In 2000, 43% of PACs were registered to business interests and only 8% to labor interests. Id.}
\item \textsuperscript{61} \textit{Unfree Speech, supra note 27, at 36.}
\item \textsuperscript{62} \textit{Urofsky, supra note 30, at 73-74.}
\item \textsuperscript{63} \textit{Id. at 74.}
\item \textsuperscript{64} \textit{Buckley v. Valeo, 424 U.S. 1, 58-61, 85-86, 109, 143-44 (1976) (affirming FECA in part and invalidating FECA in part, while laying the framework for all future campaign finance laws); see also infra Part II.C.3 (discussing \textit{Buckley}’s soft money loophole).}
\item \textsuperscript{65} \textit{See Buckley, 424 U.S. 1 (affirming FECA in part and invalidating some provisions).}
\item \textsuperscript{66} \textit{See generally E. Joshua Rosencreantz, \textit{Buckley Stops Here: Loosening the Judicial Stranglehold on Campaign Finance Reform} 10 (1998) (discussing the impact of \textit{Buckley} and how to overturn its effects).}
\item \textsuperscript{67} \textit{Buckley, 424 U.S. at 50-51, 65-66.}
\item \textsuperscript{68} \textit{Id. at 64-66.}
\end{itemize}
\end{footnotesize}
infringement on speech rights. The Buckley Court upheld the disclosure requirements because the government had three compelling interests: (1) an interest in providing information to voters so voters could judge the candidate’s political leanings; (2) an interest in discouraging corruption or the appearance of corruption; and (3) an interest in using disclosure to ensure committees keep proper records to comply with contribution limits. The tests and framework laid out in Buckley not only reorganized the campaign finance system that Congress put in place the year before, but they limited Congress’s ability to fully regulate election expenditures.

2. “Magic Words”

In Buckley, the Court narrowed the definition of candidate committee and differentiated “express advocacy” from “issue advocacy,” leaving many political communications outside of FECA and FEC regulation. The Court created an express advocacy test that limited FEC regulation to communications containing “magic words”: words that advocated for the viewer to “vote for or against” a candidate. For example, in the 2004 presidential campaign, a trade organization, called Americans for Jobs Security, mailed the following issue advertisement:

John Kerry voted against a comprehensive prescription drug benefit making prescription drugs more affordable and accessible to seniors. But it gets worse. Kerry wants to repeal the prescription drug benefits seniors now receive. Kerry’s prescription for failure: fewer choices, more government, more paperwork, higher costs. Call Senator Kerry and let him know that Americans [sic] Seniors deserve better.

This advertisement would not fall under FEC regulations because it does not contain the magic words; it does not “expressly” advocate that the reader vote for or against John Kerry. Any advertisements that did not include the magic words were issue advocacy, and if they were paid for independent of the candidate’s campaign committee, they would not fall within the campaign finance limits. However, the Supreme Court acknowledged

69. Id. at 75.
72. Id.
73. Id. at 67-68.
75. Mann, supra note 51, at 18.
that “the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.”  

3. Soft Money Loophole

In the wake of Buckley, the FEC promulgated rules, through advisory opinions, to explain how FECA limited spending. The FEC created a loophole for “soft money” (money that is not subject to federal limits) by determining that state parties have roles outside of federal election activity, such as issue advertisements and grassroots organizing. This loophole allowed state and national political parties to raise and spend vast quantities of money outside of the federal limits for “party building” activities. The effect was to create a category of money that was outside the control of the FEC, but could be manipulated to influence federal elections. The growth of campaigns financed by soft money was in part fueled by funding from previously prohibited sources, including corporate treasury funds. By the end of the 1980s, soft money was a major component of elections, paying for campaign staff salaries, overhead, and voter turnout. If state law permitted, corporations and unions could donate treasury money to state political parties to fund soft money activities. These corporate contributions and the use of soft money undermined the intent of the 1970s reforms. Over the next couple of decades, the FEC spent a lot of time explaining the permitted uses of soft money, but no major reforms were enacted. The overwhelming use of soft money became a clear indicator that FECA was no longer effective, but Congress did not pass reforms until 2002.

D. 2002 Bipartisan Campaign Reform Act and the Judicial Aftermath

The 2002 Bipartisan Campaign Reform Act (BCRA) was the most significant

---

78. See Buckley, 424 U.S. at 42.
80. Mann, supra note 51, at 20-23. Soft money is money that is not subject to federal contributions limits because it is nonfederal money raised to finance party activities. Corrado, Party Financing in the 2000 Elections, supra note 79, at 52-56. It was named “soft” in relation to hard money, which is money that is raised subject to the federal contribution limits, and is hard to raise. Id. at 50-52. The soft money loophole grew further through FEC regulatory decisions. Id. at 52-56.
81. Corrado, Money and Politics, supra note 31, at 32.
82. Id.
83. Id. Soft money receipts for the national parties alone rose from $86 million in 1992 to $495 million in 2000. Id. at 33.
84. Id. at 32.
85. Corrado, Money and Politics, supra note 31, at 32; Twenty-four states prohibit direct corporate contributions unless they are from a separate segregated fund, such as a PACs, and 21 states allow limited corporate contributions subject to a dollar limit. Bruce A. Schoenwald, A Conundrum in a Quagmire: Unraveling North Dakota’s Campaign Finance Law, 82 N.D. L. REV. 1, 7 (2006).
87. Id. at 52-56; Mann, supra note 51, at 20-23.
piece of campaign finance reform since FECA.89 BCRA attempted to curb the use of soft money and limit the use of “issue ads” in federal elections.90 The Supreme Court upheld most of the key provisions of BCRA in McConnell v. FEC.91 However, in 2007, the Court substantially weakened the impact of BCRA in Wisconsin Right to Life (WRTL).92 Most significantly, the Roberts Court has returned to “strict scrutiny” review of campaign finance laws, and overturned BCRA’s issue advocacy regulations. Thus, barely five years after its inception, BCRA, which was already the product of significant compromise and a long political battle, has only a limited impact on campaign finance.93

1. Changing Levels of Scrutiny

Prior to 2000, lower courts interpreted Buckley’s “exacting scrutiny” as a strict scrutiny test, and as a result, state contribution limits were repeatedly overturned.94 In 2000, the Supreme Court upheld a state contribution limit for the first time since Buckley.95 In Shrink Missouri, the Court acknowledged Buckley’s precedent, but appeared to simultaneously lessen the level of scrutiny and reduce the state’s evidentiary burden.96 The McConnell Court continued this trend toward legislative deference when it reviewed BCRA, applying intermediate scrutiny to the Act’s provisions.97 Given this level of deference, it appeared that more campaign finance legislation could survive judicial scrutiny.

However, just a few years later, the Supreme Court returned to strict scrutiny in reviewing campaign finance laws. In Randall v. Sorrell, the first campaign finance decision of the Roberts Court, the Court discussed strict scrutiny at length, indicating the Court would no longer defer to legislatures.98 Prior to Randall, the Court’s conservative wing—Justice Thomas, and to a lesser extent Justice Scalia—was extremely critical of the Court’s expanded deference in the area of campaign finance in Shrink Missouri and McConnell.99 In Randall, it found allies in the Court’s two newest members, Chief

91. See McConnell v. FEC, 540 U.S. 93 (2003) (affirming all significant provisions enacted by the BCRA).
95. See Nixon v. Shrink Mo. Gov’t PAC (Shrink Missouri), 528 U.S. 377 (2000) (upholding a low state contribution limit of $1,075); see Hasen, supra note 94, at 490-91 (discussing the impact of Shrink Missouri as ratcheting down the level of scrutiny, expanding the definition of corruption, lowering the evidentiary burden, and creating a different test for challenging contribution limits).
96. Shrink Missouri, 528 U.S. at 385-89.
Justice Roberts and Justice Alito.\textsuperscript{100} In 2007, \textit{WRTL} continued this trend toward heightened scrutiny when the Roberts Court reversed \textit{McConnell} and overturned BCRA’s limitations on issue advocacy.\textsuperscript{101} The \textit{WRTL} Court held BCRA’s regulations impermissibly burdened the First Amendment right to free speech and could not survive strict scrutiny.\textsuperscript{102} Scholars suggest that the tide of campaign finance regulation has turned back to strict scrutiny, and suggest the possibility that the Court either has reached its limit of what it considers permissible regulation or that very few campaign finance laws will survive judicial inquiry by the Roberts Court.\textsuperscript{103}

2. Issue Ads Are Here to Stay

A key provision of BCRA prohibited express advocacy within 60 days of a general election or 30 days of a primary election, unless paid for with hard money.\textsuperscript{104} The goal was to curb the use of corporate and union treasury funds by effectively stopping issue advertisements two months before the election.\textsuperscript{105} However, the \textit{WRTL} Court overturned most of BCRA’s issue advocacy regulations and removed BCRA’s limitations on corporations and unions.\textsuperscript{106} After \textit{WRTL}, the role of issue advertisements and outside groups is unclear. The removal of the issue advocacy limits indicates that outside groups will have increased abilities to advocate and influence elections due to this deregulation of the political marketplace.\textsuperscript{107} Trade organizations will likewise continue to have an unregulated impact on federal elections, funding issue ads without restrictions. The FEC is promulgating new rules to adapt to the Court’s decision in \textit{WRTL},\textsuperscript{108} but the FEC’s similar efforts in the wake of \textit{Buckley} led to more confusion and piecemealed enforcement.

\begin{itemize}
\item \textsuperscript{dissenting} (stating “[t]here is no significant functional difference between a party’s coordinated expenditure and a direct party contribution to the candidate”); \textit{Shrink Missouri}, 528 U.S. 377, 410 (2000), (Thomas, J., dissenting) (stating “contributions to political campaigns generate essential political speech. And contribution caps, which place a direct and substantial limit on core speech should be met with the utmost skepticism and should receive the strictest scrutiny”); Colo. Republican Fed. Campaign Commn. v. FEC, 518 U.S. 604, 635-644 (1996) (Thomas, J., dissenting) (stating “[a]s in the \textit{Buckley} Court, I believe that contribution limits infringe as directly and as seriously upon freedom of political expression and association as do expenditure limits”)
\item \textsuperscript{101} FEC v. Wis. Right to Life, Inc. (\textit{WRTL}), 127 S. Ct. 2652, 2664 (2007).
\item \textsuperscript{102} Id.
\item \textsuperscript{103} Briffault, supra note 100, at 843-45.
\item \textsuperscript{105} Id.
\item \textsuperscript{106} \textit{WRTL}, 127 S. Ct. at 2659.
\item \textsuperscript{107} Hasen, supra note 100 (manuscript at 33-34).
\end{itemize}
3. The Elimination of Soft Money

The only key provision of BCRA still intact is the attempt to cut soft money out of federal elections by curtailing its use by state parties and by prohibiting its use by national parties. The Bipartisan Campaign Reform Act (BCRA) banned the use of soft money for purchasing “electioneering communication,” such as broadcast advertising and direct mail. While soft money did not conclusively result in quid pro quo corruption, political parties did solicit soft money by promising contributors access to candidates. The McConnell court rejected a challenge to BCRA’s soft money prohibition, and upheld the provisions eliminating soft money. However, the major loopholes of BCRA were evident even before its test run in the 2004 election cycle. Instead of excising soft money, the loopholes simply redirected soft money to new outlets, such as 527 and 501(c)(6) organizations, which are less regulated and better able to hide the contributions and expenditures.

E. 527s

Buckley shaped the current campaign system and created the loopholes that allow outside groups, such as trade associations and 527s, to influence elections without regulation. The 527s are named after the Internal Revenue Code (IRC) section, which created tax-exempt status for political organizations. Congress created section 527 of the IRC to tax political organizations, but did not require these groups to itemize disclosures, believing that they would be under the jurisdiction of FECA. However, Buckley created a gap between FECA and the IRC because 527s were able to avoid using the “magic words” and were thus able to fund millions of dollars in campaign activities, by limiting their activities to focus on “issues” rather than express advocacy.

110. Slabach, supra note 52, at 13.
111. See id. at 16 (noting the Court’s acceptance of the argument that parties “peddle ‘access to federal candidates’” in exchange for soft money donations, and then use the funds to elect federal candidates). The McConnell Court noted “[m]any of the ‘deeply disturbing examples’ of corruption cited by this Court in Buckley [to justify FECA’s contribution limits] were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials.” McConnell v. FEC, 540 U.S. 93, 150 (2003) (internal citation omitted).
115. See Randall v. Sorrell, 126 S. Ct. 2479, 2484 (2006) (striking down a Vermont campaign finance law and holding that Buckley remains good law with respect to campaign finance); Corrado, Money and Politics, supra note 31, at 34.
117. Briffault, supra note 74, at 957. Candidate committees, political parties, and PACs are all 527 organizations regulated by the FEC.
118. Id. If a group files under 527 as a political organization, but does not expressly advocate, it is not
The number of television issue ads exploded in the late 1990s as independent groups understood the extent to which they could influence elections without triggering FEC regulation. In 2000, Congress reacted to the unregulated 527 problem and required 527s to make disclosures to the IRS, the only agency with existing supervision over 527s. Disclosure to the IRS was necessary because the FEC is only empowered to regulate express advocacy and 527s specialized in issue advocacy, just out of the reach of the FEC. Congress was able to take quick action because, at the time, 527s were viewed as the most pressing concern because they were the fastest growing problem. Stricter and broader regulations of tax-exempt organizations were proposed, but political jockeying resulted in a compromise requiring only 527 organizations to disclose. The new disclosure rules for 527s paralleled the FEC’s candidate and party disclosure requirements, but provided more public information. 527s must notify the IRS within 24 hours of formation and provide basic information, including names and addresses of its officers. The IRS even requires state 527s to file a notice of formation, but they are exempt from ongoing disclosure because they often disclose to state regulated by FECA. Recent Legislation—Campaign Finance Reform—Issue Advocacy Organizations—Congress Mandates Contribution and Expenditure Requirements for Section 527 Organizations, 114 Harv. L. Rev. 2209, 2209-10 (2001). In 1999, the IRS issued a private letter ruling, which clarified permissible activities within “issue advocacy.” I.R.S. Priv. Ltr. Rul. 1999-25-051 (June 25, 1999).

See Corrado, Money and Politics, supra note 31, at 34-35; Corrado, Money and Politics, supra note 31, at 34-35; Kornylak, supra note 21, at 249.


123. Id.; Congress addressed 527 organizations because they were “the most dangerous loophole that has ever come along,” and “an egregious and obscene distortion of everything the American people believe in.” 146 Cong. Rec. H5282-01 (daily ed. June 27, 2000) (statement of Rep. Doggett).


125. See Corrado, Money and Politics, supra note 31, at 34-35 (listing 527 reporting guidelines, including information similar to that required on income tax Form 990). The law required quarterly disclosure of receipts and expenditures (including names, addresses, and occupations of donors with over a $200 one-time donation or a $500 aggregate annual donation). I.R.C. § 527(j) (2000); cf. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (requiring organizations to disclose all one-time contributions over $200 or contributors that give a $500 aggregate annual donation).

authorities.\textsuperscript{127} In addition, to reduce overlap, organizations that disclose contributions to the FEC are also exempt.\textsuperscript{128} However, some IRS disclosure requirements go further than FEC regulations by mandating public access to disclosure reports and Internet access to a list of all 527 organizations.\textsuperscript{129} Furthermore, IRS enforcement mechanisms are more severe because contributions that are not reported or are not used for an exempt political activity are taxed at the highest corporate rate of 35\%.\textsuperscript{130}

Even with disclosure requirements, 527s proliferated during the 2004 election cycle, including the notorious Swift Boat Veterans for Truth and MoveOn.org.\textsuperscript{131} Republicans attempted to pass contribution caps for 527s in 2006, but Senate Democrats halted the plan.\textsuperscript{132} Now that 527s seem to favor Democrats, further reform is stalemated.\textsuperscript{133} Democrats have blocked legislation regulating 527s without a reciprocal Republican concession of regulating 501(c)(6) trade organizations.\textsuperscript{134} A similar problem is likely if Democrats attempt to pass a one-sided disclosure law on 501(c)(6)s, which overwhelmingly benefit Republicans.\textsuperscript{135}

\textbf{F. Trade Organizations}

Trade organizations themselves are not a recent phenomenon. Over a century ago, corporations banded together to influence laws by forming trade organizations to represent their interests.\textsuperscript{136} By 1912, unofficial trade organizations were proliferating in Washington, D.C., and the Chamber of Commerce started to exert its influence by requesting special tax-exempt status.\textsuperscript{137} In 1913, the predecessor of IRC Section 501(c)(6) was enacted as part of the Tariff Act to provide an exemption for nonprofit commercial organizations.\textsuperscript{138} The organizations avoided decisive political issues and

\begin{itemize}
\item \textsuperscript{127} Id. § 527(i)(5).
\item \textsuperscript{128} Id. § 527(j)(5)(B).
\item \textsuperscript{129} Id. § 527(j)(2)(A).
\item \textsuperscript{130} Id. § 527(j)(1).
\item \textsuperscript{131} In the first full election covered by the new disclosure law, 527s reported spending $151 million in the 2002 election. Albert L. May, \textit{Swift Boat Vets In 2004: Press Coverage of an Independent Campaign}, 4 FIRST AMENDMENT L. REV. 66, 79 (2005) (chronicling the history of 527s and the rise and fall of Swift Boat Veterans). These expenditures rose to $405 million during the 2004 presidential election cycle. Id.
\item \textsuperscript{133} Newmyer, supra note 23, at 6. Neither political party will give concessions that would decrease the amount of money they receive in the next election. Id.
\item \textsuperscript{134} Id.
\item \textsuperscript{137} Id.
\item \textsuperscript{138} Tariff Act of 1913, ch. 16, 38 Stat. 114 (1913) (codified at I.R.C. § 501 (2000)).
\end{itemize}
instead focused on expanding the industry by lobbying, educating members, and reporting legislative developments. The trade organizations changed from bipartisan groups focused on lobbying for legislation to partisan groups pouring money into campaigns including federal judicial nominees, state judicial races, and federal and state legislative races.

The IRC enumerates more than 30 varieties of tax-exempt organizations. The groups differ in the tax benefits and levels of disclosure to the IRS and the public. The five most common tax-exempt organizations are: 501(c)(3) charitable organizations, 501(c)(4) social welfare organizations, 501(c)(5) labor, agricultural, or horticultural organizations, 501(c)(6) trade associations, and 527 political organizations. 527s are explicitly created as campaign committees and 501(c)(3)s cannot engage in political activity, but the other 501(c) organizations are permitted to lobby and conduct political activities as long as these activities are not the organization’s main function. While the IRC allows 501(c)(4)s, 501(c)(5), and 501(c)(6)s to participate in political activities, they are limited to activities that are “consistent with the organization’s exempt purpose,” or as long as the main purpose is not influencing elections—interpreted as less than 50% of the organization’s resources.

General reporting requirements for 501(c)s include income tax and employment tax returns. 501(c)(6) organizations must file annual tax returns on Form 990 and list their total expenditures on political activity on line 81. The 501(c)(6) organizations, like most other 501(c) organizations, are not required to disclose their itemized contributors and expenditures; they only have to report net income and expenditures to the IRS. This reporting requirement leaves voters and shareholders without information on where the money came from or on what it was spent. Consequently, the trade organization loophole allows corporate entities stealth access to the political marketplace while enabling them to avoid accountability for their political activities.

140. *Id.* at 9-10.
142. *Lunder*, supra note 141, at 1-10.
143. *Id.* at 1-3.
144. *Id.* at 6-7. None of the organizations are eligible for tax-deductible charitable contributions, but they are exempt from taxation on their income, except for income generated through business activities such as investments. *Id.* at 3.
145. *Id.* at 6.
147. Under I.R.C. Sections 6033, 501(c)(3) and 501(c)(4) organizations are required to disclose names and addresses when contributions exceed $5000. *Lunder*, supra note 141, at 8. However, 501(c)(5) and 501(c)(6) organizations are not required to disclose itemized contributions. *Id.* at 12-14. They only have to report total receipts. *Id.*
150. Beacham, supra note 4, at 9-11.
Regulating Corporate Speech

Regulating the political activities of trade organizations implicates the speech rights of corporations. Corporations have a First Amendment right to freedom of speech, but associational rights are not absolute. A court must look through the corporation to the underlying members to determine where such rights originate. Some corporate entities have more protection because the purpose of the group is primarily political, while groups whose members join for multiple purposes have less protections. The theory behind this distinction is that it is unlikely that the members of the multi-purpose group all share the same political views, yet the organization can theoretically impose its political will to the detriment of its members and the political process. Put another way, a trade association comprised mostly of for-profit businesses poses more of a harm to the political process than a voluntary political corporation because its members are more captive to the will of the organization. When such a group, like Massachusetts Citizens for Life, forms for a political purpose, the corporation’s focus is narrower; there are no shareholders to protect and no economic disincentive for withdrawing. On the other hand, a chamber of commerce’s main functions include supporting the industry through lobbying, providing networking, and organizing trade shows. Political activity is only one part of a member’s reason for joining. If a member does not agree with the trade organization’s political contributions, it can withdraw, but only at the risk of suffering economic consequences. In, the Court acknowledged this difference and held that when the membership in the corporation or organization is voluntary, and the group’s political activities correlate with the member’s political goals, the association has stronger free speech rights.

In, the Michigan Chamber of Commerce, a trade organization, contested a state statute that required it to make political contributions out of a segregated fund. The Court held such restrictions on the corporation’s express advocacy are constitutional as long as the corporation can express ideas through a PAC. PACs offer a mechanism for free speech while avoiding the possibility of the trade association being used as a

---

154. Austin, 494 U.S. at 664.
155. Id. at 663 (stating that MCFL’s lack of shareholders creates “no economic disincentive for disassociating with it if they disagree with its political activity”).
156. Id. at 662.
157. Id. at 663, 665.
158. Id. at 657-58.
160. Austin, 494 U.S. at 657-61.
conduit for corporate political spending that threatens the election system. The Austin Court justified the restriction on trade organizations by offering a new definition of corruption. The Court moved beyond Buckley’s quid pro quo corruption argument, and redefined corruption as protecting against the aggregations of wealth through the corporate form. The underlying rationale for this new definition was that state law grants corporations special advantages that allow corporations to attract capital, which if unfettered would be an unfair advantage in the political marketplace. The Court wanted to protect against “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”

Austin may provide a foundation for separate scrutiny of trade organizations. On the other hand, in a new era of deregulation, Austin may be moot. WRTL has further confused how Austin now applies and whether corporations can still be required to create a separate segregated fund for contributions. While McConnell utilized Austin’s precedent to regulate corporate spending for issue advocacy, WRTL overturned McConnell’s restrictions. Justice Scalia stated in his WRTL concurring opinion that Austin was wrongly decided and is the only pre-McConnell case that permitted the restriction of speech based on the corporate identity. The WRTL Court limited Austin’s application to express advocacy, but did not address how it fits into the deregulation of campaign finance. While the differences between a social organization and trade organization remain, the Court may be indicating that such restrictions on corporate speech will be prohibited in the near future.

III. TRADE ORGANIZATIONS: CORPORATIONS’ NEWEST LOOPHOLE FOR CORPORATE POLITICAL EXPENDITURES

Trade organizations give corporate entities a way around virtually all campaign finance regulation, allowing 501(c)(6) organizations to pour vast sums of money into “issue ads” while keeping the source of those funds secret. This use of 501(c)(6) organizations is on the rise. The ever-increasing cost of elections requires campaigns to push the boundaries of campaign finance law in order to obtain the most funding, which is why money is analogized to a stream of water that may be diverted but will not be halted. Trade organizations began to flourish as tools for partisan political activity in the 1990s when Republican officials in control of legislation sought to utilize their power to elicit more money and demanded larger contributions from interested parties.
Business interests created trade organizations, such as Americans for Job Security, to use as conduits for political contributions and independent expenditures.\textsuperscript{171} By the 2000 elections, corporations such as Microsoft directly funneled over $250,000 into federal elections through trade organizations, funding issue ads against federal candidates.\textsuperscript{172} Exploiting Buckley’s grey area of issue advocacy in the same way as 527 organizations, trade organizations concealed corporate contributions in both state and federal races.\textsuperscript{173}

The most problematic part of trade organizations participating in elections is that their contributors, actions, and spending are secretive. The structure of campaign finance, combined with the lack of IRS supervision, allows contributors to hide their influence on elections, avoid contribution limits, spend money from prohibited sources, and have greater control over the message of a campaign.\textsuperscript{174} This covert nature of trade organizations makes it hard for voters to determine who is behind an ad, while simultaneously increasing the fundraising power of the trade organization.\textsuperscript{175} Contributors who would not ordinarily contribute for fear of political or legislative retaliation are free to pour money into an election.

Since the IRC requires only minimal reporting, 501(c)(6) organizations are an ideal loophole for campaign funding.\textsuperscript{176} Furthermore, the lack of disclosure requirements and lack of accountability allows them to operate without drawing attention or public scrutiny.\textsuperscript{177} In contrast, 527s disclose their contributions, allowing the media and watchdog groups to inform the public, and enabling reformers to use the contribution and expenditure disclosures to build a compelling case for reform.\textsuperscript{178} On the other hand, the case against trade organizations is widely unknown because of the lack of disclosure. Without any idea of who is giving to these groups, and how they are spending the money, the media and watchdog groups are unable to analyze their activities, keeping the public in the dark.\textsuperscript{179} The only information available results from local litigation and DeLay invited lobbyists and advocacy groups into his office and showed them where they ranked on his list, and recommended that they purge all of the Democratic lobbyists. Confessore, supra note 19. He told the \textit{Washington Post} “...if you want to play in our revolution ... you have to live by our rules.” Id. The strategy continued when Senator Rick Santorum was appointed to lead the Tuesday morning meetings that would look at what jobs were open and which Republican aides could fill the positions, people labeled as “graduates of the DeLay school.” Id. Trade organization offices began to look more like campaign headquarters, employing pollsters and message consultants. Id.

\textsuperscript{171} HIDDEN RIVERS, supra note 136, at 13.
\textsuperscript{172} Id. at 13-14. Many of these arguments and concerns regarding 501(c)(6) organizations are equally applicable to 501(c)(4) and (5) organizations. However, this discussion focuses on 501(c)(6)s because Austin and \textit{WRTL} indicate there are different considerations for social and union organizations during judicial review. In light of the increased scrutiny of campaign finance laws, any solution must be narrowly tailored to the problem.


\textsuperscript{175} Id.
\textsuperscript{176} Treas. Reg. § 1.501(c)(6)-1(2007).
\textsuperscript{177} Confessore, supra note 19, at 17.
\textsuperscript{178} Id.
\textsuperscript{179} Id.
organizations boasting of success.  

Furthermore, being able to hide the source of their money allows trade organizations to create exceptionally politically charged advertisements while keeping the source of those ads a secret. Such committees commonly create a front name that conjures positive images or associations that may mask the groups' true agenda. For example, "Americans for Job Security" sounds like a positive, innocuous group, but the name is quite ironic—it was established as a pro-Republican, pro-business organization to work against labor unions. The advertisements funded by these groups are additionally effective because they intentionally mirror candidate ads in order to increase effectiveness. The deceptive nature of these advertisements is harmful to voters because they cannot judge who is influencing them and to whom a candidate may be beholden once in office.  

WRTL's reversal of BCRA indicates that the number of issue ads of this type will likely increase because issue advertisements can now continue until and including election day. While the FEC is currently promulgating new rules and definitions of express advocacy, these rules will not expand or change the law. Since laws can only come from Congress, and Congress rarely passes campaign finance legislation, 501(c)(6)s are not likely to be seriously regulated until Congress is able to also address the issue advocacy problem and 527s.

Additionally, the trade organization loophole presents corporate governance problems. Most contributions to trade organizations are from corporations, creating a problem for shareholders; if covert contributions are discovered, they can lead to decreased company value, fines, and legal bills. Corporations like Enron bought their growth and avoided audits through political giving, much of which was secretive. Shareholders should be able to evaluate the benefits of corporate political contributions and check that they are not being used to mask corporate problems. Furthermore, this secret giving can embarrass the corporation. As a result of no internal controls and no due diligence, several top corporations were notified that their political contributions were used to fund candidates that supported positions that directly contradicted the corporations' stated policies. Additionally, corporations that do not conduct due diligence may pay substantial fines to the FEC for impermissible use of funds, and may even be subject to criminal penalties. Despite these pitfalls, corporations continue to

---

180. See supra note 5 and accompanying text.
181. Id.
183. See Herrnson, supra note 174, at 172-73 (describing how interest groups run parallel campaigns).
185. GREEN CANARY, supra note 173, at 11-20.
186. Id. at 12-14.
187. Id. at 11-17 (discussing how Enron, Global Crossing, WorldCom, Qwest, and Westar Energy avoided oversight through contributions).
189. Id. at 13. The FEC fined Mattel, Audiovox, and AMEC Construction Management for reimbursing executives for contributions, which also exposed the companies to potential criminal penalties. Id. at 12. Over the past 30 years, the Center for Political Accountability reports that corporations have paid $300 million in
fund the political activities of trade organizations, for fear of losing political influence.

IV. CONGRESS SHOULD REQUIRE TRADE ORGANIZATION DISCLOSURE WITH IRS OVERSIGHT

Many of the problems associated with trade organizations could be addressed by requiring 501(c)(6) organizations to itemize their contributions and expenditures and disclose them to the IRS. Disclosure is not the only option for regulating the use of trade organizations for covert campaign contributions; Congress could impose caps on contributions, prohibit trade organization participation in elections, or change FECA’s definition of “political organization” to include tax-exempt organizations that participate in politics. However, this Note argues disclosure is the best option because it can achieve the necessary goals and is likely to garner congressional and judicial support. Furthermore, the IRS, rather than the FEC, is the best agency to track the disclosures because the IRS already has a working system in place.

A. Contributions and Expenditures Should be Disclosed

Requiring itemized disclosure by trade organizations comports with the goals of campaign finance reform and follows historic precedent. During the history of campaign finance regulation, Congress has widely used disclosure to address the problem of corruption. In Buckley, the Court supported the use of disclosure as a permissible regulation, holding that corruption, information, and accountability are strong interests in favor of regulating campaign finance. In addition, the Austin Court allowed regulation of corporate speech, stressing that the potential for accumulation of wealth could undermine the integrity of the electoral process. This concern is perhaps even more prevalent with trade organizations. After all, the state provides corporations with the legal structure to amass corporate wealth. Requiring corporations to disclose would facilitate the detection of corruption, promote accountability, and keep the public—including corporate shareholders—more informed. The Court enumerated these goals as compelling state interests in Buckley.

Disclosure is the most viable way to address these issues. Perhaps more importantly, disclosure constitutes the least restrictive means to combat the problem, creating the likelihood that the Court would uphold disclosure, even with the new trend of fines and settlements to the FEC. Id. at 13.

190. See, e.g., Meredith A. Johnston, Stopping “Winks and Nods”: Limits on Coordination as a Means of Regulating 527 Organizations, 81 N.Y.U. L. REV. 1166 (describing ways to regulate 527s, including limiting contributions, redefining “political committee,” and strengthening parties to counterbalance independent organizations); Michael W. Carroll, When Congress Just Says No: Deterrence Theory and the Inadequate Enforcement of the Federal Election Campaign Act, 84 GEO. L.J. 551 (1996) (evaluating the deterrence of criminal and civil sanctions for campaign finance violations).


deregulation and strict scrutiny. Additionally, members of Congress are cautious when imposing campaign finance restrictions, always conscious of the impact on their next campaign and their political party. This was evident during the 527 debate in 2000, when, despite widespread awareness of the extent to which 527s were influencing elections, Congress was only able to enact a disclosure law. Seven years later, Congress has been unable to agree on any further regulation of 527s. A disclosure requirement for 501(c)(6) is perhaps the only regulation of trade organizations that could gain congressional support because such a rule would be similar to the measures Congress took when dealing with 527s in 2000. However, even this minimal disclosure law would serve the goals of campaign finance law by increasing transparency and accountability.

1. Goals of Disclosure

The importance of transparency lies in the rationale for all campaign finance law, which is reducing “corruption and the appearance of corruption” and “deterring the ‘buying’ of elections and the undue influence of large contributors.” Since 1907, Congress has sought to limit corporations’ contributions because of their ability to use large sums of money, which have a disproportionate impact on elections. In the years leading up to BCRA, legislators argued over enacting reforms, but corporate scandal was the breaking point that pushed reform. Since BCRA’s enactment, new controversies over Tom DeLay’s fundraising and Jack Abramoff’s lobbying tactics have highlighted the need to further uncover who is influencing elected officials, both informally through elections and directly through lobbying. Trade organizations appear to be corrupt because of the real or perceived impression of corporate interests exercising a concealed coercive influence on candidates and their actions. Under Buckley’s rationale, perceived corruption can be just as harmful as real corruption, and regulating it is a compelling state interest sufficient to support campaign finance regulation. Itemized disclosure will decrease the possibility of corruption, whether real or perceived.

Moreover, the public and voters have a right to know who is influencing

195. See generally Buckley, 424 U.S. at 70-71. (holding that any limitations on political contributions are speech regulations and implicate the First Amendment); see supra Part II.D.1-2.
196. See 146 Cong. Rec. H5286-01, H5287-88 (daily ed. July 27, 2000) (statement of Rep. Linder). Representative Linder argued that the bill was not bipartisan and was watered down because Democrats refused to regulate unions. Id.
198. Buckley, 424 U.S. at 67, 70; see also McGeveran, supra note 191, at 24-33 (discussing the need to deter corruption of candidates by donors and enforce limits on contributions).
199. See supra Part II.A-B.
203. Buckley, 424 U.S. at 27.
One of the central reasons for the 2000 disclosure requirement for 527s was the governmental interest in voter awareness. Voter awareness allows for “a free and open election process” where “disclosure [gives] power to the ordinary citizen.” Since some trade organizations have become conduits for political activity, the electorate must know the specifics behind trade organizations’ election activities.

From a business standpoint, lack of disclosure is a concern for shareholders and directors in determining the valuation and health of their company because political contributions can be used to cover up financial or management problems. As observed in Sarbanes-Oxley, shareholders have a right to make informed decisions about their investments—information that can only be obtained by disclosure. Even though shareholders do not have an ownership interest in trade organizations, some have become extensions of corporations. Simply requiring corporations to disclose contributions to trade organizations would not solve this problem—a savvy organization could transfer money to a second trade organization to hide its use. Therefore, itemized disclosures must come directly from trade organizations themselves. Following Austin’s reasoning, a trade organization is responsible to its members, who are dependent on the other services the organization provides. Similar to shareholders, trade organization members have a right to know how their dues are used, and if contributions are benefitting the industry. Itemized disclosures would provide this information to the corporate members of the trade organization, and in turn to the shareholders of the member corporation.

Furthermore, disclosure will keep trade organizations that participate in elections accountable for the campaigns they organize and for complying with campaign finance limitations. Organizations that run ads should stand behind those ads and answer for the content, which is often negative, inflammatory, and sometimes unsubstantiated. When campaigns operate secretly, the quality of the debate and election decreases.

204. Id. at 66-67. But see James H. Oddie, Fighting Speech with Speech: Combating Abuses of Section 527 Political Organizations with More Speech, Not Additional Regulation, 40 U.S.F. L. REV. 179, 182 (2005) (arguing that no amount of disclosure will combat an advertisement’s effects as well as more political speech refuting the allegations).

205. 146 CONG. REC. H5286-01 (daily ed. July 27, 2000) (statements of Reps. Lewis & Kasich); see Kornylak, supra note 21, at 231-32 (noting that contributors’ anonymity “hindered the electorate’s ability to be informed of the candidates’ positions”).

206. 146 CONG. REC. H5286, supra note 205 (statement of Reps. Lewis & Kasich).


209. HIDDEN RIVERS, supra note 136, at 9.

210. See Editorial, Don’t Tolerate Election Interference, SEATTLE TIMES, Aug. 17, 2005, at B6 (discussing the Chamber of Commerce contributing $1.5 million by way of a local front group to hide their involvement, and the subsequent court action).


213. See id. (calling political ads “a nightmare”).

214. See id. (arguing that reform could “get some of these phony ads off television” and “build more accountability”).
The government has an interest in organizations making contributions traceable in order to maintain accountability in campaign communications. Itemized disclosure of political activities will keep trade organizations accountable for complying with federal campaign finance law, and will decrease the use of 501(c)(6)s as conduits to circumvent election law limitations. Additionally, if trade organizations are engaged in prohibited activities, the IRS has the right to revoke their tax-exempt status. Itemized disclosure would increase the IRS’ enforcement power to hold organizations accountable for abusing their tax-exempt status. In sum, disclosure will further the government’s long-standing and historic interests in enforcing the prohibition on corporate political contributions and ensuring campaign finance laws are not circumvented through tax loopholes.

2. Congressional and Court Support

In addition to comporting with the goals of campaign finance regulation, itemized disclosure is the most viable regulatory tool available to Congress. Historically, Congress has endorsed the use of disclosure to protect the electoral process and the corporate process. Bringing these contributions to light through the “sunshine” of disclosure is the best disinfectant for a transaction that appears corrupt. Disclosure is a balance between the government’s interests and allowing organizations and individuals to freely participate in elections. When faced with the 527 problem of hidden political contributions, Congress required disclosure. Additionally, Congress’s response to corporate and accounting fraud and corruption was to expand corporate disclosure. With Sarbanes-Oxley, Congress enacted sweeping corporate reforms, requiring an entire system structured for corporate accounting disclosures. Despite the potential burden of disclosure, Congress valued the benefit of transparency.

Disclosure is similarly the appropriate remedy for corporate and trade organizations’ secretive political contributions, and is perhaps the only option capable of being passed in the current political environment. Congress has been unable to enact campaign finance reform since BCRA despite clear loopholes and issue advocacy problems. Each congressional session, new campaign finance laws are proposed, but none are enacted. Even when a campaign finance law is enacted, whether it is BCRA or the 527 disclosure law, the enacted law is a watered down version of the original proposals. Campaign finance reform is always slow, but a disclosure law is less politically charged than an attempt to renovate the system because, theoretically, neither political party gains an advantage from requiring disclosure.

216. Potter, supra note 191, at 125-35.
217. Id. at 123-24.
220. See generally Hamilton, supra note 208, at 56-69 (explaining Sarbanes-Oxley).
221. Id. at 61-64.
222. Id. at 56-69.
223. Corrado, Money and Politics, supra note 31, at 35.
While gaining congressional traction for campaign finance reform is difficult, now that WRTL has eviscerated more than half of BCRA as unconstitutional, Congress may be motivated to address issue ads and amend the intended legislation. However, facing a Roberts Court that has made it clear that it will not defer to Congress on the issue may damper Congress’s pursuit of a new law. One month after WRTL was released, Congress may have indicated its defeat when it voted not to fund the Department of Justice’s program to enforce electioneering communications restrictions.224

Nevertheless, the Roberts Court reiterated that the government has compelling interests in preventing the appearance of corruption and promoting voters’ information and electoral accountability.225 While the Court may be moving to deregulation, disclosure traditionally passes scrutiny because it does not place unnecessary restrictions on an organization’s right to political expression, and it serves an important interest in ensuring voter rights.226 Furthermore, tax exemption is a benefit, like a subsidy, and Congress does not subsidize nonprofit organizations’ political activities.227 Therefore, any organization that is registered and has accepted the tax-exempt benefit arguably is agreeing to restricted political speech.228 If a 527 or 501(c)(6) objects to disclosure, it may choose not to disclose and instead be taxed on its political expenditures. A disclosure requirement for 501(c)(6) organizations would be upheld in the same manner and for the same reasons as the Court affirmed the 2000 527 disclosure law.

B. IRS is Best to Regulate Disclosures

Itemized disclosure by trade organizations to the IRS is preferable over disclosure to another agency. Trade organizations are very similar to 527s with respect to their structure and their relationships with federal agencies.229 Trade organizations are now in the same situation 527s were prior to the 2000 law; trade organizations are influencing elections230 and have the same lack of reporting structure as 527s did in 2000.231 Thus, the best option for disclosure is mimicking the 2000 527 disclosure law. Such a law has the highest probability of being enacted by Congress because it does not include any controversial restrictions, and the same structure is in place for the 527 system.

Under such a regulation, all trade organizations would disclose any contributions over $200 or expenditures used on political activities. This disclosure would parallel disclosure requirements by political organizations reporting to the FEC.232 Disclosures would be made quarterly and annually to the IRS in the same way that 527s disclose.233

226. Frank v. City of Akron, 290 F.3d 813, 819 (6th Cir. 2002).
228. Id.
229. See generally LUNDER, supra note 141 (detailing the structure of 501(c)s and 527s).
231. Id.
232. Id. at 35.
To avoid over inclusion or requiring all trade organizations to disclose their political activities, organizations that do not participate in political activities would be exempt from disclosure.

Requiring disclosure to the IRS presents several advantages. Specifically, trade organizations should disclose to the IRS because (1) the IRS is the oversight agency for current 501(c)(6) trade organizations,234 (2) the existing structure of 527 disclosure can be utilized for efficient oversight, (3) the IRS’s supervision will reach both state and federal election involvement, and (4) if trade organizations disclose there will not be blackholes hiding transferred corporate contributions.

1. Utilization of Existing Relationships

The IRS is in the best position to regulate trade organizations because it currently oversees 501(c)(6) organizations.235 Trade organizations already must keep track of their total income and political expenditures and report them to the IRS.236 A quarterly filing, similar to requirements for 527s under the 2000 law, is an increased quantity of disclosure, but the burden is less than requiring disclosure to an additional federal agency. By reporting to the IRS, the process could be consolidated with the current filings.

The IRS and FEC currently share enforcement for 527s and 501(c)(6) organizations. While the FEC determines if the organization is expressly advocating, the IRS evaluates political participation for tax purposes. Both 527 and 501(c)(6) organizations benefit from tax exemption. When organizations fail to file a required disclosure or participate in advocacy that is not exempt, the IRS taxes the exempt organization at the highest corporate tax rate, 35%. Under an increased disclosure standard, the FEC would continue to police 501(c)(6) and 527 organizations for signs of being a “political committee.” Once an organization goes beyond issue advocacy and expressly advocates, it becomes a political committee that must register with the FEC. The FEC currently monitors 527s that have moved into express advocacy and enforces penalties for lack of compliance with filing and disclosure requirements.237 In this regard, the IRS and FEC have slightly overlapping roles in monitoring tax-exempt organizations, which would not change when 501(c)(6) organizations begin disclosure. The major change would be the itemized disclosure reports to the IRS that would facilitate all other enforcement.

2. Utilization of Existing Structure

Congress should give the IRS the authority to supervise disclosure by 501(c)(6) organizations in the same way it supervises 527 disclosures under the 2000 law. As a result of the 2000 law, the IRS is equipped to accept electronic disclosures and has the

234. LUNDER, supra note 141, at 1-2.
235. Id.
236. Id. at 8-9.
structure in place to efficiently handle the task. The 527 model has been in place for seven years and the experience in enacting the legislation is directly transferable to trade organizations.\(^{238}\) The IRS has worked out some of the difficulties in the reporting process and enhanced the availability of the disclosures; filings are available electronically within 48 hours of submission.\(^{239}\) The IRS’s institutional knowledge can be valuable in creating efficiency for new disclosures.

3. IRS Could Reach All Contributions

The IRS is also a preferable disclosure agency because it is in a better position to oversee all political activity. The IRS could ensure both federal and state corporate contributions are revealed, something the FEC cannot do.\(^{240}\) The largest limitation on FEC regulation is that its jurisdiction is limited to federal elections,\(^{241}\) allowing groups to use state organizations to get around regulations. Disclosure to the IRS would not be limited to federal elections and would meet the goals of disclosure more fully by eliminating a possible state organization loophole.\(^{242}\) Another limitation on FEC enforcement is that disclosure by tax-exempt organizations to the FEC would require congressional action to change the definition of a political committee to include issue organizations that are currently outside of its control. On the other hand, since all 527 and 501(c)(6) organizations receive federal tax exemption, they are subject to the conditions in the federal tax code.\(^{243}\) For example, in 2000, Congress required state 527s to register with the IRS, but left the disclosure regulations with state authorities.\(^{244}\) With a new 501(c)(6) disclosure law, Congress could either limit the disclosure only to organizations participating in federal elections or it could require all 501(c)(6)s to disclose. In either event, the IRS currently has jurisdiction over both types of entities, and requiring disclosure involves much less legislative wrangling than revising the FEC definitions and delineations.

Likewise, self-enforced corporate disclosure or disclosure to the SEC would also be ineffective and cumbersome.\(^{245}\) Voluntary disclosure by corporations would not show where contributions are used because money could be concealed in trade organizations and information would be limited to amenable corporations. Even if the SEC received the

---

238. See Lunder, supra note 141 (detailing the structure of 501(c)s and 527s).
240. Buckley v. Valeo, 424 U.S. 1, 14 (1976) (stating that the FEC does not have the authority to regulate state elections, because its authority is given by Congress, and Congress only has the constitutional power to regulate federal elections).
241. Id.
243. See generally id. §§ 501(c)(6), 527 (creating the exemption for such organizations and enumerating the benefits and responsibilities of organizing as such an organization).
244. Id. § 527(b)(5).
245. The Center for Political Accountability is working with shareholders to push corporations to disclose their contributions. Center for Political Accountability, http://www.politicalaccountability.net/ (last visited Oct. 14, 2007).
oversight authority, the SEC’s jurisdiction is restricted to corporations. Money contributed to trade organizations can still be hidden because trade organizations that conduct their own campaigns do not have to disclose the money they spend; it is also common for trade organizations to transfer money between themselves which would make it untraceable. However, trade organization disclosure to the IRS would provide a full picture of which corporate interests are contributing money and where that money is being used, regardless of intermediary transfers. Such a system would bring to light hidden routes used for corporate contributions because trade organization disclosure would discontinue hiding contributions through transfers.

V. CONCLUSION

Trade organizations are vehicles for hidden corporate political contributions. Congress needs to take action to reveal where the contributions are going and how they are influencing elections. BCRA unintentionally diverted the soft money it planned to eliminate to new avenues like trade organizations. Until all tax-exempt organizations disclose their political activities, money will simply flow to the next organization to avoid disclosure. At a minimum, trade organizations should disclose their political activities to ensure compliance with campaign finance law and for shareholders’ and voters’ information. With the ongoing uncovering of corporate and political scandals involving campaign finance, Congress needs to require disclosure to ensure corporate and political transparency.

Disclosure of trade organization activity needs to be tailored to stop the use of tax-exempt organizations to avoid campaign finance laws, especially in light of corporations’ aggregation of wealth and the potential for corruption. The 2000 disclosure legislation for 527s should be replicated and the IRS structure should be utilized. The IRS is equipped to oversee trade organization disclosure and has a system in place that will allow for an efficient transition. IRS oversight will get to the root of corporate campaign contributions in a way that other agencies or corporate disclosure cannot. It is time for trade organizations to show us their money.

246. Frances Hill, Corporate Philanthropy and Campaign Finance: Exempt Organizations as Corporate-Candidate Conduits, 41 N.Y.L. SCH. L. REV. 881, 930-31 (1997) (claiming that contributors give to a 501(c)(3) for the tax benefit and then the 501(c)(3) transfers the money to a 501(c)(6)).
247. Hidden Rivers, supra note 136, at 45 (explaining that PACs in Alabama transfer money between themselves to obscure the source of the contribution).
248. Id.
249. Beacham, supra note 4; Hidden Rivers, supra note 136, at 1.
250. See supra note 202 and accompanying text.