The First Amendment and Restrictions on Citizen Participation

Testimony of the James Madison Center for Free Speech
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INTRODUCTION

I am James Bopp, Jr., attorney at law, and I thank you for the opportunity to testify before this Committee. A substantial part of my law practice involves defending clients from governmental incursions against constitutionally-protected freedom of speech and political expression. I have defended the rights of citizens to participate in the electoral process through litigation, *amicus curiae* briefs, scholarly literature, and testimony before legislative and administrative bodies. The appended summary of my professional résumé summarizes my work in this area. In addition, I serve as General Counsel for the James Madison Center for Free Speech,[2] and it is in that capacity that I was asked to testify today.

In this testimony, I will first give a brief background of the First Amendment and its purposes because I believe that, unless Members of Congress start with a proper understanding of our First Amendment and its designs, they inadvertently fail to uphold their oath to uphold the Constitution. Second, I will briefly discuss the First Amendment's role in our Founding Father's

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vision of democracy because too many of today's "reformers" have a distorted view of what democracy should look like. Third, I will address current proposals, chiefly McCain-Feingold, and their effects on citizens' participation in our democracy. Fourth, I will discuss another timely topic, § 527 organizations. Because there is a widespread misunderstanding of § 527 organizations based on a faulty understanding of the Internal Revenue Code and the Federal Election Campaign Act ("FECA"), I will briefly discuss both and their interplay before analyzing current proposed amendments to the Internal Revenue Code. Lastly, I will provide two constitutional options that would enhance, rather than inhibit, citizen participation.

I. Background of the First Amendment

The First Amendment is a very special kind of law because its aim is to regulate lawmakers, not to the general public. Therefore, Members of Congress need to have a proper understanding of what the First Amendment prohibits and allows because it sets the parameters for what kinds of laws government may enact. Through the First Amendment, our Founding Fathers established certain fundamental protections for the right of self-government, expressed as *limitations* on the power of the government.

At first blush, it seems as if the First Amendment prohibits all laws and regulations that restrict speech. After all, "Congress shall make no law . . . abridging the freedom of speech." [3] The First Amendment, however, does not proscribe all government restrictions on speech, but proscribes those restrictions on speech that are inconsistent with the purposes of the First Amendment.[4] Therefore, it is the conflict of the First Amendment's purposes and its protected

[3]U.S. Const. amend. I.

[4]Otherwise, government could not regulate the making and enforcement of contracts, a

fundamental rights with restrictions on political expression and association that gives rise to many constitutional issues in campaign finance law.

A. The Purposes Behind the First Amendment

According to the Supreme Court, the purpose of the First Amendment is to further our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[5] Thus, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."[6] Political speech is protected because the Framers' understood that it is "integral to the operation of the system of government established by our Constitution."[7] As a result,

> in a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.[8]

Indeed, "public discussion" was viewed by the Framers as not only a political right, but as "a political duty."[9] This stems from the fact that the "opportunity for free political discussion" is vital to assuring "that government may be responsive to the will of the people and that changes

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type of communication or "speech."

[5]*New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

[6]*Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (*quoting Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

[7]*Id*.

[8]*Id*. at 14-15.

[9] *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

may be obtained by lawful means."[10]

Therefore, freedom of speech is a condition essential to ou political liberty. "The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.'"[11] Therefore, our commitment to freedom of expression is anchored in promoting a framework of discourse in which unrestricted deliberation on matters of public concern is secure from the intrusion of government power. The outcome in this secured "marketplace of ideas" will be determined by the persuasiveness of the speakers' reasons used in support of their values and beliefs, *not* by the dictates of the government.

As Justice Brandeis eloquently stated, democratic society must value free speech "both as an end and as a means."[12] Free speech is a valuable goal because it is a manifestation of the ultimate purpose of government: to free its citizens so that they may pursue self-fulfillment.[13] As a means, free speech is an indispensable means to political truth.[14]

As embodied in our Constitution, the People have chosen to submit to a system of government in which they retain the ultimate basis of authority. Therefore, government cannot deny the People the right to express and hear political ideas, attitudes, or beliefs, because to do so would interfere with their responsibility as citizens to govern themselves. The People's

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[10]*Stromberg v. California*, 283 U.S. 359, 369 (1931).

[11]Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 Sup. Ct. Rev. 245, 255.

[12]*Whitney v. California*, 274 U.S. 357, 375 (1927).

[13] *Id*. at 375-76.

[14]*Id*.

assumption of this ultimate authority necessarily requires that they be able to express themselves in a manner *unrestricted* by government, on whatever ideas, viewpoints, or information may prove necessary for self-governance. Public opinion mediates between the particular wills of individual citizens and the general will of the government by allowing all citizens to participate in an ongoing debate. If government restricts the speech of a citizen within public discourse, government prevents that citizen from participating in collective self-governance.

Under Article One, section six, the Constitution affords "absolute protection" to the speech of Members of Congress, our political representatives. As you, our representatives, derive your governing power from citizens, the latter must enjoy *at least* as much protection as you, their elected servants.[15] For how is the public to self-govern, and serve as a check on their elected servants, if the people are not also absolutely protected in their praise and criticism of the actions of these elected servants?

Therefore, to the extent that this country has a government "of the people, by the people, and for the people," *the public is the government*. But what end is offered by regulations that limit the participation of citizens in this process? Unless citizens may exercise their right to speak freely on political matters – including discussions of candidates and their qualifications – self-government is impossible. In order to make good decisions regarding who will represent us and to hold our representatives accountable for their actions, citizens must have access to ideas and information concerning the positions candidates take on issues and their fitness to hold

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[15] *See* Alexander Meiklejohn, *Political Freedom*, at 36 (1960) ("The freedom which we grant to our representatives is merely a derivative of the prior freedom which belongs to us as voters.").

office. In order for those ideas and that information to be available to the electorate, there must be free commerce in the marketplace of ideas. If the marketplace of ideas is limited by governmental restrictions on speech, then self-governance will necessarily suffer and so too will all of the other freedoms guaranteed by the Constitution.

The effect of placing government restrictions only on political speech cannot be easily compartmentalized. The aim of the First Amendment is not only the protection of discourse from the intrusion of governmental authority to secure self-governance, but also the independence of citizens as rulers of themselves.[16] That is, it leaves to individuals the independence to deliberately define for themselves their beliefs, morals, and ideas.[17] As Justice Brandeis stated in his famous concurrence in *Whitney v. California*:[18]

Those who won our independence believed that the final end of the State was to make

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[16]These two dimensions of freedom of expression are not mutually exclusive. It would be impossible to adequately protect one dimension of speech without also extending considerable protection to the other. Strict constraints on the public consideration of different moral points of view is not likely to lead to wide open political debate. Similarly, prohibiting the advocacy of certain political points of view is likely to have repercussions on moral discussion. Hence the *Buckley* Court's observation that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Buckley v. Valeo*, 424 U.S. 1, 42 (1976).

[17]*See* Paul G. Stern, Note, *A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse*, 99 Yale L.J. 925, 934 (1990).

[18]275 U.S. 357, 375-76 (1927) (citations omitted)

> men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary . . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . .that public discussion is a political duty; and that this should be a fundamental principle of the American government . . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Free speech on political matters, then, is the key to the preservation of self-government and concomitant personal liberties. The Supreme Court's decisions have been unanimous in upholding this principle. Therefore, political free speech is strictly guarded by the Constitution for at least three inextricably interwoven reasons: (1) because it was the Framer's intention to preserve free speech (which is obvious on the face of the First Amendment); (2) because political speech has an indispensable role in the preservation of self-government; and (3) because, given its role in preserving self-government, free political speech undergirds all other civil liberties protected by the Constitution. Thus, the Court reiterated almost sixty years later that "[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . They valued liberty both as an end and as a means."[19]

B. The First Amendment's Role in the Founding Fathers' Vision of Democracy

The United States has witnessed in the last half-century a fully functioning marketplace

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[19] *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 n.10 (1986) (*quoting Whitney v. California*, 274 U.S. at 375 (Brandeis, J., concurring)).

of ideas. Yet, the "reformers" often cry out for the need of "compelled speech" to correct market flaws in the "marketplace of ideas" and allegedly further the First Amendment's goal of maximizing the discovery of truth. They want to refocus the speech protections afforded to individual citizens by aligning the government, from which the First Amendment protects citizens, as a buffer between the individual and the intolerant and hostile majority.

The reformers' notion of democracy is synonymous with equality. However, their democratic doctrine threatens the essential understanding that all known advanced societies are inherently pluralistic and diverse, which is the seed and the root of politics. Few have understood more clearly than Alexis De Tocqueville the importance of group loyalties to mediate between "society" and the government. Thus he wrote in his *Democracy in America* that there were diversifying institutions in American society which could mitigate the danger of a "tyranny of the majority." And in his *L'Ancien Régime et law Revolution* he states:

> No gradations in society, no distinctions of classes, no fixed ranks – a people composed of individuals nearly alike and entirely equal – this confused mass being recognised as the only legitimate sovereign, but carefully deprived of all the faculties which could enable it either to direct or even superintend its own government. Above this mass, a single officer, charged to do everything in its name without consulting it. To control this officer, public opinion, deprived of its organs; to arrest him, revolutions, but no laws. In principle a subordinate agent; in fact, a master.

Thus, the heart of the reformers' doctrine is that because men are equal in some things, they should be equal in all things. One group of "reformers," the National Voting Rights Institute, even brought suit last year claiming that their clients, "as nonwealthy voters and candidates, are

excluded from meaningful participation in the electoral process,"[20] which constitutionally requires public funding of elections. In order to achieve this "equality," reformers seek far-reaching obliteration of constitutional rights – including the federal control of issue advocacy.

However, the reformers' idea of how democracy ought to function is completely at odds with the Founding Fathers' vision and the Supreme Court's application of this vision. The Court has been almost exclusively concerned with protecting the transmission of information from speaker to listener. Without this protection, the participation of citizens is chilled and their self-governing rights are diminished.

"Democracy," as Mr. Justice Holmes once said sarcastically, "is what the crowd wants." "Populist" direct democracy is one of the great animating myths of American politics for both left and right.[21] We have provisions in our state constitutions for popular initiative, referendum and recall. However, Congress must not forget that the first business of government is to govern – which may at times, even in America, call for the deliberate endurance of unpopularity.[22]

"So if democracy is best understood as one element in free government, not as a characteristic of the whole system, then it will always be possible to argue that *more* or *less* democratic institutions or democratic spirit is needed in any particular circumstance."[23] To Aristotle, the best form of government combined the aristocratic principle and the democratic – good government is a matter of experience, skill and knowledge, but is subject to the consent of

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[20]*Georgia State Conference of NAACP Branches v. Cox*, 183 F.3d 1259 (11th Cir. 1999).

[21]Bernard Crick, *In Defence of Politics* (1962).

[22]*Id*.

[23]*Id*.

the governed. Democracy then, is to be appreciated not as a principle of government on its own, but as a political principle, or an element within politics.[24] The belief that because men are equal in some things they are equal in all can be disastrous to the skill and judgment needed to preserve any order at all.[25]

Democracy, then, is but one form of politics, not something to be hoped for at every stage of a country's development or in every circumstance.[26] So while democracy can be compatible with politics, indeed politics can scarcely hope to exist without it, politics does need defending against the exclusive claims of many concepts of democracy which can lead to the despotism of the People's democracy.[27]

> But perhaps it needs most of all that most unpopular of defences: historical analysis applied against the vagueness of popular rhetoric. Democracy is one element in politics; if it seeks to be everything, it destroys politics, turning "harmony into mere unison," reducing "a theme to a single beat."[28]

Therefore, what the Founding Fathers did not propose to do, because they thought it impossible, was to change the nature of man to conform with a more ideal system. They were inordinately confident that they knew what man always had been – an atom of self-interest – and

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[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] *Id*.

what he always would be, because "[i]f men were angels, no government would be necessary."[29] Therefore, ambition must be made to counteract ambition because "what is government itself, but the greatest of all reflections on human nature?"[30]

The reformers wish the government to protect America from its present-day factions – special interest groups, the wealthy, unions and corporations – by removing their liberties to level the playing field. The answer to this proposal lies in James Madison's *Federalist Paper 10*,

> [t]here are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects. There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests. It could never be more truly said than of the first remedy that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction . . . .[31]

James Madison concluded that the *causes* of faction cannot be removed and that "relief is only to be sought in the means of controlling its *effects.*"[32] Mr. Madison was adamant that the answer to controlling the effects of factions did not lie in "reducing mankind to a perfect equality in their political rights" whereby "they would at the same time be perfectly equalized and

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[29]James Madison, *Federalist No. 51*.

[30]*Id*.

[31]James Madison, *Federalist Paper 10*.

[32]*Id*. (emphasis in original).

assimilated in their possessions, their opinions, and their passions."[33] Rather, a republican form of government, in which citizens retain self-governance, is the proper cure.

C. Uninhibited Political Speech is Also Consistent With the Supreme Court's Absolute Protection of the Freedom of the Press

The suggestion that the media has become too powerful, either because of its size or because of its pervasiveness, is antithetical to the First Amendment's spirit and purpose. The printing press had been licensed in Europe precisely because it was a powerful medium of mass communication. Its freedom was enshrined in the First Amendment for that very reason.

No one would deny that journalists, editors, and pundits influence elections through their reporting and choice of topics. But why does the press have the opportunity to influence the political debate without restriction while ordinary American citizens are restricted, or excluded, because they choose a career other than the media?[34]

The Supreme Court has not permitted government to infringe upon the freedom of the press even to prevent distortion of the political process.[35] So why has the Supreme Court not restricted the speech of the press in the area of campaign finance law and why has Congress exempted the media from the FECA's provisions? The answer lies in the history of the First

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[33] *Id*.

[34] Indeed, how are ordinary Americans, with limited time and resources, to make their voices heard over the editorial impact of the press?

[35] *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 400-04 (1973) (Stewart, J., dissenting).

Amendment.

At the time of the founding of the United States, free speech was identified most often particularly with freedom of the press.[36] There was no conception of an "institutional press" apart from ongoing political debates amongst citizens. Citizens wrote and distributed their own pamphlets criticizing the government and attempting to change public opinion. Newspapers and pamphlets were partisan political tools, and thus the Founders' declarations about the absolute necessity of freedom of the press can (and should be) understood to apply to today's debates over campaign finance laws.[37]

Nor were there any illusions about abuses of press freedoms, for as Thomas Jefferson stated, "I deplore . . . the putrid state into which our newspapers have passed and the malignity, the vulgarity, and the mendacious spirit of those who write for them," and that these evils were "produced by the violence and malignity of party spirit."[38]

That there should be no difference between protection of the media's freedom to speak and citizens' freedom has been recognized by the Supreme Court. As Chief Justice Burger stated in *National Bank of Boston v. Bellotti*, a case invalidating restrictions on corporate expenditures to influence votes in a state referendum campaign, "[b]ecause the First Amendment was meant to guarantee the freedom to express and to communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures

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[36]David M. Mason, *Repealing the First Amendment: "The Campaign Finance Reform Constitutional Amendment,"* The Heritage Foundation Issue Bulletin #230 (March 13, 1997).

[37]*Id*. at 3.

[38]*Id*. (quoting Thomas Jefferson, letter to Walter Jones, 1814).

or speeches that seek to enlarge the audience by publication and wide dissemination."[39] Indeed, most pre-First Amendment commentators "who employed the term 'freedom of speech' with great frequency used it synonymously with freedom of the press.'"[40]

"To conclude that the Framers did not intend to limit the freedom of the press to one select group is not necessarily to suggest that the Press Clause is redundant. . . . The liberty encompassed by the Press Clause, although complementary to and a natural extension of Speech Clause liberty, merited special mention simply because it had been more often the object of official restraints."[41] "The very task of including some entities within the 'institutional press' while excluding others, whether undertaken by legislature, court or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England – a system the First Amendment was intended to ban from this country. Further, the officials undertaking that task would be required to distinguish the protected from the unprotected on the basis of such variables as content of expression, frequency or fervor of expression, or ownership of the technological means of dissemination."[42] "[In short], the First Amendment does not 'belong' to any definable category of persons or entities: it belongs to all who exercise its freedoms."[43]

Therefore, the Founding Fathers did not envision a First Amendment that would permit

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[39]*First National Bank of Boston v. Bellotti*, 435 U.S. 765, 803 (1978) (Burger, J., concurring).

[40]*Id*. at 799.

[41]*Id*. at 799-800.

[42]*Id*. at 801.

[43]*Id*. at 802.

the abridgment of citizens' rights but at all costs avoids restricting the press, for the rights of speech, press, assembly, and petition were protected in the same amendment in the same way. As Jefferson stated, "[o]ne of the amendments to the Constitution . . . expressly declares that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press,' thereby guarding in the same sentence and under the same words, the freedom of religion, of speech, and of the press; insomuch that whatever violates either throws down the sanctuary which covers the others."[44]

II. The Biggest Obstacle to Citizen Participation Is Low Contribution Limits

The biggest current problem, in terms of the regulation of citizen participation in elections, is low federal and state contribution limits. The effects of low limits are three-fold. First, they limit citizen participation. The purpose of a contribution is to help a candidate get elected. When limits are too low, a donor cannot accomplish his purpose. The purpose of those donors that can participate only through the giving of their resources because of incapacities or lack of time is almost completely frustrated.

Second, low limits deprive candidates of resources necessary for effective campaigns by reducing the amount of funds available to the campaign. Reducing the amount of money that candidates may accept decreases their voices and contributes to an uninformed electorate.

Third, low limits *artificially* spawn alternate avenues of participation, *e.g.*, issue advocacy, independent expenditures, and soft money contributions to parties. Although these alternate avenues of participation are all constitutionally protected and legitimate, they are not as desirable as direct contributions because they reduce the accountability of candidates for their

[44]Thomas Jefferson, Kentucky Resolutions, 1798.

campaigns. Therefore, these other avenues of participation would not occur to the current extent if there were higher contribution limits.

III. Rather Than Address Current Problems and Their Deleterious Effects on Citizen Participation, the Proposed Regulations By McCain-Feingold, Shays-Meehan and Others Actually Further Restrict Citizens' Participation Both Directly and Indirectly

"[The First Amendment] reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.' In a republic where the people [and not their legislators] are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course we follow as a nation."[45]

While others have attempted to restrict citizen participation in various ways, the Supreme Court has unwaveringly striven to protect citizen participation in its application of the First Amendment. For example, in *Buckley*, the Court developed the "express advocacy" standard to create a bright-line test to protect the speaker and prevent the chill of his speech. Because the close relationship between candidates and issues makes the distinction between issue advocacy and electoral advocacy problematic for the speaker; he is placed in a position of doubt, not knowing whether to censor his own speech. As the Court explained,

> [n]o speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to

[45] *Buckley*, 424 U.S. at 14-15 (citations omitted).

his intent and meaning.

Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.[46]

Therefore, to obviate the danger that "fear of incurring [criminal] sanctions may deter those who seek to exercise protected First Amendment speech," thereby allowing as much speech as possible and permitting the government to regulate only as much speech as absolutely necessary, the Court insisted that mere "advocacy" was not enough to bring a communication within the purview of the statutory limitation; rather, the advocacy must be express or explicit.

Significantly, in both portions of the opinion in which the *Buckley* Court applied the "express advocacy" test, it noted the importance of precision and specificity where the regulation of speech is concerned. Thus, it is clear that the express advocacy test is a highly speech-protective judicial instrument employed to protect citizens' rights to participate in the electoral process.

A second example of the Supreme Court's endeavor to protect citizen participation, also found in *Buckley,* is the Court's establishment of the bright-line "major purpose" test. In practical application, this test prohibits government from requiring organizations which make contributions and independent expenditures to register and report as political committees unless the "major purpose" of the organization is the election or defeat of candidates for political office.[47] "In considering this provision," the Court wrote that it "must apply the same strict standard of scrutiny, for the right of associational privacy developed in *NAACP v. Alabama*

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[46]*Buckley*, 424 U.S. at 43 (*quoting Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

[47]*Buckley*, 424 U.S. at 79.

derives from the *rights of the organization's members to advocate their personal points of view in the most effective way*."[48] The Court in *FEC v. Massachusetts Citizens for Life*,[49] again sought to protect participation in the democratic process by holding that the express advocacy rationale must be extended to restrictions on expenditures by corporations. Thus, the Court protected the rights of corporations and labor unions to participate in the electoral process so long as they avoided communications that expressly advocate the election or defeat of a clearly identified candidate.

The protection of citizen speech is first and foremost at the heart of the Supreme Court's decisions. The speech which the Court has protected – political speech – lies at the core of the First Amendment. Thus, the express advocacy test and the major purpose test were clearly intended to protect citizens' rights to participate by limiting government encroachment to the smallest amount necessary because the "[d]iscussion of public issues and the qualifications of candidates for public office is integral to a system of government in which the people elect their leaders."[50] Not only is the freedom of speech, particularly political speech, necessary to the functioning of a representative democracy, it is also "the matrix, the indispensable condition of every other form of freedom."[51]

Ignoring the Supreme Court's reaffirmance of our nation's commitment to an "uninhibited, robust, and wide open" debate, reformers contend that speech itself, in the form of

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[48] *Id*. at 75 (emphasis added).

[49] 479 U.S. 238 (1986).

[50] *FEC v. National Organization for Women*, 713 F. Supp. 428 (D.D.C. 1989).

[51] *MCFL*, 479 U.S. at 264.

issue advocacy, has contributed to the "sickness" of our democracy. Such speech, they say, is a pollutant. Therefore, "reformers" advocate prohibiting speech in the form of issue advocacy by *any* citizen or organization within sixty days of an election – the time period when speech is most critical to citizens' participation and self-governance.

Reformers also justify the need to limit speech to prevent citizens from providing anything that could be "of value" to a candidate. Limiting contributions is not enough; any constitutionally protected activity, such as engaging in a two-way discussion on public policy matters or purchasing professional services from a common vendor, *might* provide a benefit to a candidate and lead to corruption and therefore must be prohibited. To reach this constitutionally protected speech, the reformers have re-defined "coordination" to include as many classes of relationships as they can dream up – direct, indirect, imputed, or assumed – between a citizen or organization and a candidate, and any communication that could in any way be "of value" to a candidate, whether actually coordinated or not.

The pretext of the reformers' speech restrictions is a concern about the perceived corrupting influence of money. But what really lies at the heart of their attempts to limit citizens' speech? It is their unending quest to level the playing field by prohibiting wealthy citizens from participating through the form of issue advocacy and independent expenditures, held by the Supreme Court to be absolutely protected. However, time and again, courts have rejected any attempt to level the playing field because "one man, one vote" "do[es] not recognize the right to equal influence in the overall electoral process."[52]

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[52]*Georgia State Conference*, 183 F.3d at 1263-64 (*citing FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 257 (1986) ("Political 'free trade' does not necessarily require that

The supposed problems with the current campaign finance system that have been identified by reformers and repeated by the media are not problems from the standpoint of American citizens who want a greater say in who is elected and which policies public officials will pursue. Considering the enormous power and influence of government, there may be too little, rather than too much, money spent during political campaigns.[53] Congress should not try to reduce the amount of money spent in political campaigns. Rather, it should concentrate on reforming or eliminating the current campaign finances laws that distort the ways in which citizens can participate in the electoral process.

In so doing, Congress must be careful that its proposed "cure is not worse than the disease." Many of the so-called reform proposals are nothing more than incumbent protection acts that would make entrenched politicians even less responsive to citizen input.[54] Thus,

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all who participate in the political marketplace do so with exactly equal resources.") (citations omitted); *Buckley*, 424 U.S. at 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.") (citations omitted)).

[53]*See* James Bopp, Jr., *Constitutional Limits on Campaign Contribution Limits*, 11 Regent U. L. Rev. 235, 284-85 (1998-99) ("as the level of government benefits increases, competition for government transfers of wealth will naturally tend to increase campaign expenditures").

[54]*See e.g.*, James C. Miller, *Monopoly Politics* (Hoover Institution Press, 1999) (Chapter 5: Incumbent's Advantage); David M. Mason and Steven Schwalm, "Advantage Incumbents: Clinton's Campaign Finance Proposal," Heritage Foundation *Backgrounder* No. 945 (June 11,

political speech and association are the People's exclusive domain:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people – individually as citizens and candidates and collectively as associations and political committees – who must retain control over the quantity and range of debate on public issues in a political campaign.[55]

Any effort by the reformers to take this power from the People is both wrong and doomed to fail because it is unconstitutional under the First Amendment.

The dangerous effect of the current "culture of regulation"[56] on citizen participation is vastly evident in the reformers' proposals. Chief among proposals that would take this power from the people is the Bipartisan Campaign Finance Reform Act of 1999, sponsored in the Senate (S. 26) by Senators John McCain (R-AZ) and Russell Feingold (D-WI) and in the House (H.R. 417) by Representatives Christopher Shays (R-CT) and Martin Meehan (D-MA). These bills taunt the First Amendment and, if passed, would restrict citizens' participation both directly and indirectly in the electoral process.

It is obvious that the proposals directly limit citizens' speech, and therefore participation, in various ways. However, the Bipartisan Campaign Finance Reform Act also indirectly limits

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[55]*Buckley*, 424 U.S. at 57.

[56]S*ee* Rodney A. Smolla, *The Culture of Regulation*, 5 Comm. Law Conspectus 193 (1997).

citizens' participation in the electoral process. Although perhaps not immediately apparent, this proposal would result in increased government oversight, increased government investigations, and a necessary increase in the level of knowledge and expertise needed by citizens in order to comply with complex regulations.[57] Campaign finance laws are already so complex that many citizens fear FEC investigations. Without a cadre of lawyers and accountants to ensure compliance with campaign finance laws, citizens simply drop out of the public debate altogether rather than risk penalties for noncompliance. Furthermore, complex campaign finance laws also cause inadvertent violations of law. For example, of the more than 60 contributors whose reported annual donations exceeded $25,000 in 1990, elderly persons "with little grasp of the federal campaign laws," made up 25% of this group.[58]

As the amount of regulation grows, ordinary citizens and those of modest means withdraw from the public debate. Deprived of their faculties which would enable them to participate, they cease self-governing. Those that are left in the debate are wealthy individuals and organizations, candidates, parties, and the media. The end result of government regulation is

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[57]For example, Mrs. McIntyre, acting on her own, distributed a simple handbill composed on her home computer to express her opposition to a proposed school tax levy being voted upon in an upcoming referendum. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). As a result of not complying with Ohio's election laws, she was fined $100 and became embroiled in litigation that survived her death and eventually made its way up to the U.S. Supreme Court– simply because she exercised her right of free speech by distributing a few handbills.

[58]Sara Fritz and Dwight Morris, *Federal Campaign Donors' Limits Not Being Enforced Politics*, L.A. Times, September 15, 1991, at A1.

that only the wealthy and the elites are able to participate in the political process. This result however, is in the interest of incumbent politicians as the primary beneficiaries of increased government regulation. To the extent incumbents can limit accountability and the information available, they can control the debate and advance their own elections. Thus, we have come to Tocqueville's "tyranny of the majority" with "public opinion, deprived of its organs" and government, "[i]n principle a subordinate agent; in fact, a master."

Specifically, how do current proposals directly and indirectly limit citizen participation? First, they attempt to alter or obliterate the constitutional distinction between express advocacy and issue advocacy by mere statutory definitions. The proposals' aim is to expand the category of speech that government can regulate – speech that would no longer be free. Although Congress generally enjoys wide latitude to define most terms for statutory purposes, it cannot convert a category of constitutionally protected speech into speech subject to regulation by artificial definitions. Second, they use labels rather than facts, to turn a constitutionally protected category of speech – coordinated expenditures – into citizen speech that may be regulated and prohibited.

A. The Obliteration of the Distinction Between Protected Issue Advocacy and Express Advocacy

The McCain-Feingold bill (S. 26) adopts two new terms: (1) "electioneering communications," defined as any television or radio broadcast that merely "refers to a clearly identified candidate for federal office" within 60 days of a general election or 30 days before a primary election, and is broadcast to an audience that includes the electorate for such election; and (2) "federal election activity," similarly defined to include any "communication that refers to a clearly identified candidate . . . and is made for the purpose of influencing a Federal election

(regardless of whether the communication is express advocacy)."

Under the McCain-Feingold bill's restrictions on "electioneering communications," the freedom to engage in unregulated issue advocacy that Americans have enjoyed would be gone. Non-corporate and labor organizations that spent more than $10,000 in the aggregate on issue advocacy during the pre-election periods specified in the bill (which would be very easy to do) would become subject to strict reporting requirements.[59] Expenditures on issue advocacy during the pre-election periods that are deemed "coordinated" with a candidate, under a new expansive and unconstitutional definition, would be regarded as contributions to candidates and thus subject to FECA's contribution limits.[60] Corporations and labor unions alike would be banned from engaging in issue advocacy during the pre-election periods.[61]

With respect to "federal election activity," any person that expended more than $50,000 in the aggregate would become subject to the same reporting requirements now imposed on political action committees.[62] If these disbursements were made within 20 days of an election, they would have to be reported within 24 hours of making the expenditure on issue advocacy.[63]

This first proposal flies in the face of the First Amendment's broad protection of issue advocacy. Campaign finance statutes regulating more than explicit words of advocacy of the election or defeat of clearly identified candidates are "impermissibly broad" under the First

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[59]Sec. 201.

[60]Sec. 202.

[61]Sec. 203.

[62]Sec. 307.

[63]*Id*.

Amendment.[64] And, such a proposal drastically limits the participation of citizens in the political process.

This approach has already been tried and rebuffed by the federal courts. The weight of authority is so heavy because the express advocacy test means exactly what it says, and issue advocacy is completely protected from regulation. In Michigan, the Secretary of State promulgated a rule that banned corporate and labor union communications made within 45 days of an election that contained merely the "name or likeness of a candidate." Two traditional adversaries, Right to Life of Michigan and Planned Parenthood, challenged the rule in separate federal courts.[65] Both courts struck it down as unconstitutional.

B. Efforts to Redefine Coordination to Encompass Protected Speech

Under the FECA, an express advocacy expenditure that is made "in cooperation, consultation, or concert, with, or at the request or suggestion of a candidate . . . shall be considered to be a contribution to such candidate."[66] If it is coordinated with the candidate, an explicit endorsement to vote for the candidate by an otherwise independent group is arguably tantamount to a contribution to the candidate because it implicates the same potential for *quid pro quo* corruption. This type of pre-arrangement with a candidate is referred to in shorthand as a "coordinated" expenditure. An ad or expenditure that is not coordinated with a candidate is termed an "independent expenditure" and cannot be constitutionally limited at all.

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[64] *Buckley*, 424 U.S. at 80.

[65] *Right to Life of Michigan, Inc. v. Miller*, 23 F. Supp.2d 766 (W.D. Mich. 1998); *Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F. Supp.2d 740 (E.D. Mich. 1998).

[66] 2 U.S.C. § 441a(7)(B)(i).

However, such proposals as McCain-Feingold and Shays-Meehan provide for a sweeping and unconstitutional definition of "coordination" that by mere label would drastically limit true independent expenditures. It would do this by presuming, without proving, the existence of coordination under certain factual scenarios in which it did not necessarily exist.

Under these leading proposals, independent expenditures would be deemed to be "coordinated" with a candidate, thus prohibiting corporations from making them, and limiting individuals to spending $1,000 on them because the communication would be subject to the $1,000 contribution limit to candidates.[67] This redefinition of coordination with labels violates the First Amendment because if the Constitution forbids Congress from limiting independent expenditures, *a fortiori*, Congress certainly cannot limit these disbursements by simply attaching a new label to them.

Both proposals provide 10 different factual instances in which "coordination" is presumed. For example, if during an election cycle, a person making an independent expenditure and a candidate employ a common vendor, coordination would be presumed. Indeed, unilateral action by the vendor, that is, providing services to a candidate after an independent expenditure had been made could convert the independent expenditure into a "contribution."

Another instance of presumed coordination would occur if the person making the independent expenditure in the same election cycle merely discussed strategy or policy with the candidate concerning his decision to seek elective office, or discussed any matter related to the candidate's campaign with the candidate. The same is true for the person making an independent

[67]2 U.S.C. § 441a(a)(1)(A), (7)(B)(i), 441b(a).

expenditure if he also helped to raise funds for the candidate who benefitted from his expenditure.

These presumptions would be invalid because the Supreme Court has held that coordination must be actually proved. In *Colorado Republican Federal Campaign Comm. v. FEC*,[68] the FEC took the position that party expenditures were presumed to be coordinated with their candidates as a matter of law. The Supreme Court rejected this view:

> An agency's simply calling an independent expenditure a "coordinated expenditure" cannot (for constitutional purposes) make it one . . . . [T]he government cannot foreclose the exercise of constitutional rights by mere labels.

The Supreme Court held that there must be "actual coordination as a matter of fact."[69] Congress therefore, cannot recite some factual scenarios in which it *might be possible*, or even probable, that coordination with candidates takes place, and then presume as a matter of law that it has occurred in such instances. To do so would allow the government to curtail independent expenditures and issue advocacy, which it constitutionally cannot limit, by mere labels.

Reformers are also attempting to limit many real independent expenditures by eliminating the express advocacy requirement from the definition of "coordination." The definition of "coordinated activity" in the leading reform bills allows coordinated expenditures based upon issue advocacy.

However, the Supreme Court has declared that only expenditures for express advocacy can be regulated; that is, communications that in "explicit words" or by "express terms advocates

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[68]116 S. Ct. 2309, 2319 (1996) (Breyer, J., plurality opinion).

[69]*Id*. at 2317.

the election or defeat of a clearly identified candidate."[70] Issue advocacy is the antithesis of "express advocacy," that is, the discussion of issues and candidates' positions on them without express words of advocacy. These reform proposals aim to eliminate this critical distinction in the area of "coordinated activity":

> "Coordinated activity" means anything of value provided by a person in coordination with a candidate . . . for the purpose of influencing a federal election (regardless of whether the value being provided is a communication that is express advocacy) . . . .[71]

Under this definition, the publication of any voting record or voter guide would be deemed an in-kind contribution to a candidate if "coordinated" newly defined. Under this expansive definition, no citizen would even need to mention a candidate to fall under the law. Merely making an expenditure that weighed in on a public policy debate that was also a campaign issue would be considered something "of value for the purpose of influencing a federal election."

Therefore, it is clear from the above discussion of just two of the provisions in McCain-Feingold, that if such provisions were enacted, Congress would essentially be telling American citizens that it does not value their speech or their participation, that there is no commitment to "uninhibited, robust" debate, and that the purposes of the First Amendment have been extremely compromised for the sake of a misguided idea of what democracy ought to look like. If Congress enacts these, or similar provisions, citizens will have lost yet other avenue of self-

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[70]*Buckley*, 424 U.S. at 43, 44; *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 248-249 (1986).

[71]Sec. 206 (Shays-Meehan); Sec. 215 (McCain-Feingold).

governance. These proposals will only increase citizen apathy and place our democracy on the brink of the slippery slope of the "tyranny of the majority."

IV. The Reformers' Attack on Issue Advocacy Has Another Front -- Section 527 of the Internal Revenue Code

There is another bill that I want to discuss today that is also part of the unrelenting attack on citizens' ability to participate in public discourse. Not content with a frontal assault through the FECA, reformers have turned their attention to the Internal Revenue Code. HR 4168 proposes to amend the Internal Revenue Code of 1986 to require that federal election rules apply to groups formed under § 527 of the Internal Revenue Code.

Before I talk about the specific effects of House Resolution 4168, some clarifying background information about § 527 and the FECA is necessary. Section 527 was added to the Internal Revenue Code in 1974 to resolve long-standing issues relating to inclusion of political contributions in the gross income of candidates.[72] Drafters were concerned that candidates would use their campaign committees to earn investment income free of tax, and so a tax on investment earnings became the major limitation on the exemption available under § 527.

Section 527 of the Internal Revenue Code provides an exemption from corporate income taxes for political organizations that are organized primarily to intervene in political campaigns.[73] Thus, to qualify for the tax exemption, the organization must be a "political organization" that meets both the organizational and operational tests under § 527.

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[72]S. Rep. No. 93-1357, 93rd Cong., 2d Sess. (1974), 1975-1 C.B. 517.

[73]Section 527 organizations must however, pay tax on their investment and unrelated business income, and cannot receive tax-deductible gifts.

A "political organization" is a party, committee, association, fund, or other organization organized primarily for the purpose of directly or indirectly accepting contributions or making expenditures for an exempt function activity. Section 527(e)(1) of the Code defines the term "exempt function" to mean, in relevant part, 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 or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected or appointed. A "political organization" meets the organizational test if its articles of incorporation provide that the primary purpose of the organization is to influence elections. Under the operational test, a "political organization" must primarily engage in activities that influence elections but it need not do so exclusively.

The IRS has issued no precedential guidance in this area, but it has issued private letter rulings which provide an indication of what constitutes evidence of political intervention for purposes of § 527. Activities that are intended to influence, or attempt to influence, the election of individuals to public office may include encouraging support among the general public for certain issues, policies and programs being advocated by candidates and Members of Congress.

Thus, the IRS has found that expenditures for issue advocacy could qualify as intervention in a political campaign within the meaning of § 527(e)(2).[74] Moreover, the

[74]In LTR 9652026, the IRS found that the purposes articulated by the § 501(c)(4) organization satisfied the organizational requirement, finding that "[t]his purpose is equivalent to accepting and expending funds not to expressly advocate for or against candidates, but to promote a program of issue advocacy designed to influence the public to give more importance

distinction between issue advocacy activities that were educational within the meaning of § 501(c)(3) and issue advocacy activities that were not educational and therefore qualified as § 527(e)(2) expenditures intended to influence the outcome of elections, was not based on major differences in the nature of conduct of the activities.[75] The IRS instead pointed to the targeting of the activities to particular areas, the timing of them to coincide with the election, and the selection of issues based on an agenda.[76] As will be discussed in a moment, these factors have been rejected by the courts as irrelevant to any determination of whether an organization's speech, regardless of its tax status, is express advocacy.

In a recent private letter ruling[77] to an organization under § 527, made public on June 25, 1999, the IRS determined that a wide range of programs qualified as "exempt functions" for a § 527 political organization. The IRS found a political nexus even though some of the materials to be distributed, and techniques to be used, resembled issue advocacy and other materials and techniques often used in the past by charitable organizations without violating section 501(c)(3) of the Internal Revenue Code. However, because the materials and techniques were designed to serve a *primarily* political purpose and would be inextricably linked to the political process, the

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to . . . issues when they decide among the candidates." *See also* LTR 9725036, Doc 97-18136 (13 pages), 97 TNT 120-30; LTR 9808037, Doc 98-6737 (14 pages), 98 TNT 35-57.

[75] *Id*..

[76] *Id*..

[77] Although a private letter ruling applies only to the organization that requests it and cannot be cited as precedent by other organizations, it provides guidance regarding one approach found acceptable by the IRS of substantiating the political nexus.

political nexus was substantiated.

Of particular interest is the IRS's conclusion that voter education, which may include dissemination of voter guides and voting records, grass roots lobbying messages, telephone banks, public meetings, rallies, media events, and other forms of direct contact with the public, can be apolitical intervention when it links issues with candidates. Whether an organization is participating or intervening, directly or indirectly, in a political campaign, however, depends, in the view of the IRS, upon all of the facts and circumstances. Thus, while voter education may be both factual and educational, the selective content of the material, and the manner in which it is presented, is intended to influence voters to consider particular issues when casting their ballots. This intent was seen by the evident bias on the issues, the selection of issues, the language used in characterizing the issues, and in the format. The targeting and timing of the distribution was aimed at influencing the public's judgment about the positions of candidates on issues at the heart of the organization's legislative agenda. These activities are partisan in the sense that they are intended to increase the election prospects of certain candidates and, therefore, would appear to qualify under § 527(e)(2).

It is the perceived intersection between the Internal Revenue Code and the FECA that reformers want to regulate. Section 527 organizations must convince the IRS that they are organized and operated for the exempt function of influencing elections as required under § 527(e)(2). However, because the organization is engaged in only issue advocacy and does not make contributions to candidates or engage in express advocacy, the organization is not subject to the FECA. However, HR 4168 would treat them as if they engaged in such activities and require them to register as PACs under the FECA.

However, the Supreme Court has made it clear that an organization cannot be treated as a PAC because it engages in issue advocacy - which was one of the purposes of the express advocacy test in the first place. The Supreme Court, in one of its most oft-quoted footnotes, has provided an illustrative list of which terms could be "express words of advocacy:" "vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"[78] Since the Court's ruling in *Buckley*, district and federal courts of appeal have followed this strict interpretation of the express advocacy test and have struck down any state or federal regulation purporting to regulate based on intent or purpose to influence an election.[79] These courts have

[78]*Buckley*, 424 U.S. at 44 n.52.

[79]*See North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969-70 (8th Cir. 1999); *Virginia Society for Human Life v. Caldwell*, 152 F.3d 268, 274 (4th Cir. 1998); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 506 (7th Cir. 1998); *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997); *Maine Right To Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 12 (D.Maine 1996), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996); *Faucher v. FEC*, 928 F.2d 468, 472 (1st Cir. 1991); *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980)(*en banc*); *Kansans for Life, Inc. v. Gaede*, 38 F. Supp.2d 928, 935-37 (D.Kan. 1999); *Right to Life of Mich., Inc. v. Miller*, 23 F. Supp.2d 766 (W.D.Mich. 1998); *Planned Parenthood Affiliates of Mich., Inc. v. Miller*, 21 F. Supp.2d 740 (E.D. Mich. 1998)(same); *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp.2d 248 (S.D.N.Y. 1998); *Clifton v. FEC*, 927 F. Supp. 493, 496 (D. Maine 1996), *aff'd on other grounds*, 114 F.3d 1309 (1st Cir. 1997); *West Virginians for Life, Inc. v. Smith*, 919 F.

unanimously required express words of advocacy in the communication itself before government may regulate such speech.

Furthermore, the organizations "major purpose" must be making contributions and express advocacy communications to be treated as a PAC. The FECA defines a "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year.[80] In *Buckley*, the U.S. Supreme Court narrowly construed this definition, holding that under the FECA's definition of political committee, an entity is a political committee only if its *major purpose* is the nomination or election of a candidate.[81]

An organization's "major purpose" may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a

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Supp. 954, 959 (S.D.W.Va. 1996); *FEC v. Christian Action Network*, 894 F. Supp. 946, 958 (W.D.Va. 1995), *aff'd per curiam*, 92 F.3d 1178 (4th Cir. 1996); *FEC v. Survival Educ. Fund, Inc.*, 1994 WL 9658, at *3 (S.D.N.Y. Jan. 12, 1994), *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995) ; *FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1456 (D. Colo. 1993), *rev'd,* 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded on other grounds*, 116 S. Ct. 2309 (1996); *FEC v. NOW*, 713 F. Supp. 428 (D.D.C. 1989); *FEC v. AFSCME*, 471 F. Supp. 315, 317 (D.D.C. 1979); *Elections Bd. of State of Wis. v. Wisconsin Mfrs. & Commerce*, 597 N.W.2d 721, 731 (Wis. 1999).

[80]2 U.S.C. § 431(4)(A).

[81]424 U.S. 1, 79 (1976).

particular candidate or candidates.[82] Even if the organization's major purpose is the election of a federal candidate(s), the organization does not becomes a political committee unless or until it makes expenditures in cash or in kind to support a person who has decided to become a candidate for federal office.[83]

Recently, the Fourth Circuit found a definition of "political committee," that included both entities that have as a primary or incidental purpose engaging in express advocacy, and those that merely wish to influence an election (engage in issue advocacy), as being overbroad and unconstitutional.[84] The court found that the definition of "political committee" could not encompass groups that engage only in issue advocacy and groups that only *incidentally* engage in express advocacy.[85]

Thus, only an organization that engages primarily in express advocacy triggers FECA reporting and disclosure requirements. Issue advocacy in the context of electoral politics does not cause an organization to be deemed a political committee. Merely attempting to influence the result of an election is not enough. This classic form of issue advocacy, influencing an election without express words of advocacy, does not cause an entity to be subject to the

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[82]*FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996).

[83]*Id*.

[84]*See North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir. 1999).

[85]*Id*. *See also FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *United States v. National Comm. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972); *New York Civil Liberties Union v. Acito*, 459 F. Supp. 75 (S.D.N.Y. 1978); *American Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973).

reporting and disclosure requirements of political committees under the FECA. Only those expenditures that expressly advocate the election or defeat of a clearly identified candidate do so.[86]

Thus, it is perfectly consistent that an organization may qualify for exemption under § 527 of the Internal Revenue Code yet not qualify as a PAC under the FECA. Tax law provides for exemption from corporate tax and a shield against disclosure of contributors. Election law mandates PACs to report all their contributors and expenses, subjects them to contribution limits, and prohibits them from receiving corporate or labor union contributions. These burdens on a PAC cannot be constitutionally applied to an issue advocacy organization.

Therefore, as discussed above, § 527 casts a wider net than does the FECA. The FECA bases its requirements on narrowly defined activities, not on tax status. Thus, activities deemed political by the Internal Revenue Service, for purposes of determining tax exempt status, are not considered "political" under the FECA when there is no express advocacy of the election or defeat of a federal candidate.

With this background of how the provisions of § 527 and the FECA work, it is apparent that the reformers are yet again attempting to regulate citizen participation in the form of protected issue advocacy. As a result of the IRS's amorphous definitions of "social and welfare activities" and "political intervention," many § 501(c)(4) organizations are now forced to organize under § 527 for tax purposes. In fact, the Christian Coalition has filed suit against the IRS challenging its overbroad interpretation of what is political intervention which caused it to

[86] *Buckley*, 424 U.S. at 76-82.

be denied its § 501(c)(4) exemption.[87]

House Resolution 4168, however, would require issue advocacy organizations exempt under § 527 to be treated as PACs under the FECA. However, it is unconstitutional to require issue advocacy groups to register as PACs. What the government may not do directly, it may also not do indirectly by bootstrapping onto the Internal Revenue Code a requirement of "political committee" registration and reporting requirements.[88] In other words, Congress may not condition a tax exempt status on reporting and disclosure requirements of issue advocacy when it may not constitutionally require in the first instance.

The fact that issue advocacy groups may engage in activities which influence an election, or even admit that their purpose is to influence an election, is totally irrelevant to the analysis. What is pertinent is whether these groups engage in any express advocacy. The *Buckley* Court left intact, as constitutionally protected, speech that influences an election.

To make it clear that speech that only influences an election, but does not contain express words of advocacy, is completely free from regulation, the Supreme Court explicitly stated this both positively and negatively. First, the Court stated that "[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified

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[87]*The Christian Coalition International v. U.S.*, No. 2:00cv136 (E.D. Va. filed Feb. 25, 2000).

[88]*See American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1065 (9th Cir. 1995) (*citing New York Times v. Sullivan*, 376 U.S. 254, 277 (1964) ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.")).

candidate, they are *free to spend as much as they want to promote the candidate* and his views."[89] Second, the Court explained that the FECA did "not reach *all partisan discussion* for it only requires disclosure of those expenditures that expressly advocate a particular election result."[90]

Therefore, in order to protect speech, especially speech that may influence an election, the Court drew a bright-line so that the speaker would know exactly when he crossed into regulable territory – the express advocacy realm. Anything on the other side of the line, speech that may influence an election, whether intentionally or not, was to be protected from government regulation so as to promote the free discussion of issues and candidates. Thus, speech free from explicit words of advocacy, whether made with the intent to influence an election or not, is perfectly appropriate and legitimate.

This is not to say that Congress is completely without power to lawfully regulate § 527 organizations. The Joint Committee on Taxation's recommendation that § 527 organizations should be required to disclose tax returns (except for donor information) would create parity between § 527 organizations and § 501(c)(3) and § 501(c)(4) organizations.[91] However, any disclosure that goes beyond the public disclosure of tax returns violates the constitutional protection of issue advocacy.

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[89] *Buckley*, 424 U.S. at 45 (emphasis added).

[90] *Id*. at 80 (emphasis added).

[91] Staff of Joint Committee on Taxation, 106th Cong., Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998, Vol. II at 95 (January 28, 2000).

V. Two Options That Would Advance Citizen Participation

There are constitutional measures that Congress could adopt that would address real concerns and still guarantee citizen control over the "quantity and range of debate on public issues in a political campaign." These concerns include the distortions and evasions caused by complex laws, the lack of transparency in political contributions that result from such distortions, and the almost constant need for public officials to engage in raising a large number of small contributions.

To adopt true reform, Congress first needs to recognize that today's perceived abuses are simply the predictable result of past "reforms" in which the suppression of political speech was the principal focus. In contrast, adopting measures that would *enhance* political speech and improve public accountability would more effectively address the problems and unquestionably be upheld by the courts. Such measures include raising contribution limits that have been eroded by inflation and providing tax credits for small contributions.

A. The Individual Contribution Limit And The Aggregate Limit Should Be Increased

The individual limit of $1,000, found in § 441(a)(a)(1)(A), and the aggregate contribution limit of $25,000, found in § 441(a)(a)(3), has been in effect since 1974. While a $1,000 contribution represented a large contribution in 1974, it does not represent one today. In fact, based on figures from the Consumer Price Index, $1,000 in 1974 is worth only $302 today; an equivalent amount in today's purchasing power would be $3306.[92]

[92] *See* Sen. Hrg. 106-19, at 14 (Dan Coats Statement) (citing Consumer Price Index in 1974 and 1998).

Allowing individuals to make larger contributions will enhance the ability of individual citizens to influence the political process while helping to offset the influence of "special interests" and PACs. The individual limit should be raised to $3,000 and the PAC limit raised to $15,000. Both should be indexed for inflation. Furthermore, to accommodate the increase in individual contributions to candidates, the aggregate individual contribution limit should be increased to $100,000 and also be indexed for inflation.

B. The Tax Credit For Small Political Contributions Should Be Restored

Three problems exist in the current system of funding political campaigns:

1. Political candidates must spend an increasing amount of time raising campaign funds in small increments that grow smaller in terms of real dollars each year as inflation takes its toll. Elected officials are increasingly distracted from their public duties by the constant need to raise funds, and some public officials have resigned as a result of the fundraising pressure.[93]

2. To ease the fundraising burden, candidates focus on raising campaign contributions in large amounts rather in small increments.

3. More money is poured into fundraising leaving less funds for conveying the candidate's positions and message to the public, resulting in an uninformed electorate.

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[93] *See Concerning Limits to Candidates in Federal Elections: Hearings before the Senate Committee on Rules and Adminsitration*, 106th Cong., 1st Sess., May 24, 1999 (testimony of former Senator Dan Coats and Exhibit 6, quoting Senators John Kerry (D-MA), Frank Lautenberg (D-NJ), Wendell Ford (D-TN), and Dennis DeConcini (D-AZ) and former Senator Paul Simon (D-IL), most announcing their intention to retire but all expressing dismay at the inordinate amount of time necessarily devoted to raising campaign contributions).

The 1974 amendments to the FECA contained a 50% individual tax credit for political contributions up to $100, providing a substantial incentive for small political contributions. This incentive should be restored to encourage small contributions from a greater number of citizens.[94]

There are three benefits to reenacting a tax credit. First, a tax credit makes raising small contributions more affordable for candidates. Direct mail becomes more attractive as a result of a higher response rate and larger contributions. Candidates will pursue small contributions more vigorously because of a higher return. Second, small contributions are the counterweight to large contributions, reducing the potential influence of large contributions. Third, a tax credit would provide more money to candidates overall by reducing the fundraising burden and thus allowing more money for candidates to spend to get their messages out.

CONCLUSION

In sum, Congress should learn the difference between enhancing accountability to the people, and exercising control over them. Proposals that would restrict or curtail the involvement of individuals, political organizations, and political parties represent an attempt to exercise control over the people and distort the electoral process. Therefore, with few exceptions, they are unconstitutional under the First Amendment.

Proposals that are aimed at opening up the process and simplifying the campaign finance

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[94]In fact, H.R. 4224, introduced this Session, calls for an amendment of the Internal Revenue Code of 1986 to allow a tax credit in an amount equal to one-half of all political contributions, and all newsletter fund contributions, paid by the taxpayer during the taxable year, not to exceed $100 ($200 in the case of a joint return).

rules enhance politicians' political accountability to the people. Such proposals reinforce the sovereignty of the people over elected officials, making it more likely that perceived influence will be exposed, which will result in the decrease of the threat of corruption.

When the heated rhetoric of the reformers is stripped away, the public is staunchly in favor of free political speech. Once the public understands what is at stake – their voices, their participation, their self-governance – there will be serious voter reaction. The American People treasure their First Amendment rights and believe that their representatives should honor their oaths to uphold the Constitution – including the People's right to free political expression.

SUMMARY OF RÉSUMÉ OF

JAMES BOPP, JR.

James Bopp, Jr. is an attorney with the law firm of Bopp, Coleson & Bostrom in Terre Haute, IN and with the law firm of Webster, Chamberlain & Bean in Washington, D.C. His law practice concentrates on first amendment cases regarding political free speech and free exercise of religion and constitutional law cases regarding pro-life issues. He represents numerous not-for-profit organizations, political action committees, and political party committees, including the National Right to Life Committee, Inc. and the Christian Coalition.

Mr. Bopp's extensive federal and state election law practice includes successful federal litigation striking five sets of Federal Election Commission regulations in cases including *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991), *Maine Right to Life Committee v. FEC*, 98 F.3d 1 (1st Cir. 1996) and *Minnesota Citizens Concerned for Life v. Federal Election Commission*, 113 F.3d 129 (8th Cir. 1997). In addition, Bopp has successfully challenged state election laws in over two dozen states on free speech grounds, including winning the seminal cases of *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), and *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996). Finally, Bopp has successfully litigated several redistricting cases, including *La Porte County Republican Central Committee v. Board of Commissioners*, 43 F.3d 1126 (7th Cir. 1994).

Because of Bopp's expertise in election law, he has testified on campaign finance reform before the United States Senate Committee on Rules and Administration and before the United State House Committee on House Administration and the Subcommittee on the Constitution of

the United States House Judiciary Committee. Bopp has published three leading law review articles on election law entitled *The First Amendment Is Not A Loophole: Protecting Free Expression in the Election Campaign Context*, 28 UWLA LAW REV. 1 (1997), *Constitutional Limits on Campaign Contribution Limits*, 11 REGENT U. LAW REV. 235 (1998-99) and *All Contribution Limits Are Not Created Equal: New Hope in the Political Speech Wars*, 49 CATHOLIC U. LAW REV.11 (1999). He has also published opinion pieces in The Washington Post, The Washington Times and USA Today.

Mr. Bopp currently serves as General Counsel for the James Madison Center for Free Speech and as Chairman of the Election Law Subcommittee of the Free Speech and Election Law Practice Group of the Federalist Society.