Richard E Coleson <rcoleson@bopplaw.com> on 04/05/2004 03:41:20 PM

To: pcstestify@fec.gov, politicalcommitteestatus@fec.gov
cc: "Jim (AOL) Bopp" <jboppjr@aol.com>

Subject: Comments on NPRM 2004-6

Dear Ms. Mai T. Dinh,

Attached to this e-mail is a PDF document containing (1) a cover letter submitting comments on NPRM 2004-6 (Political Committee Status) and stating the desire of attorney James Bopp, Jr. to testify at the scheduled hearing and (2) the comments submitted on behalf of Focus on the Family, Inc., National Right to Life Committee, Inc., National Right to Life Educational Trust Fund, National Right to Life Political Action Committee, Susan B. Anthony List, Inc., and SBA List Candidate Fund.

Sincerely,

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FECcomments-politicalcommittee4-5-2004.pdf

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April 5, 2004

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463
By E-Mail: politicalcommitteestatus@fec.gov

Re: Notice 2004-6 (NPR Regarding "Political Committee Status")

Dear Ms. Dinh:

We send with this letter the comments on Notice of Proposed Rulemaking 2004-6 ("Political Committee Status") prepared on behalf of Focus on the Family, Inc., National Right to Life Committee, Inc., National Right to Life Educational Trust Fund, National Right to Life Political Action Committee, Susan B. Anthony List, Inc., and SBA List Candidate Fund.

Attorney James Bopp, Jr. wishes to testify orally concerning the proposed rulemaking at the scheduled hearing.

Sincerely,

BOPP, COLESON & BOSTROM

/s/ James Bopp, Jr.

James Bopp, Jr.
Richard E. Coleson

1 Attachment

Comments on FEC Notice of Proposed Rulemaking 2004-6: "Political Committee Status"

Prepared by

James Bopp, Jr. & Richard E. Coleson

April 5, 2004

These comments are prepared on behalf of Focus on the Family (a § 501(c)(3) corporation), National Right to Life Committee, Inc. (a § 501(c)(4) corporation), National Right to Life Educational Trust Fund (a § 501(c)(3) separate segregated fund), National Right to Life Political Action Committee (a separate segregated fund political committee), Susan B. Anthony List, Inc. (a § 501(c)(4) corporation), and SBA List Candidate Fund (a separate segregated fund political committee). These organizations engage in a wide variety of democracy-promoting activities, including communications that refer to federal officeholders that could be interpreted as promoting, supporting, attacking, or opposing candidates; voter registration; voter identification; and get-out-the-vote activity.

These groups are concerned that rules suggested in the FEC's Notice of Proposed Rulemaking 2004-6 (NPRM) would limit their ability to participate in the American marketplace of ideas and system of representative democracy. Of particular concern is the statement of Vice Chair Ellen L. Weintraub that full-page newspaper ads paid for by FRCAction (a § 501(c)(4) organization) thanking President Bush for supporting the Federal Marriage Amendment and pledging support for the effort might constitute an "expenditure" under certain proposed rules, which in turn would make FRCAction into a political committee. Weintraub, *Statement for the Record* at 4-6 (Mar. 4, 3004). The present commenters believe that the notion that citizen advocacy groups cannot publish an open letter in major newspapers to the President concerning a proposed constitutional amendment without the bondage of political committee shackles is antithetical to liberty and the very concept of American participatory government.

Introduction

The NPRM "explores whether and how the Commission should amend its regulations defining whether an entity is a nonconnected political committee [*fn*] and what constitutes an 'expenditure.'" 69 Fed. Reg. 11736. The short answer is that there is no authority to change the definition of "political committee" or "expenditure" because Congress did not change the statutory definitions of "political committee," "expenditure," or "contribution." So there is no agency authority to make changes inconsistent with those current definitions, as the NPRM proposes to do.

The NPRM recognizes that the definitions are unchanged when it sets forth the unaltered definitions of "expenditure" and "political committee," i.e., "FECA . . . define[s] a political committee as 'any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 in a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year.' 2 U.S. 431(4)(A)." 69 Fed. Reg. 11736.

But the NPRM fails to apply, or even mention, the implications of the fact that Congress did not alter these key definitions.

Instead, the NPRM tries to shift the focus from what Congress *did not do* in the Bipartisan Campaign Reform Act of 2002 (BCRA) to what the Supreme Court did regarding *other* provisions and *said* in *McConnell v. FEC*, 124 S. Ct. 619 (2003), as the asserted basis for new rules. The NPRM's opening paragraph is emblematic of this focus on *McConnell* instead of FECA. The first sentence says Congress enacted BCRA and the second sentence shifts immediately to *McConnell*. The second paragraph says that because *McConnell* upheld certain restrictions on an anti-circumvention rationale the FEC is considering new rules on when organizations may be treated as political committees (PACs).

Of course it is basic agency law that the authority for rulemaking must come from the actual statutory language of the Federal Election Campaign Act (FECA), as amended by BCRA, not on whether the Supreme Court upheld other provisions before the Court or on any broad statements in *McConnell* that might fuel speculation about what the Court might permit *Congress* to do *if* sufficient political support is generated in the legislature. The Supreme Court has declared that it "is bound by holdings, not language," *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001), and the same principle applies to the FEC and courts that will review any rulemaking challenged as beyond agency authority.

These comments will develop the neglected implications of the decision of Congress not to change the definitions of "contribution," "expenditure," or "political committee," showing how no organization may be shackled with PAC irons unless it meets the trigger amount of contributions or expenditures defined in "political committee" and that the "major purpose" doctrine remains unchanged after *McConnell*. The major purpose test serves as a limit on when PAC burdens may be imposed on organizations that actually do independent expenditures, not as part of the definition of what constitutes a political committee. That FECA definition of political committee remains unchanged and requires expenditures or contributions involving express advocacy or transfers of money or other things of value to candidates.[1]

But first, it is important to briefly remind all of the fact that the Commission is working on the edge of the most protected participatory government rights so that extreme care must be taken to avoid violating explicit constitutional protections. And it is vital to closely examine

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[1]As there will be numerous comments opposing the NPRM, the present comments do not attempt to touch all bases. It is a sign of the broad bipartisan nature of the opposition to the NPRM that the present commenters find themselves in general agreement with the comments filed by the Coalition to Protect Nonprofit Advocacy, which has circulated a draft dated April 1, even though the present commenters may differ widely on ideological issues with listed members of the Coalition. *See* <www.NonprofitAdvocacy.org> (visited April 2, 2004). The First Amendment and the need of Americans to associate to participate effectively in public debate and representative democracy know no ideological boundary. Thus, there is agreement with the following points made by the Coalition: the proposed rules seriously impede the ability of citizen groups to engage in issue advocacy, nonpartisan voter mobilization, and communications with members; Congress considered and rejected approaches taken in the proposed rules; the FEC lacks the ability to properly consider the issues raised, especially in an expedited rulemaking; and if further regulation of nonprofits is to be done, it must be done by Congress.

what Congress actually did and did not do in BCRA and exactly what the Supreme Court did and did not do in *McConnell.*

Extreme Care Must Be Taken to Protect Participatory Government Rights

The NPRM seems entirely focused on a single Supreme Court opinion. No notice is taken of the importance of the rights of free expression and association, the First Amendment, and the need to exercise extreme care when regulating to be certain that participatory government is safeguarded. It is important to recall why "the People" insisted on a First Amendment constitutional guarantee of free speech, press, and association and why the Supreme Court has repeatedly held that these rights are so important that an abridgement must be narrowly tailored to a compelling interest.

America has a participatory form of government in which the people do the ultimate governing, and these freedoms are the very means by which they govern. To shackle these freedoms is to alter the essential nature of the United States of America. This big picture must not be forgotten in partisan bickering over what a single decision of the Supreme Court portends or which non-party group is raising what funds and doing what activity. The Supreme Court has not declared unconstitutional (nor could it) the rights of the people to retain the means to govern themselves. Rather, the Court has consistently affirmed the necessity of these means and the people's participation, which affirmation is not altered by *McConnell.*

"Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. A modern society based on the rule of law of course requires a government able to make laws that restrict, for example, the sort of speech found in contracts and other commercial documents. So the First Amendment must ban restrictions on speech inconsistent with the purpose of the First Amendment. What is that purpose?

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." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Thus, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (*quoting Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

Political speech is protected because the Framers' understood that it is "integral to the operation of the system of government established by our Constitution." *Id.* 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." *Id.* at 14-15.

Indeed, "public discussion" was viewed by the Framers as not only a political right, but as "a political duty." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). 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 may be obtained by lawful means." *Stromberg v. California*, 283 U.S. 359, 369 (1931).

Therefore, freedom of speech is a condition essential to our 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.'" Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 Sup. Ct. Rev. 245, 255. 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." *Whitney*, 274 at 375. 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. *Id.* at 375-76. As a means, free speech is an indispensable means to political truth. *Id.*

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 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-govemance. Public opinion mediates between the particular wills of individual citizens and the general will of the govemment 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 our representatives derive their governing power from citizens, the latter must enjoy *at least* as much protection as their elected servants. *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."). 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 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.[2] That is, it leaves to individuals the independence to deliberately define for themselves their beliefs, morals, and ideas. *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). As Justice Brandeis stated in his famous concurrence in *Whitney*:

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

275 U.S. at 375-76 (citations omitted).

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

Congress in enacting BCRA did not pretend to eviscerate the right of the people to participate in American debate and democratic government through their citizen watchdog groups. It placed some limits on political parties and candidates, but the only limits it placed on citizen groups was to restrict electioneering communications. And Congress made the electioneering communication provision applicable only for limited times before elections, leaving the preexisting FECA regime otherwise in place.

And the Court in *McConnell* did not repudiate the things it said in *Buckley*, *MCFL*, and other cases about the vital importance of the involvement of citizen groups in American

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[2]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*, 424 U.S. at 42.

participatory government. Instead, it approved restrictions that applied *only* to political parties and candidates and approved a limited restriction *only* on what it said was the "functional equivalent" of express advocacy.

These holdings provide no warrant to run roughshod through this vitally important, highly protected, and sensitive area of the law. Regulation in this area requires narrowly-tailored scalpel work, not level-all bulldozer work. The liberty and participatory government rights of the people must be the first consideration in this proposed rulemaking. In the NPRM, these rights don't rate even a mention. That is an inauspicious beginning.

What BCRA and *McConnell* Did and Did Not Do[3]

The NPRM attempts to extract from various passages in the *McConnell* opinion support for all sorts of limitations on the people's liberty and participation in government. As it is necessary to step back for the big picture and remind ourselves of the participatory nature of American government and the people's liberties of speech and association as guaranteed by the First Amendment, it is also necessary to pause and ask what was really at issue in *McConnell* and what were the Court's holdings on those narrow issues.

The Express Advocacy Test and Strict Scrutiny Remain

A good starting point in determining what the Supreme Court actually *did* in *McConnell* is to note that the express advocacy test is still alive. The most important analytical point about *McConnell*'s treatment of the electioneering communication ban[4] is that the Court considered the ban under the *Buckley/MCFL* express advocacy rubric. Even though *McConnell* declared that the express advocacy test is not compelled by the Constitution, it nonetheless required that there be something functionally equivalent to the express advocacy test if the express advocacy test is not employed to analyze statutes bordering on issue advocacy for constitutionality. 124 S. Ct. at 686-97.

The Court thereby reaffirmed *Buckley*'s general rule protecting issue advocacy against encroachment from vague and overbroad restrictions by means of the express advocacy test and created a narrow exception for a statute that (1) is not vague, *id.* at 688-89, and (2) is not overbroad because there is sufficient evidence demonstrating that the targeted communication is the "functional equivalent," *id.* at 650-51, 686-89, 696-97, of express advocacy and the restriction is supported by the same justifications. *Id.* at 689, 697. Consequently, vague statutes that border on issue advocacy still require the express advocacy construction imposed in the *Buckley* and *MCFL* statutory constructions, and statutes bordering on issue advocacy that

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[3]Much of the following material is adapted from a forthcoming symposium article in the *Northern Kentucky Law Review* entitled "The First Amendment Is Still Not a Loophole: Examining McConnell's Exception to Buckley's General Rule Protecting Issue Advocacy," by James Bopp, Jr. & Richard E. Coleson, which contains a fuller analysis of *McConnell.*

[4]In his dissent, Justice Kennedy cogently argued that § 203 is indeed a sweeping ban. *McConnell*, 124 S. Ct. at 762-68.

regulate more than express advocacy communications must conform to the *McConnell* exception.[5]

And of course, the Court's express advocacy construction still governs key definitions in the Federal Election Campaign Act (e.g., 2 U.S.C. § 431(17) (definition of "independent expenditure")), in FEC regulations (e.g., 11 C.F.R. § 100.16 (definition of "independent expenditure")), and in numerous state provisions (either by express language or by judicial construction). So the express advocacy analysis remains alive and broadly applicable after *McConnell.* To place *McConnell* in its correct context, it is helpful to look at how BCRA's sponsors drafted, and then litigated the defense of, BCRA's electioneering communication ban.

The approach of BCRA's sponsors in drafting BCRA was not to incorporate "electioneering communication" into the definition of "independent expenditure," "expenditure," "contribution," or "political committee." That approach was considered early on and rejected by BCRA's sponsors.[6]

Had Congress incorporated electioneering communications into the meaning of independent expenditure, then independent expenditures would not continue to be defined solely by the express advocacy test and electioneering communications would have been automatically banned for corporations and labor unions under 2 U.S.C. § 441b. So there would have been no need for Congress to tack electioneering communications onto § 441b as an additional banned activity.

And there would have been no need for the Court to declare that the exception for independent expenditures by certain nonprofits established in *MCFL*, 479 U.S. at 263-65, also applied to electioneering communications. *McConnell*, 124 S. Ct. at 698-99. This is so because, if Congress had incorporated electioneering communications into independent expenditures, then *MCFL*-type corporations would have been able to do independent expenditures (including electioneering communications) as they now do (and would include electioneering communications within the independent expenditures they report to the FEC). Their independent expenditures other than electioneering communications would still have been identified by the presence of explicit words expressly advocating the election or defeat of a clearly identified candidate. So even under such an incorporation approach the concept of express advocacy would have retained some vitality in FECA.

BCRA's sponsors did not incorporate electioneering communications into the definition of expenditure. Rather, electioneering communication was added to FECA as another sort of activity tacked onto the list of things required to be reported, 2 U.S.C. § 434(f), and onto § 441b as another activity prohibited to corporations and unions (along with contributions and expenditures). 2 U.S.C. § 441b.

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[5]This analysis has already been applied by the United States Court of Appeals for the Sixth Circuit in *Anderson v. Spear*, 2004 U.S. App. LEXIS 586 (6th Cir. 2004).

[6]*See* Brief for Defendants at 50, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (Civ. No. 02-582) (quoting 144 Cong. Rec. H3801, H3802 (June 28, 2001)); Opposition Brief for Defendants at I-84, *McConnell*, 251 F. Supp 2d 176 (D.D.C. 2003) (Civ. No. 02-582) ("Congress self-consciously evaluated ways to limit the reach of the law without sacrificing its purpose, so as to leave unregulated as many avenues of speech as possible.")

And the addition of electioneering communications to the list of things that § 441b bans was not a *redefinition* of "contribution or expenditure" as the NPRM alleges, seeking to find some redefinition for these key terms where none exists. 69 Fed. Reg. at 11738. Section § 441b(b)(2) (emphasis added) says that "*for purposes of this section* . . . the term 'contribution or expenditure' *includes* . . . any applicable electioneering communication." So any extra *inclusion* in the "term 'contribution or expenditure'" is limited to that section. The functional "definitions" of the key terms are set out in § 431, i.e., "political committee" (§ 431b(4)), "contribution" (§ 431(8)), and "expenditure" (§ 431(9)), and those definitions do not include electioneering communications (or federal election activities).

As a result, even under BCRA, the express advocacy test is alive and well, both in FECA and the FEC regulations, as that which distinguishes an independent expenditure communication from an electioneering communication and from an issue advocacy communication. Up until sixty days before a general election (thirty before primaries), the express advocacy test separates independent expenditures from issue advocacy. Within the 30/60-day blackout period, the express advocacy test separates electioneering communications from independent expenditures. If any entity that is a "political committee' or a "qualified nonprofit" makes what would otherwise be an electioneering communication, it is not considered an electioneering communication and reportable as such if it is reportable as either an "expenditure" (reportable by PACs) or an "independent expenditure" (which is distinguished by express advocacy and is reportable by both PACs and *MCFL*-type corporations).[7]

Given this ongoing vitality of the express advocacy test, and doubtless gauging what might be required to muster a majority on the Court, the campaign finance "reform" community's legal strategy was not to argue that the express advocacy analysis should be eliminated, but to interpret it as a statutory construction tool designed to avoid vagueness and overbreadth and to provide guidelines into which the electioneering communication restriction nicely fit: "It was, after all, principally a concern for clarity that first led this Court to adopt the 'express advocacy' test as a gloss on FECA's language," they argued to the Supreme Court. *[Redacted] Brief for Intervenor Defendants* at 59 (citing *Buckley*, 424 U.S. at 40-44, 79-80). The Intervenor Defendants (Sen. McCain, Sen. Feingold, Rep. Shays, Rep. Meehan, et al.) asserted that the express advocacy analysis was a "roadmap" with two principle concerns: (1) eliminating vagueness and (2) assuring that restrictions are "'directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.'" *Id.* at 62 (quoting *Buckley*, 424 U.S. at 80). "Those are precisely the precepts to which Congress adhered in framing Title II," the Intervenors proclaimed. *Id.*

The 5-4 Supreme Court majority followed the lead of BCRA's sponsors and evaluated the electioneering communication ban within the *Buckley* framework, agreeing that the definition of electioneering communication was not vague and that it targeted the "functional equivalent" of express advocacy, retaining express advocacy as the benchmark. *McConnell*, 124 S. Ct. at 696. Examining what the Court actually did, and how it went about its analysis, provides guidance for future legislation, regulation, and litigation.

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[7] 11 C.F.R. § 100.29(c)(3) (Electioneering communication excludes communications that "constitute[] an expenditure or independent expenditure provided that the expenditure or independent expenditures is required to be reported under the Act or Commission regulations.").

The Supreme Court's analysis of the electioneering communication ban under the *Buckley/MCFL* rubric also meant that the majority did not embrace Justice Breyer's balancing analysis, which would have rejected reliance on precedent and strict scrutiny, as he set out in a 2002 lecture and article at New York University School of Law. Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U.L. REV. 245, 250-54 (2002). The Stevens-O'Connor joint opinion in *McConnell* (joined by Justices Souter, Ginsburg, and Breyer) did not embrace Breyer's balancing without regard to precedent and his abandonment of traditional strict scrutiny when considering electioneering communications. *McConnell* examined the electioneering communication definition under the Court's precedents, concluding that the definition "raises none of the vagueness concerns that drove our analysis in *Buckley*, 124 S. Ct. at 689; *see also id.* at 688 (distinguishing *Buckley* and *MCFL*), and then declared: "Nor are we persuaded, independent of our precedents that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy." *Id.* at 688-89. In its analysis of the electioneering communication ban, the Court used language indicating a traditional strict scrutiny analysis, finding that Congress had a "compelling" interest, *id.* at 695, and rejecting "plaintiffs' argu[ment] that the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications." *Id.* at 696.

Consequently, *McConnell* requires generally that laws and regulations restricting free association and speech that border on issue advocacy continue to be reviewed for constitutionality under the traditional strict scrutiny standard, i.e., they must be narrowly tailored to a compelling state interest. And within strict scrutiny precedents, *McConnell* requires that statutes bordering on issue advocacy must be analyzed under the *Buckley*, *MCFL*, and now *McConnell* line of precedents so as to employ the express advocacy test or its functional equivalent. This line of precedents requires that restrictions bordering on issue advocacy that place any significant burden[8] on issue advocacy must (a) avoid vagueness by employing the express advocacy test or its functional equivalent and (b) avoid overbreadth by targeting express advocacy or by proving a functional equivalent -- and functional equivalents must be proven by substantial evidence to implement the same justifications underpinning the express advocacy test; and where there are facial determinations the option of as-applied challenges must be left open. *Id.* at 689, 696-97.

In sum, the holding of the Court was an upholding of the electioneering communications ban -- as a non-vague, functional equivalent of the benchmark express advocacy -- against a

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[8]There was broad support on the Court for requiring *disclosure* of electioneering communication expenditures, while support for the electioneering communication ban was narrow. *Cf. id.* at 689-94 (majority) *with id.* at 762-769 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J.). Although there is little explanation of the point by Justices who objected to the ban but not the disclosure, their support doubtless rested on the facts that disclosure is a significantly lighter burden than a ban, that no disclosure is required until $10,000 has been expended, and that only donors of $1,000 or more need to be disclosed (as compared to the $200 level for independent expenditures). *Id.* at 690 (describing provisions of BCRA § 201 codified at 2 U.S.C. § 434(f)). And the Court left open the possibility of as-applied challenges to the donor disclosure requirement for organizations that can demonstrate a "reasonable probability" of "economic reprisals or physical threats as a result of dispelled disclosure." 124 S. Ct. at 692.

claim that facially it was not narrowly tailored to a compelling interest. The other key holding, of course, was that because of the unique characteristics of political parties and candidates they could be limited to using FECA-compliant funds even for federal electioneering activities.

Examining what Congress actually did in BCRA and the two actual *holdings* in *McConnell* reveals no support for the sort of broad rule changes proposed in the NPRM. One proposal is to add the major purpose test onto the FECA trigger definition of "political party" to create a new definition of "political party" and then to use low threshold amounts to decide major purpose (which under the NPRM could actually be a minor purpose). There is no statutory warrant for this. There is no warrant in the *McConnell* holdings. It is simply an overreaching attempt to further limit the liberty and participation in government of the people by slapping PAC shackles on them. This necessitates an examination of the real purpose of the major purpose test and how it remains unchanged.

The Major Purpose Test Remained Unchanged

The major purpose test, which establishes whether a citizen group whose major purpose is issue advocacy but who makes occasional independent expenditures may be treated as a political committee, was established in *Buckley*. In the process of construing the FECA definition of "expenditure" to encompass only express advocacy, the Supreme Court noted that the definition of "political committee" shared a similar fatal vagueness to what it had noted in the definition of "expenditure":

> The general requirement that "*political committees*"and candidates disclose their expenditures could raise *similar vagueness problems*, for "political committee" is defined only in terms of amount of annual "contributions" and "expenditures," [*fn*] and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words "political committee" more narrowly. [*fn*] *To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.* Expenditures of candidates and of "*political committees*" *so construed* can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Buckley, 424 U.S. at 79 (emphasis added).

So for government to treat an organization as a political committee, the organization must be "under the control of a candidate or [have] the major purpose [of] . . . nominati[ng] or electi[ng] . . . candidate[s]." In *MCFL*, the Court cited this passage, 479 U.S. at 252 n.6, and spelled out the two ways an organization could be found to have such a major purpose: (1) on the basis of its organizational purpose or (2) on the preponderance of expenditures for certain activities, as set out below.

In *MCFL*, the Supreme Court considered the case of Massachusetts Citizens for Life (MCFL), a nonstock, nonprofit corporation whose declared mission was "'[t]o foster respect for human life and to defend the right to life of all human beings, born and unborn . . . .'" 479 U.S. at 238 (citation omitted). MCFL published a newsletter on occasion and had published a "Special Edition" before the 1978 primaries. *Id.* at 242-43. It exhorted readers to vote prolife and described which candidates were prolife. *Id.* at 243. Responding to a complaint, the FEC initiated an investigation followed by an enforcement action against MCFL. *Id.* at 244-45.

The Supreme Court found that the costs of producing the special newsletter constituted an "expenditure" as defined by 2 U.S.C. § 431(9)(A)(i) ("for the purpose of influencing"), which was forbidden to corporations by § 441b ("in connection with any election"). *Id.* at 245-48. In response to MCFL's claim that the "in connection with any election" language of § 441b should be construed to apply only to express advocacy, as had been done with similar provisions in *Buckley*, the Court noted that *Buckley* had employed the express advocacy test "in order to avoid problems of overbreadth" (which *MCFL* described as "distinguish[ing] discussion of issues and candidates from more pointed exhortations to vote for particular persons"). *Id.* at 249. The Court construed § 441b to apply only to express advocacy and then decided that the special edition newsletter in fact contained express advocacy (and was not entitled to the press exemption because of its non-routine features). *Id.* at 249-51.

The Court next turned to considering the constitutionality of § 441b's ban on such independent expenditures, developing the major purpose test in response the FEC's assertion that there was no burden on MCFL because the organization could simply make independent expenditures through a PAC. *Id.* at 251-56. The major purpose test as developed in *MCFL* established when an entity that makes independent expenditures may be treated as a PAC, with all the attendant burdens of regulatory compliance.

The major purpose test is distinct from the question of whether an organization is an *MCFL*-type organization, to which question the Court turned after its major purpose analysis, because the *MCFL*-type organization analysis evaluates whether a corporation *may* make independent expenditures. By contrast, the major purpose test decides whether an organization that *does* make independent expenditures may simply report the occasional independent expenditures or must register as a political committee, report all its expenditures, and meet other PAC compliance requirements. *See id.* at 252-54 (detailing the different requirements). An organization may be an *MCFL*-type corporation (so that it may make independent expenditures), but may be exempt from treatment as a PAC under the major purpose test.

But it is worth reminding ourselves at this point that the question of whether an organization may be treated as a PAC would never even arise *unless* the organization had made sufficient contributions or independent expenditures to trigger "political committee" status under the FECA definition. In other words, it could have the express, specific purpose of defeating a candidate and its officials could want that result in the worst way, but until it made $1,000 in independent expenditures (express advocacy) or in contributions to candidates, it could not be a candidate for PAC shackles, no matter what other activity it did (whether it would be "electioneering communications" or "federal election activities").

The Court in *MCFL* began its major purpose analysis with the observation that "[i]ndependent expenditures constitute expression at the core of our electoral process and of the First Amendment freedoms. We must therefore determine whether the prohibition of § 441b burdens political speech, and, if so, whether such a burden is justified by a compelling state interest." *Id.* at 251-52 (quotation marks and citations omitted).

As noted, the FEC had asserted that there was no burden because of the PAC option. The Court first listed MCFL's minimal reporting requirements (resulting from having made independent expenditures) "[i]f it were not incorporated,"*id.* at 252, and concluded that "[a]ll unincorporated organizations whose *major purpose is not campaign advocacy*, but who occasionally make independent expenditures on behalf of candidates, are subject only to these regulations." *Id.* at 252-53 (emphasis added). Then the Court listed all the PAC registration,

recordkeeping, organizational, reporting, and disclosure requirements -- along with the severely limited PAC fundraising options (especially for organizations without "members") -- to which MCFL would be subject if it did independent expenditures as a corporation. *Id.* at 253-54. The Court concluded that it was "evident . . . that MCFL is subject to more extensive requirements and more stringent restrictions than it would be if it were not incorporated. These additional regulations may create a disincentive for such organizations to engage in political speech." *Id.* at 254.

Because "the avenue [§ 441b] leaves open is more burdensome than the one it forecloses," which may have the "practical effect" of "discourag[ing] protected speech," the Court declared § 441b "an infringement on First Amendment activities." *Id.* at 255. In fact, the Court declared the burden "a severely demanding task." *Id.* at 256. Interestingly, the *McConnell* majority (including Justice O'Connor) refused to employ the analysis that the PAC option was too burdensome as applied to electioneering communications (at least facially) even though *MCFL* had held that it was too burdensome with respect to *independent expenditures* (and Justice O'Connor concurred specially in *MCFL* to point out the inadequacy of the PAC option).

The Court then went on to decide whether there was any "compelling state interest" as applied to MCFL and decided that organizations with the characteristics of MCFL posed none of the corruption threats that justified regulating corporations, i.e, it recognized the *MCFL* exception. There have been some interesting decisions with respect to the exception for *MCFL*-type corporations, but that is beyond the scope of these comments. *Id.* at 265-66.

What factors should be examined in determining the major purpose of an organization? In *MCFL* the Court cited *Buckley* for the proposition that the organization that may be treated as a political committee is one that "is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 479 U.S. at 242 n.6 (quoting *Buckley*, 424 U.S. at 79). This is the controlling phrase, as *MCFL* acknowledged by quoting *Buckley*, so when *MCFL* also employs the more amorphous phrase, "organizations whose major purpose is not *campaign advocacy*," *id.* at 252-53 (emphasis added), or speaks of an organization whose "major purpose may be regarded as *campaign activity*," *id.* at 262 (emphasis added), the phrase "campaign advocacy" must be understood as synonymous with the phrase "the nomination or election of a candidate."

In deciding whether an organization's major purpose is nominating or electing candidates, *MCFL* indicated that there are two things to look at. First, the Court required examination of the organization's "central organizational purpose." *Id.* at 252 n.6. Immediately after citing *Buckley* for the nominating or electing candidates formula, *MCFL* said that "[i]t is undisputed on this record that MCFL fits neither of those descriptions. Its *central organizational purpose* is issue advocacy, although it occasionally engages in activities on behalf of political candidates." *Id.* (emphasis added). This was obviously based on the "corporate purpose" the Court recited at the beginning of *MCF* ("[t]o foster respect for human life . . . through educational, political and other forms of activities . . . .") taken from MCFL's article of incorporation. *Id.* at 241-42.

Second, *MCFL* said that "should MCFL's *independent spending become so extensive* that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262. So an organization's major purpose may be established by examining its central organizational purpose, as established in its organic documents, or by examining its spending to see if independent expenditures (or contributions)

had become the organization's major purpose, which would necessarily require comparing independent spending with overall spending to determine whether the former had become the "major" financial purpose of the organization.

In examining an organization's central organizational purpose and expenditures for the purpose of nominating or electing candidates, the two specific activities to examine are contributions and independent expenditures. The FECA and FEC regulations both define a political committee as "any . . . group of persons which receives *contributions* . . . or makes *expenditures* aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4) (emphasis added); 11 C.F.R. § 100.5(a) (emphasis added).

Buckley construed an expenditure (§ 434(e) ("for the purpose of . . . influencing' the nomination or election of candidates for federal office"), *id.* at 75 (citation omitted), "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. And *MCFL* construed the § 441b ban on corporate and union expenditures to reach only express advocacy. 479 U.S. at 249. So in determining whether an organization's major purpose is the nomination or election of a candidate, it is only proper to examine the organization's express advocacy and contribution activity.

In the wake of BCRA and *McConnell*, has anything changed? As noted earlier, BCRA's sponsors chose to tack the electioneering communication onto a disclosure requirement and onto the ban at § 441b, not to include it in the definition of independent expenditure, expenditure, contribution, or political committee. Therefore, nothing has changed with respect to the major purpose test. The lack of statutory change to the functional definitions means that no other activities, such as "electioneering communications" or "federal election activities"[9] may be considered in determining whether an organizations's major purpose is the nomination or election of candidates absent a change in the statute.

But did *McConnell* say anything that would indicate such a dramatic broadening of the major purpose test and the concept of political committee could be constitutionally warranted if a statutory change were made? *McConnell* described electioneering communications as the "functional equivalent" of express advocacy. 124 S. Ct. at 696. Would Congress then be warranted in redefining the terms "contribution," "expenditure," or "political committee" to include electioneering communications? One very good reason for a negative answer is that the full outline of the electioneering communication domain has not been shaped by the inevitable series of as-applied challenges, which the Court necessitated by engaging in a facial overbreadth analysis, *id.* at 696-97, to separate out the things permissibly excluded from the facially-approved ban. Grass roots lobbying is a clear example of activity that should be excluded in an as-applied challenge. Two other serious contenders for as-applied exemptions are legislative score cards (telling voters how legislators voted on issues of vital importance) and voter guides (telling voters the positions of candidates on vital issues). While these latter two are usually not

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[9]"Federal election activity" includes (1) voter registration within 120 days of any federal election, (2) voter identification and get-out-the-vote activity, (3) generic campaign activity (promoting a political party), and (4) issuing any public communications that promote/support or attack/oppose a referenced federal candidate ("whether or not the communication expressly advocates a vote for or against a Federal candidate"). 11 C.F.R. § 100.24.

broadcast, there is no reason they could not be,[10] and if an electioneering communication ban were expanded by Congress or a state to reach print media these two traditionally print media communications would be clearly at issue. And surely there will be an as-applied exception for organizations that have good reasons for not wanting a PAC, such as the ACLU has stated concerning itself. *See McConnell*, 124 S. Ct. at 768. These and other as-applied issues are currently bound up in the electioneering communication ban waiting to be liberated. But until they are, any major purpose test that includes electioneering communications would convert into PACs organizations that simply urge the public to contact their candidate-legislator and advise him or her how to vote on an immediately pending bill. This would be damaging to our American system of participatory democracy and inconsistent with the Supreme Court's instruction that "major purpose" must be based on activities furthering the nomination or election of candidates.

Even further afield would be any notion of including within the major purpose test whether an organization engages in federal election activities. Voter registration bears little resemblance to the express advocacy activities approved to date. And BCRA expressly indicated that nonprofit corporations would be able to engage in "federal election activity" because it referred to them doing just such activity in 2 U.S.C. § 441i(e)(4) (emphasis added), wherein it provided rules governing the solicitation by federal officials of funds for 501(c)s that engage in "federal election activities," including those whose "*principal purpose* is to conduct" voter registration, voter identification, get out the vote, or promoting political parties, all of which was noted in *McConnell. See id.* at 682. Moreover, "federal election activity" was imposed on political *parties* in BCRA, not even on political committees in general, let alone other organizations. *McConnell* decided, in response to an equal protection claim that BCRA "discriminates against political parties in favor of special interest groups such as the National Rifle Association (NRA), American Civil Liberties Union (ACLU), and Sierra Club" with the federal election activity restriction, that political parties differed from those citizen groups and the difference justified the differing treatment. *Id.* at 685-86. And *McConnell* expressly said that "[i]nterest groups . . . remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other that electioneering communications)." *Id.* 676. There is no suggestion in the opinion that such groups would be converted to PACs for doing this federal election activity.[11]

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[10]In a case brought by Hawaii Right to Life against the FEC in the United States District Court for the District of Columbia, plaintiff alleged plans to broadcast radio advertisements comparing the positions of the candidates on pro-life issues. After a preliminary injunction for plaintiff, the FEC agreed to declaratory and permanent injunctive relief for plaintiff on the basis that it was an *MCFL*-type organization despite receipt of de minimis business activities and contributions from business corporations. *See Hawaii Right to Life v. FEC*, No. 02-02313 (D.D.C. Dec. 16, 2002) (Final Order).

[11]As to the notion that an organization can have more than "major" purpose, this is a violation of the common use of the term "major," trying to make it mean "minor." An organization can have two or more minor purposes, but not two or more major purposes. As to the idea that instead of focusing on the nature of the organization itself major purpose can be established by some threshold amount, this has already been rejected by a federal court of appeals. In a recent application of the major purpose test, the Fourth Circuit rejected a test that created a

Finally, it should be noted that 2 U.S.C. § 431 defines a "political committee" as an organization that receives *contributions* (i.e., donations intended to be used to make contributions to candidates or for express advocacy) of $1,000 or more in a calendar year or makes *expenditures* (i.e., express advocacy communications) of $1,000 or more in a calendar year. The trigger amount of $1,000 must be for financial transactions that have been construed, as noted above, to encompass only contributions to candidates or express-advocacy independent expenditures. Because BCRA did not incorporate electioneering communications into the definition of "independent expenditure," "political committee," "contribution," or "expenditure," an organization cannot be treated as a political committee unless it receives contributions for or makes expenditures for express advocacy communications or contributions to candidates. The practical effect of how Congress designed BCRA is that an organization may have the major purpose (i.e., spend the majority of its funds) of making electioneering communications and not be treated as a political committee so long as it makes no candidate contributions or express advocacy communications (or receives contributions for such purposes), or if it does it keeps these "contributions" and "expenditures" under $1,000 annually. The organization would be required to report the electioneering communications under BCRA, but would not be converted to a PAC by such electioneering communication activity.

In sum, the major purpose test limits the imposition of PAC bonds on organizations that have already met the unchanged FECA definition of "political committee." It was never intended, and is not suited, for determining when an organization becomes a political committee. And in determining what should be considered in deciding what is an organization's major purpose, it is already settled law that the activity considered is contributions to candidates (in money or in-kind) and independent expenditures. The NPRM approach is inconsistent with this approach and so is contrary to statutory and case law.

IRS Guidelines Provide No Guidance for FEC Rulemaking

BCRA and *McConnell* also did not revise the standards for organizations known as "political organizations" under § 527 of the Internal Revenue Code or the concept of "exempt function." 26 U.S.C. § 527. While IRC political *organizations* and FECA political *committees*

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rebuttable presumption that an organization was a political committee if it expended three thousand dollars or more on contributions or expenditures, noting that

> the constitutional defect of the major purpose presumption is not so much the use of any presumption, but the fact that instead of basing the major purpose standard on the nature of the entity and its overall activities, the standard is based on an arbitrary level of spending that bears no relation to the idiosyncracies of the entity. This shifts the focus from the entity itself, where it belongs, to the effect expenditures generally have on an election.

North Carolina Right to Life v. Leake, 344 F.3d 418, 430 (4th Cir. 2003), *petition for cert. filed* Dec. 22, 2003. As to elements to examine in determining major purpose, the Fourth Circuit said that "examining an entity's stated purpose . . . and the extent of an entity's activities and funding devoted to pure issue advocacy versus electoral advocacy." *Id.* at 430 (noting that *MCFL* described MCFL's "central organization purpose" as "issue advocacy," *id.* at 430 n.4 (citation and quotation marks omitted)).

might seem to have some similarities, § 527 "exempt function" activity is much broader than the activity that defines FECA political committees. Consequently, IRS regulations provide no guidance for FEC rulemaking.

Section 527 deals with taxation of "political organizations," which are defined as "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1). Section 527 *exempts* "political organizations" from tax on "exempt function" income but *imposes* tax on "exempt functions" done by nonprofit organizations, such as those under IRC § 501(c)(4) (social welfare organizations, the common form for citizens' issue advocacy groups), § 501(c)(5) (labor organizations), and § 501(c)(6)(business leagues).

So the concept of "exempt function" is key to the reach of § 527. Section 527 defines "exempt function" as "the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors . . . ." So as a general rule, political organizations are *urging* the IRS to recognize their activities as "exempt function" activity to avoid taxation on expenditures for the activities at issue.

The § 527 concept of "influencing" is very broad under the IRC, as is the concept of "political intervention," which is prohibited to organizations exempt under § 501(c)(3).[12] For example, IRS Revenue Ruling 2004-6, says that if a § 501(c) organization engages in express advocacy, it clearly has engaged in an exempt activity. But even if it does not engage in express advocacy, it may have engaged in an "exempt function" communication, based on (but not limited to) six factors: (1) candidate identification, (2) proximity to an election, (3) targeting of voters, (4) identifying a candidate's position on the issue topic of the communication, (5) identifying a candidate's position on an issue distinguishing the candidate that was raised in the campaign, and (6) whether the communication was part of a series on the issue. IRS Rev. Rul. 2004-6 at 4. By its terms, this ruling goes beyond express advocacy, and clearly such broad criteria could sweep in issue advertising, grass roots lobbying, legislative scorecards, and voter guides.[13] Because the definition of "influencing" in § 527 has not been narrowed by express advocacy glosses, "exempt function" activity is broader than the activity that would subject an

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[12]In an IRS publication for IRS agents, a section heading dealing with 501(c)(3) organizations asks the question, "Is it feasible for the Service to adopt the FEC 'express advocacy' standard?" The manual's answer is "No, it is not feasible for the Service to adopt the FEC 'express advocacy' standard to determine when participation or intervention in a political campaign on behalf of or in opposition to a candidate for public office has occurred" (and proceeds to give examples of non-express advocacy activity that the IRS would consider to be political intervention). IRS, EXEMPT ORGANIZATIONS: TECHNICAL INSTRUCTION PROGRAM FOR FY 2002 at 346 (nd).

[13]And the revenue ruling declares that "[c]ertain broadcast, cable, or satellite communications that the meet the definition of "electioneering communications" are regulated by [BCRA]. An exempt organization that violates the regulatory requirements of BCRA may well jeopardize its exemption or be subject to other tax consequences." *Id.* at 3.

organization to regulation under FECA, and the concept of "political organization" under § 527 is broader than "political committee" is under FECA. An organization may be a "political organization," because it is organized or functions primarily to engage in "exempt function" activity, but not be a "political committee" because it is not under the control of a candidate and its major purpose is not the nomination or election of candidates for federal office.

The Supreme Court in *McConnell* also recognized that 501(c)s and 527s would continue to be involved in "federal election activity." "Interest groups, however, remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other that electioneering communications)," 124 S. Ct. at 676, indicating that these organizations would operate under rules different from those governing political parties. The Court even rejected an equal protection challenge by political parties that political parties could not do "federal election activities," while other groups were able to do so. *Id.*

Furthermore, § 527 organizations, and certainly 501(c) organizations, do not share the characteristic of political parties that the *McConnell* Court found decisive in upholding the "federal election activities" restrictions on political parties:

> Interest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses. Political parties have influence and power in the legislature that vastly exceeds that of any interest group. As a result, it is hardly surprising that party affiliation is the primary way by which voters identify candidates, or that parties in turn have special access to and relationships with federal officeholders. Congress' efforts at campaign finance regulation may account for these salient differences.

124 S. Ct. at 686.

The test for a political committee is not what an organization says about itself or wants to do but the actual nature of the organization as determined by what it actually does. For example, a § 501(c)(3) nonprofit could have the goal of electing President Bush and yet operate wholly within the law permitting it to be recognized as nonprofit under § 501(c)(3). A citizen watchdog group, under § 501(c)(4), could have the goal of defeating President Bush, do all its electioneering communications under its § 501(c)(4), do its nonpartisan voter registration activity through a connected educational entity (a § 501(c)(3)), and do all its express advocacy activity through a connected PAC. This organization would be wholly in compliance with all laws permitting it to engage this activity and not to be classified, or treated as, a political committee.

In fact, the FEC has already been instructed on the closely related issue of when an organization is a political committee under the major purpose test by a federal court in a way that forecloses the FEC's present argument. In *FEC v. GOPAC*, 917 F. Supp. 851 (D.D.C. 1996), the FEC filed an action against GOPAC, Inc. alleging that it was a political committee and had failed to register and report under FECA. *Id.* at 852. The FEC asserted that in 1989 and 1990, GOPAC was a political committee "because (1) its 'major purpose' [was] electoral activity,' and (2) it made expenditures and received contributions of $1,000 of more for the purpose of influencing federal elections." *Id.* at 853 (citation omitted). The FEC conceded that GOPAC had made no direct contributions to federal candidates in the disputed years, focusing in those years on contributions to state and local candidates, but the FEC focused on GOPAC's stated purpose

"to help the Republican Party 'to become competitive in more congressional districts' and 'to win a majority in the U.S. House of Representatives,' 'with an eye to 1991.'" *Id.* at 853-54 (citations omitted). The court's declared rule clarified that an organization's actual activities must bear out any proclaimed electoral goal before an entity may be declared a political committee: "an organization is a 'political committee' under the Act if it received and/or expended $1,000 or more and had as its major purpose the election of a particular candidate or candidates for federal office." *Id.* at 862.

So under *GOPAC*, it is not enough for an organization to declare a politicalgoal to be treated as a political committee. Rather, the actual expenditures of the organization must reflect that it has the major purpose of the election or nomination of candidates. Consequently, the fact that an organization is a § 527 "political organization" or says it wants to defeat or elect a candidate is not sufficient reason alone to treat it as "political committee" under FECA.

Conclusion

BCRA and *McConnell* did not alter the key definitions that control which organizations may be forced into political committee shackles, so the proposed changes in the NPRM should be rejected. They are beyond the authority of the FEC. The proposed rules would also badly damage the American system of participatory government by silencing citizen groups from engaging in constitutionally protected activity that has been approved by both Congress and the United States Supreme Court.

Finally, while these comments have argued against changing current regulations as proposed in the NPRM with respect to all citizen groups, whether they are § 527s or § 501(c)s, if the FEC decides to adopt such regulations as applicable to § 527s, then the FEC should also include in such regulation a *positive declaration* that the regulations *do not* apply to any § 501(c) organizations and that the new standards adopted for § 527s are not applicable, and will not and cannot be used by the FEC, to judge the political committee status of § 501(c) organizations.