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ISSUE ADVOCACY: IF IT CANNOT BE REGULATED WHEN IT IS LEAST VALUABLE, IT CANNOT BE REGULATED WHEN IT IS MOST VALUABLE

Kirk L. Jowers*

It used to be that the preferred antidote for the “danger[s] flowing from speech” was “more speech, not enforced silence.”¹ This is no longer the case. Campaign finance reformers, as the media loves to call them, are alarmed at the ever-increasing amount of political speech. They loathe the hundreds of advertisements shown across America that praise and criticize public officials and candidates for their positions on issues of public importance but avoid express words of advocacy as established by Buckley v. Valeo² and its progeny. Campaign finance reformers bemoan that the sponsors of these advertisements seek to influence elections, but because these communications do not fall within the “express advocacy” standard, they remain free from federal contribution limits and prohibitions and are not subject to any reporting and disclosure requirements. Regardless of the sponsors’ motives, these advertisements, as political speech, are the most constitutionally protected communications in our democracy. Accordingly, the United States Supreme Court and a wide variety of lower courts have repeatedly decreed that government may only narrowly regulate express advocacy—and not issue advocacy—so that would-be speakers are subject to a clear unambiguous standard.

Unfortunately, campaign finance reformers, and at times the Federal Election Commission (FEC) and state election agencies, remain undeterred by the First Amendment.³ These groups continually seek new le-

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3. The First Amendment to the U.S. Constitution mandates that “Congress shall
gal means to regulate or eradicate political speech. A currently popular innovation—found in several pending federal bills, Vice-President Gore’s campaign finance proposal, and the Committee for Economic Development’s campaign finance recommendations—regulates issue advocacy with bright-line rules that specify time periods in which otherwise protected speech loses its First Amendment protection. These federal bills and their state counterparts are attractive because the bright-line rules clearly specify the time periods in which certain images and language will be regulated. Admittedly, such clarity completely eliminates any vagueness concerns. Whatever gains these regulations achieve, however, are lost because they are overly broad and therefore, encroach unconstitutionally upon free speech rights guaranteed by the First Amendment.

I. THE FRENZY TO REGULATE ISSUE ADVOCACY

Would-be reformers find the stringency of First Amendment protections on political speech almost unbearable. They view “issue ads” (critics generally use quotation marks around “issue advertisements” to connotate that these advertisements are not really about issues, but about influencing elections) as clearly designed efforts to circumvent the federal election laws and influence the outcome of selected races.¹ In fact, the sponsors and beneficiaries of many of these advertisements often confirm reformers’ worst fears by proudly proclaiming that the adver-

make no law... abridging the freedom of speech.” U.S. CONST. amend. I.

4. Fred Wertheimer, President of Democracy 21, a public policy organization, wrote:

Vice President Al Gore and Gov. George W. Bush and their presidential campaigns are living a lie. The lie is this: that the TV ads now being run in presidential battleground states across America are political party “issue ads.” In fact, everyone—and I mean everyone—knows that these ads are presidential campaign ads being run for the unequivocal purpose of directly influencing the presidential election.

... 

As such, the “issue ads” are illegal, because, among other things, they are being financed with tens of millions of dollars of soft-money contributions that the law says cannot be used to influence a federal election.

Fred Wertheimer, Gore, Bush, and the Big Lie, WASH. POST, July 24, 2000, at A23. David L. Hunter, campaign manager for Senator Max Baucus, commented on the National Right to Work Committee’s issue ads that criticized Senator Baucus and more than a half dozen other Senators, and complained that “[t]his is totally about influencing the outcome of the election.” Eliza Newlin Carney, Air Strikes, 28 NAT’L J. 1313, 1315 (1996). FEC General Counsel Lawrence M. Noble commented that: “It is very easy to write these ads and do these commercials without using those magic words, but they are very clearly campaign ads...” Id. at 1315.
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5. Senator Bob Dole, in commenting on a 60-second Republican National Committee issue ad that never mentioned the presidential election but devoted 56 seconds to his biography, quipped that the ad “never says that I’m running for President [but] I hope[d] that [was] fairly obvious, since [I was] the only one in the picture.” Adam Clymer, System Governing Election Spending Found in Shambles, N.Y. TIMES, June 16, 1996, at A1.

The posterchild organization of 527 infamy in the 2000 presidential campaign was “Republicans for Clean Air.” This group, led by George W. Bush supporter Sam Wyly, launched a $2.5 million issue ad campaign against GOP presidential candidate John McCain in the form of criticizing Senator McCain’s environmental record. “Mr. Wyly said that ‘of course’ he hoped the commercials would benefit Mr. Bush . . . .” Richard W. Stevenson with Richard Pérez-Peña, Wealthy Texan Says He Bought Anti-McCain Ads, N.Y. TIMES, Mar. 4, 2000, at A1.


7. Id.

8. Professor David B. Magelby studied the scope and impact of outside issue advocacy efforts in the 2000 presidential primaries. He summarized his research as follows:

The 2000 presidential nomination, with no incumbent running, held the possibility of interested groups and individuals applying the techniques of issue advocacy not only to influence the selection of the nominees, but also to set the agenda for the remainder of the campaign cycle.

The amount of issue advocacy in the 2000 primaries exceeded the amount of independent expenditures in past presidential primaries. It was also focused primarily on the candidates, rather than issues, with 62% either supporting or attacking a presidential candidate.

David B. Magelby, Getting Inside the Outside Campaign 1, 9 (2000).

According to a study conducted by the Annenberg Public Policy Center, “more than two dozen organizations engaged in issue advocacy during the 1995-1996 election cycle, at an estimated total expense of $135 million to $150 million.” Deborah Beck et al., Issue Advocacy Advertising During the 1996 Campaign 3 (1997). A study of the 1999-2000 election cycle by the Annenberg Public Policy Center estimates that more than $342 million has been or will be spent on issue advocacy. See Issue Ads @ APPC (last modified Sept. 20, 2000) <http://appcpenn.org/issueads/estimate.htm>. 
more strictly a broader definition of what constitutes express advocacy, and/or, at a minimum, disclose the sponsoring organizations and funding sources of issue advocacy.9 These “grim efforts” to regulate issue advertisements “will inevitably trench unacceptably far upon current conceptions of freedom of political speech.”10 Examples of such efforts that may trench unacceptably far include the “delimited time period,”11 “blackout period,”12 and “name or likeness”13 approaches.

The Bipartisan Campaign Finance Reform Act of 1999 (“Shays-Meehan”)14 is perhaps the best-known recent example of the express advocacy approach. This federal legislation attempted to regulate as “express advocacy” all communications that:

[R]efer to one or more clearly identified candidates in a paid advertisement that is transmitted through radio or television within 60 calendar days preceding the date of an election of the candidate and that appears in the State in which the election is occurring, except that with respect to a candidate for the office of Vice President or President, the time period is within 60 calendar days preceding the date of the general election.15

Shays-Meehan was never passed into law,16 but its legacy survives in the form of bills pending in Congress and a proposal by the Democratic presidential candidate.

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9. See, e.g., Dollars and Democracy: A Blueprint for Campaign Finance Reform (visited Aug. 20, 2000) <http://www.abcny.org/dollar.html> (“The explosive rise of so-called issue advertising threatens several important values of our campaign finance system.”).


15. Id. at 26. Ironically, Shays-Meehan would make it illegal, for example, for New York University School of Law’s Brennan Center to pay for a television advertisement within a few days of a vote on the legislation if the vote was within 60 days of an election.

II. The Federal Election Campaign Act as Interpreted by Buckley v. Valeo

Congress passed the Federal Election Campaign Act of 1971 (FECA or Act) due to mounting concerns about wealthy challengers and rising campaign costs. The Act set limits on campaign costs and bolstered federal disclosure and reporting requirements. In 1974, Congress passed the FECA amendments in order to stem potential corruption of federal office holders through the financing of their political campaigns after the fundraising abuses by candidates and party committees emerged in the Watergate scandal. The 1974 FECA amendments established the most comprehensive campaign finance regulatory scheme ever enacted. Less than two years later, and before the law took effect, the Supreme Court, in *Buckley v. Valeo*, struck down many of FECA’s provisions as unconstitutional restraints of protected free speech rights. Specifically, the Court struck down the Act’s limits on individual, candidate, and PAC expenditures because they did not serve a government interest strong enough to justify abridging First Amendment rights. In striking down the expenditure limitations, upholding the contribution limitations, and reinterpreting the reporting and disclosure requirements, the Court highlighted a problem that would vex proponents of campaign finance reform for decades after *Buckley*: the interplay between the overbreadth and vagueness doctrines. Courts employ both doctrines as tools of constitutional analysis to assess the specificity of statutes. Thus, in order for a campaign finance reform measure to survive vagueness and overbreadth challenges, it must provide a clear, bright-line standard. The measure cannot be drawn so broadly that it encompasses nonelectoral political issue advocacy.

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18. See *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). The Court also upheld a significant portion of the law. Thus, it held that FECA’s contribution limits to candidates, political action committees (PACs), and political parties could remain intact because they served a “weighty” government interest of preventing corruption and the appearance of corruption. *Id.* at 25-29, 58. In addition, the Court reinterpreted the Act’s reporting and disclosure requirements so that they too could serve the same government interest. *See id.* at 74-84.
19. *See id.* at 45, 51, 55, 58.
21. *See id.* at 24-35.
22. *See id.* at 60-84.
23. *See id.* at 61, 76-79, 82.
III. THE JUDICIAL HISTORY OF POLITICAL SPEECH AND PROXIMITY REGULATION

The Supreme Court has historically treated regulations of political speech, especially those that limit speech during a political campaign, with extreme skepticism. The Court, in *Eu v. San Francisco County Democratic Central Committee*, documented the myriad of court decisions expressing this skepticism when it addressed a state’s prohibition on primary endorsements by political parties:


Likewise, *Buckley* reminded us that the discussion of public issues and debate on candidate qualifications is integral to the operation of government as established by the Constitution. The *Buckley* Court noted that “[t]he First Amendment affords the broadest protection to such political expression in order ‘to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'”

More specifically, the Court proclaimed that all regulations impinging political expression burden “core First Amendment rights of political ex-

25. Id. at 222-23.
pression.\textsuperscript{27} Any restriction of such core speech must, therefore, satisfy the highly demanding standard applicable to statutes that transgress fundamental Constitutional values of strict judicial scrutiny. To withstand strict scrutiny, a law must be narrowly tailored to achieve a compelling governmental interest. Despite this rigorous standard, \textit{Buckley} permitted regulation of campaign-related communications and expenditures involving express advocacy, but granted independent issue advocacy full freedom from government regulation.\textsuperscript{28} Furthermore, \textit{Mills v. Alabama},\textsuperscript{29} and cases applying \textit{Mills}, placed an even heavier legal burden on those seeking to regulate political speech at the last minute.\textsuperscript{30} Analyzed together, \textit{Buckley} and \textit{Mills} provide two complimentary bases upon which proposals that seek to limit issue advocacy near elections should be found unconstitutional.

\textbf{A. Buckley v. Valeo: The Creation of the “Express” Versus “Issue” Advocacy Distinction}

The \textit{Buckley} opinion essentially established a three-tiered structure for regulating campaign expenditures: coordinated expenditures and contributions (limits and prohibitions); independent expenditures (disclosure and reporting requirements); and independent issue advocacy (no regulation). \textit{Buckley} set a bright-line that limits government regulation of political speech to “express advocacy” of “the election or defeat of a clearly identified candidate for federal office.”\textsuperscript{31} The Court cautioned that a strict approach was necessary because “the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.”\textsuperscript{32}

The \textit{Buckley} Court then explained “express advocacy” in two different contexts. First, in striking down FECA’s $1,000 independent expenditure limit, the Court stated that because the discussion of political issues is so closely linked to the discussion of political candidates, the Act’s expenditure limits that relate to clearly identified candidates are constitutionally vague.\textsuperscript{33} The Court feared that the expenditure limits would be

\begin{footnotesize}
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\item \textsuperscript{27} \textit{Id.} at 44-45.
\item \textsuperscript{28} \textit{Id.} at 22-23.
\item \textsuperscript{29} 384 U.S. 214 (1966).
\item \textsuperscript{30} \textit{See id.} at 220 (criticizing the Alabama law because it allows people to “hurl their campaign charges up to the last minute of the day before the election” and prohibits an “adequate reply to these charges”).
\item \textsuperscript{31} \textit{Buckley}, 424 U.S. at 44.
\item \textsuperscript{32} \textit{Id.} at 42.
\item \textsuperscript{33} \textit{See id.} at 39-43.
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applied to constrain constitutionally protected political issue discussions. The Court continued by saying that in order to redress the expenditure limitation's vagueness difficulties, the Act "must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."

Second, the Buckley Court discussed "express advocacy" with respect to FECA's reporting and disclosure provisions. The Court found a vagueness problem with these reporting and disclosure requirements because they could unconstitutionally chill issue discussion when applied to every person who made a contribution or expenditure for the purpose of influencing a federal election. The Court remedied this problem by referring to its discussion of the $1,000 independent expenditure limitation and limited FECA's reporting and disclosure requirements to communications "that expressly advocate the election or defeat of a clearly identified candidate."

The Court reaffirmed the vitality of the "express advocacy" requirement in FEC v. Massachusetts Citizens For Life, Inc. In Massachusetts Citizens For Life, the Supreme Court declared that Buckley "adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." The Court then held that the statute at issue could only be found constitutional if its reach was limited to "express advocacy."

In attempting to protect the rights of citizens to speak out on issues and apply the express advocacy test established in Buckley—as further clarified in Massachusetts Citizens For Life—all but one federal circuit court has strictly and literally interpreted the "express advocacy" standard to require the use of specific "magic words," such as "vote for" or

34. See id. at 41-42 (noting that the Court of Appeals erred when thinking that the statute's construction completely eliminated vagueness).
35. Id. at 44.
36. See id. at 75-83.
37. See id. at 76-82 (discussing and recognizing the statute's "serious problems of vagueness").
38. Id. at 80.
40. Id. at 249.
41. Id. at 251; cf. West Virginians for Life v. Smith, 960 F. Supp. 1036, 1039 (S.D. W. Va. 1996) ("It is clear from the holdings in Buckley and its progeny that the Supreme Court has made a definite distinction between express advocacy, which generally can be regulated, and issue advocacy, which generally cannot be regulated.").
"elect," as a mandatory prerequisite to finding "express advocacy." Likewise, courts that have addressed state laws regulating issue advocacy have also resisted a more encompassing approach. This bright-line approach "may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues." In short, the "express advocacy" standard is the constitutional minimum, and courts have consistently struck down or reinterpreted regulations of political speech that overreach this standard.

42. Id. at 249 (citing Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976) (per curiam)); see, e.g., FEC v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997); Faucher v. FEC, 928 F.2d 468 (1st Cir. 1991); Maine Right to Life Comm., Inc. v. FEC, 914 F. Supp. 8, 12 (D. Me. 1996); see also, e.g., FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 52-53 (2d Cir. 1980) (stating that section 441d of the FECA "clearly establish[es] that, contrary to the position of the FEC, the words 'expressly advocating' mean[] exactly what they say"); Right to Life of Dutchess County, Inc. v. FEC, 6 F. Supp. 2d 248, 250 (S.D.N.Y. 1998) (citing with approval the approach of the First and Fourth Circuits in ruling that the FEC's definition of "express advocacy" was impermissible). But see FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987). The Ninth Circuit, in the only appellate court decision that has permitted some reference to outside circumstances in evaluating whether words constitute express advocacy, required a finding that the only reasonable interpretation of the message is that the reader or listener should vote for or against a particular candidate. See id. at 864.

43. See, e.g., North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705, 713, 718 (4th Cir. 1999) (finding a statute unconstitutionally vague and overbroad because it encompassed entities engaging in issue advocacy and did not limit its coverage to entities engaging in express advocacy); Kansans for Life, Inc. v. Gaede, 38 F. Supp. 2d 928, 936-37 (D. Kan. 1999) (finding that the Kansas Governmental Ethics Commission's definition of "express advocacy" was unconstitutionally vague, as it reads, "a communication which, when viewed as a whole, leads an ordinary person to believe that he or she is being urged to vote for or against a particular candidate for office"); see also, e.g., Right to Life of Michigan, Inc. v. Miller, 23 F. Supp. 2d 766, 771 (W.D. Mich. 1998); Planned Parenthood Affiliates of Michigan, Inc. v. Miller, 21 F. Supp. 2d 740, 741, 746 (E.D. Mich. 1998) (finding a state rule "prohibit[ing] the use of a candidate's name or likeness in a communications made by a corporation forty-five days prior to an election as "overbroad and [likely to] chill the exercise of constitutionally protected 'issue advocacy'"); Vermont Right to Life Comm., Inc. v. Sorrell, 19 F. Supp. 2d 204, 214 (D. Vt. 1998) (narrowly construing the term "political advertisements," as used in statutes, to mean express advocacy communications because "[i]f the Vermont legislature intended to regulate communications that impliedly advocate for or against a candidate, it has flouted the United States Supreme Court's holdings in Buckley and Massachusetts Citizens For Life"); Virginia Soc'y for Human Life, Inc. v. Caldwell, 500 S.E.2d 814, 817 (Va. 1998) (narrowing "the broad sweep of the phrase for the purpose of influencing . . . so as to have no application to individuals or groups that engage solely in issue advocacy").

44. Maine Right to Life, 914 F. Supp. at 12.
B. Mills v. Alabama: *Thou Shalt Not Regulate Otherwise Protected Speech Simply Because the Regulation Is Limited to Times when the Speech Is Most Valuable*

*Mill* and its progeny stand for the constitutional precariousness of regulating political speech when it is most valuable: in proximity to Election Day.\(^4\) The Supreme Court in *Mill* addressed the constitutionality of an Alabama statute that made it a crime to:

[D]o any electioneering or to solicit any votes or to promise to cast any votes for or against the election or nomination of any candidate, or in support of or in opposition to any proposition that is being voted on the day on which the election affecting such candidates or propositions is being held.\(^5\)

A newspaper editor who was prosecuted for violating the statute appealed the case to the United States Supreme Court.\(^6\) The Court weighed a narrow issue: whether a state can constitutionally prosecute a newspaper editor who published an election day editorial urging people to vote a particular way on a proposition.\(^7\) The Court began by asserting that a fundamental purpose of the First Amendment included protecting the free discussion of government affairs.\(^8\) The Court concluded that the Alabama statute “silences the press at a time when it can be most effective” and that “no test of reasonableness can save [the] law from invalidation as a violation of the First Amendment.”\(^9\)

Although this decision was confined to only newspaper editorials in non-candidate elections, lower courts have extended this ruling to create more comprehensive election day restrictions on electioneering.\(^10\) The Supreme Court of Florida further extended *Mill* when it struck down a town ordinance that prohibited the publication or circulation of material attacking political candidates within seven days of an election.\(^11\) In so


\(^{46}\) Id. at 216 n.2.

\(^{47}\) See *Mill*, 384 U.S. at 215-17.

\(^{48}\) See id. at 215.

\(^{49}\) See id. at 218-19 (discussing the universal agreement on the major purpose of the First Amendment).

\(^{50}\) Id. at 219-20.


\(^{52}\) See Town of Lantana v. Pelczynski, 303 So. 2d 326, 327-28 (Fla. 1974). The town of Lantana, Florida passed an ordinance, which provided:

It shall be unlawful for any candidate or other person, during seven (7) days preceding the day of any election, to publish or circulate or cause to be published or
doing, the court addressed overbreadth difficulties and stated that the ordinance outlawed "not only false statements but true statements as well, those that would be helpful and fair, as well as any which might be harmful and prejudicial."  \(^{33}\)

In *Buckley v. Valeo*, the Supreme Court also relied upon *Mills*. While invalidating FECA’s $1,000 limit on independent expenditures, the Court found that "the prohibition of election-day editorials invalidated in *Mills* is clearly a lesser intrusion on constitutional freedom than a $1,000 limitation on the amount of money any person or association can spend *during an entire election year* in advocating the election or defeat of a candidate for public office."  \(^{54}\) This greater-includes-the-lesser argument ostensibly established the one day prohibition in *Mills* as a baseline of unconstitutional regulation, which fell below FECA’s year-long limitation. In emphasizing that the FECA provision would limit independent spending over the course of an entire election year, the Court indicated its aversion to regulations that encroach upon free speech rights upon the onset of election day.  \(^{55}\) By referencing *Mills*, the Court confirms the *Mills* rationale: silencing political debate at its most important time, in proximity to election day, as an unconstitutional violation of the First Amendment.  \(^{56}\)

IV. THE FATE OF BILLS LIMITING POLITICAL SPEECH BASED ON THE SPEECH’S PROXIMITY TO AN ELECTION

"Never does the Constitution of the United States loom over the regulatory projects of the [legislative and executive branches] more con-

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53. *Id.* at 328.
55. *See id.* at 50-51.
56. *See id.*
spiciously than when they seek to regulate activity protected by the First Amendment. In 1798, James Madison explained the necessity of the Constitution's looming presence over political speech in his report condemning the Sedition Act to the General Assembly of Virginia:

Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.

In *Buckley*, the Supreme Court recognized the connection between discussion of campaigns and issues when it concluded that "[n]ot only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." Unsurprisingly, most citizens begin to focus on and become engaged in political debate once election day approaches. Communications from various individuals and groups at election time are essential to candidates, and especially incumbents, accountable to the public. One disadvantage that incumbents face includes answering for one's legislative voting history. Thus, if issue advocacy was allowed to be regulated under the guise of election proximity provisions, the electoral playing field would tilt even more in favor of incumbents. For all of these reasons, political speech should receive the greatest protection during the period just prior to an election.

The county, state, and federal statutes described below fail to appreciate the fundamental role that political speech plays in our democracy. These reform statutes magically seek to convert issue advocacy to express advocacy by looking at the speech's proximity to election day rather than the content of the speech. In doing so, these statutes convey the message that issue speech should occur only when the state deems it appropriate or when it is least likely to be persuasive. James Madison

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59. *Buckley*, 424 U.S. at 42.
61. In a metaphor employed in *Buckley*, "[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as
strongly believed that the health of our constitutional democracy depends upon an informed citizenry. Individuals and associations have every right to communicate their messages when they deem it appropriate and especially when the public may be listening.\(^{62}\)

\textbf{A. State and County Proximity Regulations}

Several states have attempted to regulate campaign advertisements by prohibiting communications involving the identification of candidates within a specified time period before a general or primary election.\(^{63}\) Without exception, the courts found these laws to be unconstitutionally overbroad because they inhibit issue advocacy and chill political speech.\(^{64}\) Should Shays-Meehan or any of the host of other federal bills with similar provisions ever be enacted into law, they would almost certainly experience a similar fate.

\textit{1. Michigan}

In \textit{Planned Parenthood Affiliates of Michigan, Inc. v. Miller},\(^{65}\) a not-for-profit corporation challenged the constitutionality of rule 169.39b(1) of the Michigan Administrative Code, which provided:

Except as otherwise provided in this rule, an expenditure [by a corporation or union] for a communication that uses the name or likeness of 1 or more specific candidates is subject to the prohibition on contributions and expenditures in section 54 of the Act, if the communication is broadcast or distributed within 45 calendar days before the date of an election in which the

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\(^{62}\) \textit{Cf.} FEC \textit{v. Central Long Island Tax Reform Immediately Comm.}, 616 F.2d 45, 53 (2d Cir. 1980) ("[T]he right to speak out at election time is one of the most zealously protected [rights] under the Constitution.").

\(^{63}\) See, \textit{e.g.}, VT. STAT. ANN. tit. 17, § 2883 (1998); W. VA. CODE § 3-8-5(c), (f) (1999); MICH. ADMIN. CODE r. 169.39b (1998).


candidate's name is eligible to appear on the ballot.66 The corporation sued for injunctive relief, claiming that the rule, on its face, violated the First Amendment. The State responded that it had a compelling government interest in ensuring fairness in its electoral process. In addition, the State argued that the regulation was not overly burdensome because the corporation could still finance similar advertisements from separate segregated funds.67

The United States District Court for the Eastern District of Michigan enjoined the State from enforcing the rule, declaring it unconstitutionally overbroad68 because it went beyond regulating express advocacy and “prohibit[ed] corporate expenditures for a wide range of issue advocacy communications and chill[ed] constitutionally protected speech.”69 Relying upon the distinctions between “issue advocacy” and “express advocacy” set forth in Buckley and FEC v. Massachusetts Citizens For Life, Inc., the court concluded that “the same requirements imposed upon an organization engaging in issue advocacy were imposed on an organization engaging in express advocacy”70 and, thus, impermissibly infringed upon constitutionally protected speech.

Accordingly, the court found the defendant’s reliance on permitting separate segregated funds to communicate during the time leading up to the election unavailing: “While that is not an absolute restriction on speech it is a substantial one, because to speak through a segregated fund [the Plaintiff] must make very significant efforts to raise monies for each and every specific issue it desires to address to the public.”71

At approximately the same time, the United States District Court for the Western District of Michigan struck down the same rule in Right to Life of Michigan, Inc. v. Miller.72 The court determined that limitations on expenditures are valid only if they “in express terms advocate the election or defeat of a clearly identified candidate for federal office.”73 In reaching this conclusion, the court stated that “Rule 169.39b applies to all references to candidates, whether or not the reference can be con-

66. Id. at 741 (quoting MICH. ADMIN. CODE r. 169.39b (1998)).
68. See id. at 746.
69. Id. at 743.
70. Id. (citing West Virginians for Life v. Smith, 960 F. Supp. 1036, 1039 (S.D. W. Va 1996)).
71. Id. at 745.
73. Id. at 767 (quoting Buckley v. Valeo, 424 U.S. 1, 44 (1976) (per curiam)).
strued as an exhortation to vote for or against the candidate."\textsuperscript{74} The court also noted several types of communications prohibited under the rule that would otherwise be allowable, such as “articles that mention the sponsors [of legislation], authors and supporters of specific pending bills, identification of those who testified at hearings, and interviews with candidates.”\textsuperscript{75} For these reasons, the court declared the rule to be unconstitutional.

2. Vermont

Vermont, like Michigan, attempted to regulate campaign advertisements that ran shortly before election dates. Section 2883 of Title 17 of the Vermont Statutes Annotated required a person who makes expenditures in excess of $500 for mass media activities within thirty days of an election to report these expenditures to the secretary of state and to the candidate whose name or likeness appears in the advertisement.\textsuperscript{76} In \textit{Vermont Right to Life Comm., Inc. v. Sorrell,}\textsuperscript{77} the United States Court of Appeals for the Second Circuit declared this statute to be unconstitutionally overbroad.\textsuperscript{78} The Second Circuit illustrated the unconstitutionality of the statute by listing examples of the types of advertisements that would be covered under the law. “Under the plain terms of § 2883, for example, VRLC would be required to report expenditures exceeding $500 on an advertisement about a law or proposal popularly known by the name of a legislator who happened to be seeking re-election.”\textsuperscript{79} In addition, “expenditures on advertisements urging people to contact a candidate, or publicizing a news item containing the candidate’s name, would have to be reported under § 2883 even if the advertisement does not expressly advocate the election or defeat of the candidate.”\textsuperscript{80} The court found the law unconstitutional and enjoined the State from enforcing it.\textsuperscript{81}

\textsuperscript{74} Id. at 768.
\textsuperscript{75} Id. at 769.
\textsuperscript{76} See VT. STAT. ANN. tit. 17, § 2883 (1998).
\textsuperscript{78} See id. at 278-79.
\textsuperscript{79} Id. at 278.
\textsuperscript{80} Id.
\textsuperscript{81} See id. at 281.
3. West Virginia

In *West Virginians for Life, Inc. v. Smith,* the United States District Court for the Southern District of West Virginia considered the constitutionality of West Virginia Code section 3-8-5(e)(1), which provided that the publication, distribution, or dissemination of any scorecard, voter guide, or other written analysis of a candidate’s position or votes on specific issues within sixty days of an election would be considered “activity for the purpose of advocating or opposing the nomination, election or defeat of any candidate.” Section 3-8-5(f) of the West Virginia Code required those who publish, distribute, or disseminate the materials regulated in section 3-8-5(e)(1) to include the name of the party responsible for it, otherwise such materials would be prohibited. The court ruled that both provisions were unconstitutionally overbroad and permanently enjoined the State from enforcing them. The court found that these provisions “impose the same requirements on an organization engaging in issue advocacy as it does on an organization engaging in express advocacy,” and unconstitutionally “presume that voter guides constitute express advocacy if they are distributed within sixty days of an election[].”

B. The Unconstitutionality of Federal Proximity Regulations

Among the bills before the Senate Rules and Administration Committee during the 106th Congress were several that sought to limit political speech near an election. As provided above, the most prominent is the Shays-Meehan bill. Under this bill, paid advertisements that “refer” to a clearly identified candidate and that run within sixty days before an election constitute express advocacy. Thus, just as the rule at issue in *Planned Parenthood Affiliates of Michigan, Inc. v. Miller* and *Right to Life of Michigan Inc. v. Miller,* Shays-Meehan appears to be unconstitutionally overbroad because it regulates advertising at certain times merely for using the name or likeness of a candidate. Further, under *West Virginians for Life Inc. v. Smith,* this provision would be unconstitutional because it presumes that referring to a clearly identified candidate constitutes “express advocacy.”

84. See id. § 3-8-5(f).
85. See West Virginians for Life, 960 F. Supp. at 1042.
86. Id. at 1039.
87. Id. at 1040.
Even without reference to the state court decisions, Supreme Court precedent would not uphold Shays-Meehan. First, *Buckley v. Valeo*’s greater-includes-the-less framework may also be employed to strike it down as unconstitutionally overbroad. Shays-Meehan defines “express advocacy” as speech that refers to a clearly identified candidate within sixty days of an election.88 The most compelling instance of this overbroad definition is that it completely prohibits corporations and labor organizations from engaging in these types of otherwise protected communications.89 This flaw was particularly egregious when the Supreme Court explicitly upheld the rights of corporations and labor unions to conduct unlimited issue advertisements.90 Moreover, a sixty-day ban on the discussion of candidates is a more flagrant infringement on First Amendment rights than the one-day ban invalidated in *Mills*. Finally, the most overarching problem is that Shays-Meehan makes no attempt to draw distinctions between express and issue advocacy. As we have seen in cases like *Buckley*, *FEC v. Massachusetts Citizen For Life, Inc.*, and *Planned Parenthood*, regulations of political speech that fail to draw such distinctions have been deemed unconstitutional.

Perhaps more problematic than the Shays-Meehan bill is the Advancing Truth and Accountability in Campaign Communications Act (Snowe-Jeffords), which regulates “electioneering communication” and defines that term as:

[A]ny broadcast from a television or radio broadcast station which-

“(i) refers to a clearly identified candidate for Federal office;
“(ii) is made (or scheduled to be made) within-
“(I) 60 days before a general, special, or runoff election for such Federal office; or
“(II) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for such Federal office; and
“(iii) is broadcast from a television or radio broadcast station whose audience includes the electorate for such election, con-

90. See generally id. at 248-49; see also generally First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765 (1977) (striking down a Massachusetts statute that prohibited corporate expenditures addressing referenda issues because it violated the First Amendment).
This regulation is even more encompassing than the Shays-Meehan bill because it applies to all communications—not just "paid advertisements"—that refer to a clearly identified candidate within sixty days of a general election. Likewise, a bill introduced by Senators Feinstein and Torricelli on March 22, 2000 (Feinstein-Torricelli), uses the same language as the Snowe-Jeffords bill. Under the standards set forth in the above-referenced cases, both bills would be at least as likely as the Shays-Meehan bill to be found unconstitutional by the courts.

Finally, another bill currently before the Senate Rules and Administration Committee takes a slightly different, though equally flawed, approach to regulating issue advocacy. The Clean Money, Clean Elections Act (Wellstone-Kerry) defines the term "issue advertisement" as:

[A] communication through a broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising-
(A) the purchase of which is not an independent expenditure or a contribution;
(B) that contains the name or likeness of a Senate candidate;
(C) that is communicated during an election year; and
(D) that recommends a position on a political issue.

Creators of issue advertisements must file a report with the FEC within forty-eight hours after disbursing the advertisement: (1) specifying the amount of the disbursement; (2) identifying information for each person contributing more than $5,000 to the person making the disbursement; (3) identifying the name and address of the person making the disbursement; and (4) identifying the purpose of the issue advertisement. This

93. The Committee for Economic Development's campaign finance recommendations, as described in this issue, also contains a proposal to reform issue advocacy by defining express advocacy to "include communications that (1) refer to a clearly identified federal candidate, or feature the image or likeness of a clearly identified candidate; (2) occur within 30 days of a primary election and are targeted at the state in which the primary is occurring, or within 60 days of a general election; and (3) would be understood by a reasonable person to be encouraging others to support or oppose that candidate." Charles E.M. Kolb & Christopher Dreiblebis, Campaign Finance Reform: A Business Perspective, 50 CATH. U. L. REV. 87, 102-03 (2000). Kolb and Dreiblebis acknowledge that this reform would be "vigorously contested in the federal courts." Id. I agree and contend that, based on the authorities described in this article, this reform would not withstand First Amendment scrutiny.
94. S. 982, 106th Cong. § 303(b) (1999).
bill attempts to be less intrusive than the other bills, but blocks out the entire election year for its coverage of otherwise protected speech. Regardless of the nuances, it is also likely to be found unconstitutional because it seeks to redefine issue advocacy in order to regulate it.

In sum, the federal legislation pending in the Senate, which contains election proximity provisions, may be unconstitutional. Such legislation violates the constitutional requirement that regulations of political speech are limited to communications expressly advocating the election or the defeat of a clearly identified candidate.\textsuperscript{95}

\textbf{C. Arguments for the Constitutionality of Regulating Issue Ads Based on Proximity to an Election}

One proponent of campaign finance reform, Glenn J. Moramarco, has suggested two means whereby regulating based on proximity to election day may pass constitutional muster. First, he claims that the Supreme Court’s overbreadth analysis should be governed by the more rigorous “substantial overbreadth” standard.\textsuperscript{96} Second, Moramarco maintains that creating a rebuttable presumption may save the constitutionality of such a regulation, not enacting a hard and fast rule.\textsuperscript{97}

Moramarco’s first claim fails because substantial overbreadth, as described in the Supreme Court’s decision in \textit{Broadrick v. Oklahoma},\textsuperscript{98} is not appropriate for review of regulating political speech by proximity to Election Day. The \textit{Broadrick} Court stated that overbreadth scrutiny has been somewhat less rigid in the context of the First Amendment; however, the application of substantial overbreadth hinges upon whether the speech is more akin to conduct, as opposed to “pure speech,” and whether the extent of the suppression of the speech can be predicted.\textsuperscript{99} Both of these criteria are lacking when legislators attempt to regulate by proximity to election day.

First, \textit{Buckley v. Valeo} teaches that regulations limiting expenditures

\textsuperscript{95} Vice President Gore’s current proposal is extremely broad. He “supports measures to require that all issue advertisements by special interest groups broadcast within 60 days of an election disclose their sources of funding.” Gore Lieberman 2000, \textit{Al Gore’s Plan to Restore Faith in America’s Democracy} (last modified Oct. 1, 2000) <http://www.algore.com/agenda/agenda_cfr.html>.


\textsuperscript{97} \textit{See id.} at 125-26 & n.106.

\textsuperscript{98} 413 U.S. 601, 610-18 (1973) (discussing the overbreadth doctrine).

\textsuperscript{99} \textit{Id.} at 614-15.
for political advocacy are not restrictions of expressive conduct, such as those upheld in United States v. O'Brien, but are direct restraints on verbal communication. Therefore, the Shays-Meehan bill and its state counterparts that directly limit expenditures for political discussion should not be assessed for substantial overbreadth because they also regulate beyond expressive conduct and extend into the pure speech domain. Second, the nature of regulating political speech by proximity to election day makes the suppression of speech very predictable. The anti-vagueness quality of regulating expenditures for political advocacy by reference to a specific timeframe provides the perfect indicator of the kind of speech to be constrained and exactly when it will be circumscribed.

Buckley also renders Moramarco's suggestion of a rebuttable presumption unconstitutional. The Association of the Bar of the City of New York (ABCNY) has adopted this suggestion to justify its recommendation that any communication, including the name or likeness of a clearly identified candidate expressed within thirty days of an election, be presumed to be express advocacy. The ABCNY acknowledges that a "temporal test would be overinclusive," but nevertheless believes that a rebuttable presumption would solve the constitutional problems:

To deal with the danger of overinclusiveness, Congress should provide that the presumption that a communication that mentions the name or includes the picture of a clearly identified candidate within the pre-election period is election-related may be rebutted on a showing by the speaker that based on the con-

100. See generally Buckley v. Valeo, 424 U.S. 1, 15-20 (1976) (per curiam). The Buckley Court stated that it could not agree with the holding in United States v. O'Brien, 391 U.S. 367 (1968). The defendant in O'Brien was prosecuted for burning his draft card; however, he claimed that the First Amendment prohibited his prosecution. O'Brien, 391 U.S. at 376. The Court, however, sustained the conviction due to the governmental interest in the nonspeech element. See id. at 376-77. The Buckley Court could not "share the view that the present Act's contribution and expenditure limitations are comparable to the restrictions on conduct upheld in O'Brien." Buckley, 424 U.S. at 16.


tent and context of the speech, viewers, listeners, or readers are unlikely to treat it as an election-related communication. The opportunity to rebut the definition of express advocacy would raise some question of vagueness or uncertainty, but whatever uncertainty results would be due to the law’s desire to give some extra opportunity to exempt true issue advocacy from regulation.\textsuperscript{103}

The rebuttable presumption is not only constitutionally unsound, because it would inevitably chill protected speech, but also because it would be a practical nightmare for those brave souls who dare speak in the vaguely-defined land of presumed guilt.

The \textit{Buckley} and \textit{Massachusetts Citizens For Life} opinions, as well as interpretive opinions of lower courts, have mandated that any existing presumption must favor free discussion of political issues. Because the discussion of issues and political candidates are often conflated, the Supreme Court held that limitations on expenditures can only be maintained if they entail express advocacy.\textsuperscript{104} The district court in \textit{Maine Right to Life Committee v. FEC} understood this principle perfectly: “What the Supreme Court did was draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues.”\textsuperscript{105} Creating a presumption to the contrary unconstitutionally chills speech and, therefore, directly opposes the dictates of the Supreme Court.

Assuming \textit{arguendo} that such a standard could withstand constitutional scrutiny, there is no way to develop a clear and workable standard because the “distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.”\textsuperscript{106} The Supreme Court realizes that most advertisements contain mixed motives. For example, Right to Life groups presumably run ads decrying abortion and thanking candidates for their pro-life stances because groups want to end the practice of abortion by electing pro-life candidates.\textsuperscript{107} Would the presumption be rebutted by these

\begin{footnotes}
103. \textit{Id.}
\end{footnotes}
groups showing that their commitment to fetal life is the predominating motive of their ads? If so, the courts must include in the legislation some sort of qualifying language such as "primarily" or "predominantly" "election-related communications." But what kind of proof would be required to prove that the communication was not primarily an election-related communication? Are there any issues or legislation that are completely unrelated to elections? Finally, even the true issue advocates would find little solace in rebutting the presumption after expending substantial time and money to vindicate themselves from FEC enforcement actions and court cases.

V. CONCLUSION

"Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues." Accordingly, although the political debates that arise during campaign season may center around candidates, they inevitably focus on the candidates' records on political issues and the efficacy of the issues. Therefore, issue advertisements play a vital role in increasing accountability, debate, and public awareness. By limiting the province of government regulation to "express advocacy" and by explaining the dangers of speech restrictions in the time leading up to election day, the Supreme Court has successfully: (1) recognized the fundamental principles of our democracy; (2) established the critical balance, which any campaign finance reform measure must comply, by securing the integrity of the electoral process while still protecting political speech; and (3) preordained the fate of issue advocacy proximity regulations. Accordingly, statutes like Shays-Meehan that seek to limit political speech as election day approaches, are constitutionally unsound, and would likely be struck down. Rather than lament the assured proliferation of political speech, however, we should cheer the triumph of the First Amendment.

108. See, e.g., Massachusetts Citizens For Life, 479 U.S. at 249 (superimposing the "express advocacy" definition onto the corporate and labor organization expenditure prohibitions of 2 U.S.C. § 441b).
109. See id. at 248-49.