Beyond "Magic Words": Using Self-Disclosure to Regulate Electioneering

Glenn J. Moramarco

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A few days prior to Election Day in your district, you are watching television, and you see the following advertisement:

United States Senator Joe Smith is standing in the way of reform. Voting against curbs on frivolous lawsuits that cost the State jobs. What's worse, Smith's made a career of putting the rights of criminals ahead of the rights of victims: Voting to deny employers the right to keep convicted felons out of the workplace. That's wrong. That's liberal. But that's Joe Smith. Call Joe Smith. Tell him honest working people have rights, too.¹

Curiously, the advertisement does not identify its sponsor. If you try to contact the Federal Election Commission, which requires reporting of expenditures by individuals or groups seeking to influence the outcome of a federal election, you will be unable to discover any information about this ad. Why is that? Because the sponsors of the commercial you have just read claim that this is not a campaign ad.

Under federal law, as it has been interpreted by several courts, a commercial is not considered a regulable political advertisement unless it uses explicit words of advocacy, such as "vote for," "vote against," "elect," or "defeat." Because the commercial urges voters to "Call Joe Smith," rather than "Vote against Joe Smith," it is considered a constitutionally-protected "issue ad" rather than a regulable campaign commercial. Corporations and labor unions, both of which are prohibited by law from making financial contributions or expenditures in connection with

¹ This advertisement is adapted from a commercial that was aired by a business group in Wisconsin in 1996. See Elections Bd. of Wis. v. Wisconsin Mfrs. & Commerce, 597 N.W.2d 721, 725 (Wis. 1999). Although this particular commercial was intended to influence the outcome of a state electoral campaign, it is similar in tone and content to numerous sham issue advocacy commercials run by similar groups throughout the nation that were attempting to influence the outcome of various federal election campaigns. See generally DEBORAH BECK ET AL., ISSUE ADVOCACY ADVERTISING DURING THE 1996 CAMPAIGN (Annenberg Public Policy Center 1997).
any election for federal office, can pay for and run these ads. Individuals, who are prohibited from contributing more than $1000 directly to any federal candidate, can pay for these ads. And any individual or group that chooses to pay for these ads can do so without complying with any of the disclosure laws that govern political expenditures.

The government's desire to regulate electioneering\(^2\) represents a clash between two hallowed American principles. On the one hand, the right of individuals and groups to criticize elected officials and speak out on political issues is at the height of First Amendment protections. On the other hand, there is a compelling government interest, recognized by the courts, in disclosing and regulating the sources of money that flow into the political system in order to combat both actual corruption and the appearance of corruption. This clash has led to one of the most hotly debated questions in election law today, which is how to draw a line, consistent with the First Amendment, between regulable electioneering and protected issue advocacy.\(^3\)

This Article begins by assuming three bedrock principles. First, speech about politics and political candidates is core First Amendment activity that is entitled to a high level of constitutional protection.\(^4\) Second, despite this strong protection for political speech, there exist compelling government interests, such as the prevention of corruption and the appearance of corruption, that justify some restrictions on political speech.\(^5\) Consistent with this second principle, the government may, at a minimum, subject all electioneering to reasonable disclosure rules;\(^6\) corporations and unions may be banned completely from spending their general treasury funds for electioneering purposes;\(^7\) and speech by advocacy groups about current political issues ("issue advocacy") may not be banned.\(^8\) Third, and finally, a regulatory regime that seeks to respect First Amendment values must differentiate between electioneering

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2. I use the term "electioneering" or "electioneering speech" to encompass all speech that is intended by the speaker to influence one or more votes in an election.


5. See id. at 26.


speech and issue speech in a reasonable and coherent manner.

The attempt to draw a principled line between regulable electioneering speech and protected issue advocacy—a line that is neither overly broad nor overly vague—has confounded the best efforts of both legislators and courts. However, one cannot seriously question the necessity of drawing such a line. In the current political and legal landscape, the clear intent of the Federal Election Campaign Act (FECA) is being evaded, and the government's clearly constitutional regulatory objectives are going unmet. Corporations, labor unions, and third party groups are spending millions of dollars on advertisements that they claim are constitutionally protected issue advocacy, but that any reasonable listener would view as electioneering activity.

This Article is divided into three parts. Part I examines the historical origins of the problem of defining issue advocacy and express advocacy, beginning with the Supreme Court's decision in Buckley v. Valeo, and exploring the subsequent court decisions that attempt to follow that precedent. Part II outlines and critiques two of the most prominent proposed solutions to the problem—an administrative solution and a legislative solution. Finally, in Part III, this Article suggests a new approach, using a regime of self-disclosure, which allows the government to better capture and regulate sham issue advocacy.

I. THE JUDICIAL SEARCH FOR ACCEPTABLE DEFINITIONS OF EXPRESS ADVOCACY AND ISSUE ADVOCACY

Since 1907, with the passage of the Tillman Act, it has been illegal for corporations in the United States to make financial contributions or expenditures in connection with any election for federal office. The Till-
man Act was consistent with other landmark legislation enacted during the Progressive Era, which reflected a view that the concentration of wealth in large corporations posed a threat to the democratic and economic principles upon which America was founded.\textsuperscript{14} Similarly, in 1941, Congress passed the Smith-Connally Act, which extended the ban on electioneering to labor unions.\textsuperscript{15} Although these measures placed substantial limits on the ability of corporations and unions to engage in political speech, the Supreme Court has never questioned their constitutionality.\textsuperscript{16} Congress' decision to prevent corporations and unions from using their economic resources to influence electoral outcomes required the courts to develop a clearer understanding of the difference between electioneering activities and non-electioneering activities. That distinction was not well-developed until the mid-1970s, with the landmark decision of \textit{Buckley v. Valeo}.\textsuperscript{17}

\textbf{A. The Origin of "Issue Advocacy" and "Express Advocacy" in \textit{Buckley v. Valeo}}

Buoyed by the Watergate scandal and building on a more modest set of reforms originally passed in 1971, Congress in 1973 amended the Federal Election Campaign Act (FECA) and passed a comprehensive package of campaign finance reform legislation governing all federal elections.\textsuperscript{18} A principal purpose of FECA was to use mandatory spending limits to reduce the amount of money necessary to run an effective campaign and concomitantly to reduce the need for political candidates to solicit large contributions that could be corrupting.\textsuperscript{19}

The cornerstone of FECA was the adoption of mandatory contribution limits for individuals and groups,\textsuperscript{20} as well as mandatory spending limits


\textsuperscript{17} 424 U.S. 1 (1976).


\textsuperscript{20} Individuals were allowed to contribute up to $1000 per candidate per election, with an overall annual contribution limit of $25,000. \textit{See} 18 U.S.C. § 608(b)(1), (3) (1970 & Supp. V); \textit{Buckley}, 424 U.S. at 189-90 (appendix). FECA also imposed limits on a can-
for political candidates. As a corollary to the contribution limits, FECA limited the ability of individuals and groups to make independent expenditures. FECA also enacted a system of voluntary public funding for presidential primary and general election campaigns. Finally, FECA enacted a new public disclosure system that required reporting of contributions and expenditures above certain threshold levels.

Opponents immediately challenged the constitutional validity of FECA in federal court in Buckley v. Valeo. The plaintiffs presented a facial challenge to virtually every provision of FECA—they argued that the spending limits, the contribution limits, the independent expenditure limits, the voluntary public funding, and the disclosure requirements all violated First Amendment speech and associational rights. With the 1976 federal elections looming, the Supreme Court decided the case on an expedited basis.

Although FECA, as enacted, was a carefully balanced plan to limit both the supply and demand for political contributions, the Court in Buckley analyzed separately the different components, upholding some and striking down others. In general, the Court upheld FECA's contribution limits, voluntary spending limits, and disclosure provisions, while striking down mandatory spending limits. In the course of deciding on the constitutional validity of spending limits and disclosure limits, the Court created the concepts of "issue advocacy" and "express advocacy," which, prior to Buckley, did not exist as terms of art in constitutional law.

In upholding FECA's contribution limits, the Court in Buckley found that limiting the amount of a political contribution creates "only a marginal restriction" on a contributor's free speech rights. "A contribution serves as a general expression of support," and the size of the contribution does not appreciably change the communicative impact of that mes-

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22. See 18 U.S.C. § 608(c) (1970 & Supp. V). FECA placed mandatory spending limits on all candidates for federal office. Presidential candidates were permitted to spend up to $10 million in the primaries and up to $20 million in the general election campaign. See id. § 608(c)(1)(A)-(B). The spending limit for primary and general election campaigns for the House of Representatives was, with limited exceptions, set at $70,000. See id. § 608(c)(1)(E). The spending limit for senatorial campaigns was based on the size of the voting-age population of the relevant state. See id. § 608(c)(1)(D). All of these spending limits were indexed for inflation. See id. § 608(d)(1); Buckley, 424 U.S. at 190-91 (appendix).
24. See Buckley, 424 U.S. at 7-8 (listing the plaintiff-appellants in Buckley).
25. See id. at 143.
26. Id. at 20-21.
FECA's contribution limits were justified by the government's compelling interest in preventing both actual corruption and the appearance of corruption, which are inherent in a regime that permits large individual financial contributions. Similarly, the Court had little difficulty upholding FECA's disclosure requirements, noting that “disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.”

The Court, viewed expenditure limits very differently, however. The Court found that the expenditure limits, unlike the contributions limits, imposed “direct and substantial restraints” on free speech, and it found no compelling government interest sufficient to justify these limits. The government's interest in preventing corruption and the appearance of corruption was already satisfied through FECA's contribution limits, which the Court upheld. The Court found unpersuasive the Government's asserted interest in reducing the skyrocketing costs of political campaigns: “The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise.” Finally, the Court rejected the notion that the government had a compelling interest in limiting campaign spending in order to equalize the financial resources of competing candidates. Spending by candidates on their campaigns is core First Amendment speech that may not be limited by the government.

27. Id. at 21.
28. See id. at 25-27. Although upholding contribution limits generally, the Court struck down the limitations on expenditures by a candidate from his own personal or family resources. See id. at 51-54.
29. Id. at 68.
30. Id. at 39.
31. See id. at 55.
32. See id. The Supreme Court dismissed as unpersuasive the court of appeals' finding that “the expenditure restrictions are necessary to reduce the incentive to circumvent direct contribution limits.” Id. With the advantage of 23 years of experience, it is now clear that the court of appeals was correct and the Supreme Court wrong in its predictive judgment. The decision to uphold contribution limits while striking down spending limits effectively limited the supply of money into the political system without correspondingly limiting demand. This disjunction between supply and demand has led politicians to devise increasingly sophisticated schemes and devices to circumvent the contribution limits. These schemes range from the rise of candidate-sponsored “issue” political action committees (PACs) to the explosion in “soft money” and political party-sponsored “issue advocacy.”
33. Id. at 57.
34. See id. at 56-57.
35. See id. at 57. The Court upheld, however, the presidential funding system that
The most restrictive expenditure limit imposed under FECA, and the significant one for purposes of this Article, was the $1000 limitation on expenditures by third parties (non-candidates and non-parties) "relative to a clearly identified candidate."\footnote{18 U.S.C. § 608(e)(1) (1970 & Supp. V).} It was this restriction on independent expenditures by third party individuals and groups that led the Court to develop the concepts of "issue advocacy" and "express advocacy."\footnote{See Buckley, 424 U.S. at 74-82.}

The FECA restrictions on independent expenditures raised issues of both overbreadth and vagueness.\footnote{See id. at 40-41.} Although the terms "expenditure," "clearly identified," and "candidate" were defined in the statute, there was no definition clarifying when an expenditure would be considered "relative to" a candidate, and a construction that covered issue-oriented expenditures would be overbroad. The Court chose to remedy these problems by construing "relative to" to mean "advocating the election or defeat of" a candidate.\footnote{See id. at 42 (noting that FECA's legislative history supports this definition).} The Court concluded that unconstitutional vagueness and overbreadth could be avoided if FECA's limitation on expenditures was limited to "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."\footnote{Id. at 44.} In a footnote that has proven to be of tremendous legal significance, the Court further explained: "This construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"\footnote{Id. at 44 n.52.} A requirement that specific words of advocacy be present is sometimes referred to as a "magic words" test. \textit{See}, e.g., Thomas and Bowman, \textit{supra}, note 3.

After addressing the vagueness aspect of the limitation on independent expenditures, the Court proceeded to examine whether the limitation, as narrowly construed to avoid vagueness problems, would otherwise survive First Amendment scrutiny.\footnote{Id. at 44.} The claimed justification for FECA's $1000 limit on independent expenditures was the need to uphold the integrity of the contribution limits. However, the Court found that the rationale that justified upholding the contribution limits—reducing the contained voluntary spending limits for participating candidates who accepted government funds. \textit{See id.} at 85-108.
danger of corruption and the appearance of corruption—was not sufficient in the context of regulating independent expenditures. The Court concluded that third party expenditures—which would be deemed contributions unless they were made independently of the candidates and their committees—did not pose the same danger of real or apparent corruption of candidates as did direct contributions to the candidates. Moreover, the Court questioned the efficacy of the restriction on independent expenditures as a loophole-closing provision because, as narrowly construed by the Court to cover only “express advocacy,” it would not prevent resourceful and unscrupulous speakers from engaging in communications that promoted a candidate without using explicit words of advocacy. Thus, the Court concluded that the $1000 limit on independent expenditure severely burdened core First Amendment speech without serving a compelling government interest.

In its discussion of FECA’s disclosure requirements, the Court returned to its newly created concept of “express advocacy.” Section 434(e) of FECA required FEC disclosure filings from every person who made “expenditures” aggregating over $100 in a calendar year. The term “expenditure” was defined in terms of using money or other assets “for the purpose of . . . influencing” the nomination or election of candidates for federal office. The Court found that the “for the purpose of . . . influencing” language in § 434(e) had the same vagueness and overbreadth problems—potentially encompassing both issue discussion and political advocacy—as did the “relative to” language used in § 608(e)(1), which governed limits on independent expenditures.

In order to solve these problems, the Court narrowly construed the term “expenditure” for purposes of § 434(e) in the same manner it had construed the term for purposes of § 608(e)(1), “to reach only funds used for communications that expressly advocate the election or defeat of a

43. See id. at 45-46.
44. See id. at 45.
45. See id. at 47-48. The Court found that FECA’s $1000 limit on spending “relative to a clearly identified candidate” was unrealistically low. See id. at 19-20. The $1000 limit would have essentially prevented all groups, except candidates, political parties, and the institutional press from playing any significant role in political campaigns through use of media. See id. at 19-20.
46. See id. at 74-82.
47. See id. at 77.
48. See id. at 76-77.
clearly identified candidate." In this case, however, after construing the statute narrowly, the Court upheld the disclosure provision as bearing a sufficient relationship to substantial government interests.50

Thus, the Supreme Court invented the terms "express advocacy" and "issue advocacy" to save portions of FECA from unconstitutional vagueness and overbreadth. *Buckley* held that it is impermissible for the government to attempt to regulate "issue advocacy" that is concerned with political ideas, while it is permissible for the government to regulate, at least through disclosure, "express advocacy."51

**B. Lower Courts Begin to Grapple with Buckley’s Distinction Between Protected Issue Advocacy and Regulable Express Advocacy**

After *Buckley*, the FEC was left with the task of enforcing FECA's disclosure provisions, as narrowly construed to apply only to communications containing express advocacy. Although the Supreme Court in *Buckley* may have believed that it was drawing a clear, bright line between protected issue advocacy and regulable express advocacy, in practice that line has been subject to substantial dispute. More specifically, both the lower federal courts and the FEC are having trouble grappling with how explicit a communication's message of support or opposition to a candidate must be before it can be considered "express."52

The first post-*Buckley* federal appellate court decision to raise the express advocacy question was *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee (CLITRIM).*53 The case arose out of a complaint filed with the FEC against a Long Island affiliate of the John Birch Society. The John Birch Society, which advocated lower taxes and less government spending, published a quarterly bulletin called TRIM (Tax Reform Immediately).54 The Central Long Island Tax Reform Immediately Committee (CLITRIM) was a non-profit unincorporated association whose stated purpose was to inform Long Island residents of the need for lowering taxes through less government.55 In October 1976 (prior to the November 1976 federal elec-

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49. *Id.* at 80 (footnote omitted).
50. *See id.*
51. *See id.* at 80-81.
53. 616 F.2d 45 (2d Cir. 1980) (en banc) (per curiam).
54. *See id.* at 49.
55. *See id.* at 50.
tion), CLITRIM published a four-page TRIM pamphlet, which the FEC concluded expressly advocated the defeat of Congressman Jerome Ambro, the congressional representative from central Long Island.\(^a\)

The four-page TRIM pamphlet contained two pages that set forth the general views of the organization, identified the officers of the Committee, furnished information about the CLITRIM members, and invited others to join the association.\(^b\) The remaining pages reported and commented upon the voting record of Congressman Ambro. This two-page spread included a photograph of Congressman Ambro and an analysis of twenty-four votes that he cast. The pamphlet characterized twenty-one of those votes as being for "Higher Taxes and More Government," and three of the twenty-four as being for "Lower Taxes and Less Government."\(^c\) CLITRIM's position against higher taxes and more government was made clear by numerous statements and slogans contained elsewhere in the bulletin.\(^d\)

The FEC's complaint charged that CLITRIM had not complied with FECA's filing and disclaimer requirements, which apply to communications that expressly advocate the election or defeat of a candidate. The CLITRIM pamphlet, however, did not contain a direct exhortation to vote for or against Congressman Ambro. Nor did it contain a reference to Congressman Ambro's political party, to the fact that he was running for re-election, or to the fact that an election was imminent. Nevertheless, the FEC argued that the purpose of the pamphlet was clear—it was not intended merely to inform the public about the voting record of a government official; rather it was intended to "unseat 'big spenders'" like Congressman Ambro.\(^e\)

The Second Circuit, in a unanimous decision for the en banc court, held that the filing and disclaimer requirements of § 434(e) and § 441d did not apply to CLITRIM's pamphlet.\(^f\) The Court rejected the FEC's

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56. See id.
57. See id. at 51.
58. See id.
59. See id. at 50-51 n.6. Examples of some of the statements include:
   "Your Uncle Sam is a tax glutton .... Nearly half of your earnings are now taken either by direct or hidden taxes .... Uncle Sam has become too fat, too bossy, and too wasteful to be allowed to continue in his tax gluttony .... As you study your Representative's voting record on the inside, remember that the cost per household shown for each measure is paid by you either directly, or through hidden taxes .... Lastly, never forget that since you are paying the tax bills, you are the boss. And don't ever let your Representative forget it!"
60. Id. at 53.
61. See id.
position and interpreted *Buckley* to require express words of advocacy of election or defeat.

[T]he FEC would apparently have us read “expressly advocating the election or defeat” to mean for the purpose, express or implied, of encouraging election or defeat. This would, by statutory interpretation, nullify the change in the statute ordered in *Buckley v. Valeo* and adopted by Congress in the 1976 amendments. The position is totally meritless. 6

The Second Circuit's *CLITRIM* decision was the first federal appellate court ruling to adopt a “magic words” test for “express advocacy.” 63

C. The Supreme Court Gives Additional Guidance on Express Advocacy in Massachusetts Citizens for Life

The Second Circuit's unanimous en banc *CLITRIM* decision appeared to be the final word on the express advocacy question until the Supreme Court returned to the subject six years later, in *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL)*. 64 *MCFL* represents the first and only time that the Supreme Court has itself applied the express advocacy standard to concrete facts. The case arose as a result of a complaint filed with the FEC, alleging that Massachusetts Citizens for Life, Inc. (MCFL), a nonprofit corporation formed for the purpose of promoting the pro-life agenda through educational and political activities, had used its general treasury funds to make a political expenditure in violation of *FECA*. 65

The alleged violation stemmed from a *Special Election Edition* newsletter that MCFL prepared and distributed in September of 1978, which urged readers to “vote pro-life” in the upcoming elections in Massachusetts. The pro-life newsletter listed every candidate for state and federal office, and it identified each candidate's views on pro-life issues. Although the newsletter contained a disclaimer that stated that the group did not endorse any particular candidates, the newsletter nevertheless chose to display photographs of only 13 of the 400 candidates, all 13 of whom were identified as having a 100% pro-life voting record. This *Special Election Edition* was not prepared by MCFL's regular newsletter staff, and it was distributed to a much larger audience than that of the

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62. *Id.*


64. 479 U.S. 238 (1986).

65. *See id.* at 242-45.
regular newsletter. Responding to a complaint, the FEC concluded that the newsletter contained express advocacy and violated the ban on corporate expenditures.66

The Supreme Court first addressed the question of whether the newsletter contained express advocacy. The Court reiterated its holding in Buckley, that an expenditure must constitute "express advocacy" in order to be a political "expenditure" under FECA.67 Despite the fact that the newsletter contained a statement disclaiming any electoral intent, and despite the fact that the newsletter did not directly state "vote for" the thirteen photographed candidates, or "vote against" any of the others, the Court found that the newsletter nevertheless contained express advocacy:

The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature. The Edition goes beyond issue discussion to express electoral advocacy. The disclaimer of endorsement cannot negate this fact.68

Although the Court reiterated the holding in Buckley that "a finding of 'express advocacy' depended upon the use of language such as 'vote for, ' 'elect,' 'support,' etc.,"69 its analysis was not limited to the presence or absence of specific "magic words;" rather the Court examined the "essential nature" of the message and what it conveyed "in effect."70 The bright line between "issue advocacy" and "express advocacy" that the court perceived in CLITRIM71 was perhaps not as sharp and unambiguous as

66. See id. at 243-45.
67. See id. at 248-49.
68. Id. at 249 (emphasis added).
69. Id. at 249.
70. See id. at 249. After concluding that the newsletter contained "express advocacy," the Court held that MCFL was entitled to an exemption from the ban on direct corporate spending on political activity. See id. at 263-264. The corporate ban is justified by the fear that resources amassed in the economic marketplace do not reflect popular support for the corporation's political ideas, and thus may, if used, "provide an unfair advantage in the political marketplace." Id. at 256-259. MCFL was a nonprofit group formed to disseminate political ideas, however, not to amass capital. See id. at 259. Individuals who contribute to it presumably are fully aware of its political purposes, therefore the concerns which ordinarily justify restrictions on corporate political activity do not apply to it. Thus, the Court held that MCFL was exempt from § 441b's restriction on independent spending, and it could therefore use its general treasury funds for the "express advocacy" contained in its Special Election Edition newsletter. See id. at 263-64.
71. See Federal Election Comm'n v. Central Long Island Tax Reform Immediately
the Second Circuit presumed.

D. The Confusion in the Lower Courts Continues

In Federal Election Commission v. Furgatch, the Ninth Circuit became the second federal appellate court to address the express advocacy question, and the first to do so after the Supreme Court's decision in MCFL. The case arose from an FEC complaint against a private citizen, Harvey Furgatch, who issued a full page advertisement in the New York Times and the Boston Globe criticizing President Carter two weeks prior to the 1980 election. Furgatch's advertisement stated that President Carter was "cultivat[ing] the fears, not the hopes, of the voting public," and "degrading the electoral process and lessening the prestige of the office." Furgatch's advertisement accused President Carter of trying "to buy entire cities, the steel industry, the auto industry, and others with public funds" during the election campaign. Finally, the advertisement warned that "[i]f he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning. DON'T LET HIM DO IT."

The FEC sued Furgatch for, among other things, failing to report his expenditures on these newspaper advertisements. The United States Court of Appeals for the Ninth Circuit held that, even though Furgatch's advertisements did not use any of the "magic words" listed in Buckley, they nevertheless expressly advocated the defeat of President Carter, and thus had to be reported to the FEC as independent expenditures.

According to the appellate court, the "magic words" test urged by Furgatch would preserve the First Amendment interest in unfettered expression only at the expense of eviscerating FECA. Nominally independent campaign spenders could too easily circumvent the Act by simply avoiding certain key words while conveying a message that is unmistakably an electioneering message. Thus, the court began its analysis by rejecting the "magic words" test and concluding that "'express advocacy' is not

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72. 807 F.2d 857 (9th Cir. 1987).
73. See id. at 861. Curiously, although Furgatch was decided one month after the decision in MCFL was handed down, Furgatch does not cite MCFL.
74. Id. at 858 (internal quotations omitted).
75. Id. (internal quotations omitted).
76. Id. (internal quotations omitted).
77. See id. at 864-65.
78. See id. at 863.
79. See id.
strictly limited to communications using certain key phrases.\textsuperscript{80}

The court held that, rather than dissecting a communication to search for magic words, "[a] proper understanding of the speaker's message can best be obtained by considering [the communication] as a whole."\textsuperscript{81} The court added that context, such as timing of a communication near an election, is important in determining whether a communication contains express advocacy.\textsuperscript{82} Thus, communication is "express advocacy" "when, read as a whole, and with limited reference to external events," it is reasonably susceptible to interpretation only "as an exhortation to vote for or against a specific candidate."\textsuperscript{83}

Since \textit{Furgatch}, \textit{MCFL}, and \textit{CLITRIM} were decided, there have been numerous additional federal and state court decisions addressing the permissible limits for defining "express advocacy," with some courts adopting a strict "magic words" test for express advocacy,\textsuperscript{84} and others accepting the more flexible \textit{Furgatch} approach.\textsuperscript{85} Although the FEC has been urging the Supreme Court to take a case that would resolve this dispute, thus far the Court has declined.\textsuperscript{86}

\section*{II. \textsc{Current Federal Efforts to Better Define "Express Advocacy"}}

As the Ninth Circuit observed in \textit{Furgatch}, a "magic words" test for "express advocacy" eviscerates the intent of FECA. Relatively few of

\begin{thebibliography}{99}
\bibitem{80} \textit{Id.} at 862.
\bibitem{81} \textit{Id.} at 863.
\bibitem{82} \textit{See id.} at 863-64.
\bibitem{83} \textit{Id.} at 864.
\end{thebibliography}
the political advertisements broadcast on television today, even when
sponsored by candidates themselves, end with an explicit directive to
"vote for" the sponsoring candidate or "vote against" her opponent. The
ban on corporate and union use of general treasury funds on election-earing is thwarted if these entities can spend unlimited sums on highly partisan political commercials that simply eschew the use of "magic words." And even when the sponsoring organizations are advocacy
groups, who like corporations and labor unions have an indisputable
right to make independent expenditures, the public is denied disclosure
of the identity of the speaker and the source of their funding.

The 1996 federal election cycle witnessed an explosion in sham "issue
advocacy." Spurred in part by these kinds of abuses, the FEC and con-
gressional reformers have each attempted to adopt a definition of "ex-
press advocacy" that reflects real world electioneering practices better
than the "magic words" test. Through regulation, the FEC has adopted
an approach which goes beyond "magic words" by adopting a variation
of the "reasonable person" test. Current congressional reformers, in
contrast, have opted for a delimited time period approach that focuses on
the timing of communications which mention candidates for federal of-

A. The FEC's "Reasonable Person" Approach

In 1995, the FEC adopted a new two-pronged definition for "express
advocacy." Under the first prong of the test, a communication would be

87. See generally, BECK ET AL., supra note 1.
88. See 11 C.F.R. § 100.22 (1999).
"Expressly advocating" means any communication that—
(a) Uses phrases such as "vote for the President," "re-elect your Congress-
man," "support the Democratic nominee," "cast your ballot for the Republi-

88. See 11 C.F.R. § 100.22 (1999).
"Expressly advocating" means any communication that—
(a) Uses phrases such as "vote for the President," "re-elect your Congress-
man," "support the Democratic nominee," "cast your ballot for the Republi-

can challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill
McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a
listing of clearly identified candidates described as Pro-Life or Pro-Choice,
"vote against Old Hickory," "defeat" accompanied by a picture of one or
more candidate(s), "reject the incumbent," or communications of campaign
slogan(s) or individual word(s), which in context can have no other reason-
able meaning than to urge the election or defeat of one or more clearly iden-
tified candidate(s), such as posters, bumper stickers, advertisements, etc.
which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or
considered “express advocacy” if it contained explicit words of advocacy, such as “elect” or “defeat,” or if it contained campaign slogans or similar words, such as “Nixon’s the One.” The second prong of the test, derived from the Ninth Circuit’s decision in Furgatch, adopts a modified “reasonable person” standard to expand the definition of “express advocacy.” Under the second prong of the test, a communication is “express advocacy” if it is “unmistakable, unambiguous, and suggestive of only one meaning,” and “[r]easonable minds could not differ as to whether it encourages actions to elect or defeat . . . .” Thus, under the second prong of the FEC’s test, a communication does not become “express advocacy” simply because a reasonable person would view it as such; rather, it becomes “express advocacy” only when no reasonable person could view it as anything other than electoral advocacy.

In regard to the trade-off between overbreadth and vagueness, the FEC regulation attempts to avoid any substantial overbreadth by adopting a standard that is more vague and subjective than the “magic words” test. The constitutional validity of the new FEC regulation was challenged in Maine Right to Life Committee, Inc. v. Federal Election Commission, and the district court reluctantly struck down subpart (b) of the regulation as going beyond the limits established by the Supreme Court in Buckley and MCFL for protecting “issue advocacy.”

In Maine Right to Life, the district court began its analysis of the validity of subpart (b) of the regulation by noting that it was based on the Ninth Circuit’s language and reasoning in Furgatch. The district court, agreeing with some of the Furgatch reasoning, recognized that language

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

Id. § 100.22(a).

89. Although the least controversial portion of the regulation, even this first half of the test goes beyond the strict “magic words” approach. A bumper sticker that says “Reagan/Bush” or “Mondale!” does not, in fact, explicitly urge any action at all. Nevertheless, it is quite clear that such bumper stickers have the unmistakable intent of urging the viewer to vote for the named candidates.

90. 11 C.F.R. §§ 100.22(b)(1)-(2) (1999).


92. See id. at 11-13.
"is an elusive thing," and "that the meaning of words is not fixed, but depends heavily on context as well as the shared assumptions of speaker and listener."

The court noted that

One does not need to use the explicit words "vote for" or their equivalent to communicate clearly the message that a particular candidate is to be elected. Subpart (b) appears to be a very reasonable attempt to deal with these vagaries of language and, indeed, is drawn quite narrowly to deal with only the "unmistakable", and "unambiguous," cases where "reasonable minds cannot differ" on the message.

Thus, the court concluded, a strict "magic words" approach "is not very satisfying from a realistic communications point of view and does not give much recognition to the policy of the election statute to keep corporate money from influencing elections . . . ."

Despite concluding that subpart (b) was narrowly drawn to address FECA's concerns, and that "the FEC had the better of the argument on its regulation so far as the logic of language is concerned," the court nevertheless held that Buckley and MCFL required the court to strike down subpart (b). The court concluded that Buckley and MCFL established "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." Thus, according to the district court, the First Amendment, as interpreted by the Supreme Court in Buckley and MCFL, requires the use of a bright line "magic words" test for "express advocacy" that permits wholesale evasion of FECA's purposes. The First Circuit affirmed the decision, which other federal courts have since followed.

B. Congress' "Delimited Time Period" Approach

The leading campaign finance reform proposal currently pending in
The Bipartisan Campaign Reform Act of 1999 (commonly known as the McCain-Feingold Bill in the Senate and the Shays-Meehan Bill in the House)—has garnered majority support in both Houses of Congress and from the President, but it has not been enacted into law. The Senate and House bills, although different in some respects, each use a delimited time period approach in attempting to define “express advocacy” and thereby regulate sham “issue advocacy.” Under this delimited time period approach, a communication is generally considered to be “express advocacy” if it names a federal candidate within a certain specified time period prior to an election.

Under the McCain-Feingold Bill, an “electioneering communication” is defined as any television or radio commercial which names a candidate for federal office within sixty days of a general election or thirty days of a primary election, and that is broadcast to the relevant electorate for that office. The Shays-Meehan Bill has a similar, although somewhat broader, definition of “express advocacy.” In both of the bills, corpora-
tions and labor unions are banned from using their general treasury funds on these electioneering communications, while all other sponsors of electioneering communications are subject to disclosure requirements.

The appeal of a pure delimited time period approach is its clarity. Every speaker will know with certainty whether his/her planned advertisement will fall within the definition of regulable electioneering activity. Ads that name a candidate, utilize the specified media, and are broadcast within a certain number of days prior to an election are electioneering; ads which fail to name a candidate, fall outside the electoral time-frame, or are broadcast using different media outlets, are not electioneering.

The principal criticism of the delimited time period approach is that although it has the clarity required by the Supreme Court, this comes at the expense of overbreadth. One can readily imagine true issue ads that name a federal office-holder, but are intended solely to influence public opinion about an important issue, rather than an upcoming election. Thus, a radio ad that urges: "Congressman Smith—Americans Need Health Care Reform Now, Support the President's Plan," could not be sponsored by a corporation or labor union within sixty days of the general election if Congressman Smith is running for re-election. Hence, the delimited time period approach may, on occasion, capture true "issue advocacy."

In reality, of course, advertisements that are run close to an election and that name a candidate for public office are almost always intended to influence voters. Thus, the question for a reviewing court will be whether the delimited time period approach is "substantially overbroad." It may be that the delimited time period approach provides a close enough fit under real world circumstances to survive constitutional

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103. See S. 26, § 203; H.R. 417, § 501. Although banned from using their general treasury funds, corporations and labor unions may fund electioneering communications through political action committees subject, of course, to the separate federal restrictions on such committees. See 2 U.S.C. § 441a(a)(2), (4)-(5) (1994).

104. See S. 26, § 201; H.R. 417, §§ 307-08.

The government's attempts, whether through administrative regulation or new legislation, to better define "express advocacy" have faced enormous difficulties. Providing the clarity that the Supreme Court appears to desire leads inevitably to dangers of over- or under-inclusiveness. The "magic words" test is relatively clear, but dramatically under-inclusive of true electioneering. The Bipartisan Campaign Reform Act provides even greater clarity than the "magic words" test, but it has been criticized as over-inclusive. And definitions that attempt to target "express advocacy" through the use of "reasonable person" standards, like the FEC's approach, typically gain their increased accuracy at the expense of reduced clarity, thereby creating a potential problem of unconstitutional vagueness.

III. USING SELF-DISCLOSURE TO DISCERN ELECTIONEERING INTENT

The underlying objective of the law in this area is to allow speech that is truly intended to influence the debate on political issues to flourish freely, while allowing the government to regulate, in a constitutionally permissible manner, speech intended to effect electoral outcomes. Since intent is the crucial factor that differentiates electioneering speech from true issue advocacy, a statutory definition of "electioneering speech" that is based on objective, measurable factors, will never achieve a perfect fit, capturing all and only speech that is intended to influence a vote. Although there are many real world phenomena that give clues to a person's intent, in the end, only the individual truly knows for certain his own intent.

106. One method for softening the delimited time-period approach and thereby making it more First Amendment-friendly is through the use of a rebuttable presumption. Under this type of approach, the criteria that we associate with electioneering ads in the delimited time-period approach—naming a candidate, proximity to an election, using certain specified media, etc.—are used to create a presumption of regulable electioneering, rather than a hard and fast rule. For example, the government will presume, subject to rebuttal by the speaker, that any ad which names a candidate for federal office, and which is broadcast over the television or radio within 60 days of the election is an electioneering ad. The speaker will be given the opportunity to rebut the presumption through any kind of relevant evidence he possesses. Hence, an advocacy group might attempt to prove that its advertisement, which triggered the presumption, was really intended to educate the public about an issue of long-standing interest and importance to the group, and it chose to name a federal candidate only because of that candidate's relationship to the issue being discussed. The regulatory authority might accept or reject the proffered evidence, but, if it rejected the proffer, the government would have the burden of proving the speaker's intent. Thus, the use of a rebuttable presumption, rather than a rigid rule, provides a safety net for the unusual cases that detractors of campaign finance laws are so fond of inventing.
Because it is the individual speaker, and not the state, that possesses the relevant knowledge of intent, it is reasonable to develop a system of self-disclosure for regulating electioneering speech. A self-disclosure system would begin, like the Bipartisan Campaign Reform Act, with a set of objective factors that appear to correlate closely with advertisements that have an electioneering intent. Thus, naming a federal candidate, doing so within a certain number of days of an election, broadcasting the ad in certain specified media, and spending more than a certain dollar threshold, would all be highly relevant, objective criteria that regulators could use as a starting point. If all of the objective factors are present, the FEC would then require the sponsor of the ad to file a disclosure form stating either that the ad was intended to influence the election or defeat of the named candidate, or that it was not intended (even in part) to influence the election or defeat of the named candidate.

As a general rule, if the sponsor stated that an ad was not intended to influence an election, the FEC would accept the sponsor's designation of his own ad as an “issue ad,” rather than an electioneering ad. The FEC would, however, have the authority to challenge a sponsor's designation, with the government bearing the burden of proof. False designations could be fined civilly (in an amount, say up to three times the amount paid for the offending advertisement) rather than punished criminally.

Ads that are self-disclosed as electioneering ads would be subject to all of the restrictions permitted by the Supreme Court. Consequently, corporations and labor unions could be barred from spending general treasury funds for the ads, and other groups could be required to make full

107. The government frequently relies on self-disclosure in order to obtain compliance with a government program or regulatory regime. The most prominent example, of course, is the United States tax system, in which each individual and company prepares its own tax return, rather than being sent a bill calculated by the government. Other areas in which self-disclosure to the government are common include health care, see Provider Self-Disclosure Protocol Office of Inspector Gen. Dep't of Health and Human Servs., 1121 PLI/CORP 407 (May-July 1999); the environment, see Nancy K. Stoner & Wendy J. Miller, National Conference of State Legislatures Study Finds That State Environmental Audit Laws Have No Impact on Company Self-Auditing and Disclosure of Violations, 29 Envtl. L. Rep. (Envtl. L. Inst.) 10265 (May 1999); and exports, see Mark D. Menefee, Making A Self-Disclosure Under Section 764.5 of the Export Administration Regulations, 782 PLI/COMM 737 (Dec. 1998).

108. The Supreme Court scrutinizes First Amendment claims of chill and overbreadth more closely when criminal penalties are involved. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. 455 U.S. 489, 498-99 (1982) (expressing “greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe”); Buckley v. Valeo, 424 U.S. 1, 40-41 (1976) (“Close examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests.”).
What does this self-disclosure system accomplish? The answer depends, at least in part, on the assumptions one is willing to make concerning truthful voluntary compliance. At least two outcomes are possible—a reasonable degree of truthful compliance or widespread evasion. I will argue that widespread evasion is not a likely outcome. However, even if one begins by assuming widespread false reporting of ads with an electioneering purpose as “issue ads,” this self-disclosure system nevertheless eliminates some of the worst abuses of the current model.

Today it is possible for an advocacy group to write a letter to its membership seeking donations to fund an “issue ad campaign” that targets for defeat ten incumbent members of Congress. After the ads are run, the advocacy group trumpets to its members and the media that its “issue ad campaign” was successful in defeating eight of the ten targeted Congressmen. Because the ads did not use “magic words” of advocacy, however, the group is confident that it can legally run its ad campaign wholly outside of the regulatory reach of FECA.

Under a self-disclosure regime, the advocacy group could never flout the intent of the law in such a blatant manner. An advocacy group seeking to raise money for a sham issue advocacy campaign could not disclose its true electioneering purpose without a real fear of facing a regulatory penalty. A fund-raising letter or telephone solicitation script that discloses an electioneering purpose, for example, would be “smoking gun” evidence. It is, of course, substantially more difficult for a membership organization to raise and spend funds for a purpose that it cannot truthfully disclose to its own members.

Moreover, the types of groups and organizations that are able to spend substantial sums of money on issue ads and electioneering ads tend to be established participants in the political process with reputations to uphold.110 There is no reason to assume that they would decide to file a

109. See, e.g., Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657-61 (1990); Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 209-11 (1982); Buckley, 424 U.S. at 60-84. Additionally, advertisements that are certified by the sponsor as “issue ads” could perhaps be required to contain a disclaimer stating that the ad does not comply with federal law governing disclosure and fundraising because it is not intended to affect the outcome of any federal election.

110. In the 1998 election cycle, some of the large spenders on issue advocacy communications included the AFL-CIO, see <http://www.appcpen.org/issueads/profiles/aflio.htm>, the Business Roundtable, see <http://www.appcpen.org/issueads/profiles/brtabla.htm>, the National Abortion and Reproductive Rights Action League, see <http://www.appcpen.org/issueads/profiles/naral.htm>, the National Right to Life Committee, see <http://www.appcpen.org/issueads/profiles/nrlc.htm>, the Sierra Club, see <http://www.appcpen.org/issueads/profiles/sierraclub.htm>, and the United States
false statement with the government lightly. For a typical advocacy group, the decision to use its limited resources to fund a series of political commercials is not routine. The possibility of substantial civil fines, although not as threatening as potential criminal sanctions, should nevertheless be a significant deterrent.\footnote{111}

For all of these reasons, it is realistic to assume that a self-disclosure regime would not be subject to wholesale evasion. Assuming a reasonable degree of truthful compliance, the self-disclosure system would allow the government to distinguish accurately between those ads that truly are intended to influence a candidate's election or defeat and those that are not—which is, after all, the underlying objective of the law. And those groups that continue to engage in electioneering under the guise of issue advocacy will no longer be allowed to have it both ways—touting their electoral successes while operating under the banner of “issue advocacy.”

Some will no doubt argue that a self-disclosure system such as the one outlined above does not completely eliminate the danger of chilling protected issue advocacy. This is because the threat of potential civil fines may be enough to prevent some speakers from engaging in issue advocacy that is close to the line. That criticism, although accurate, is without significance—it sets an impossibly high standard that no regulation of First Amendment activity could ever meet. Every area of First Amendment jurisprudence—libel,\footnote{112} obscenity,\footnote{113} fighting words,\footnote{114} union ele-

\footnote{111. I have suggested that it would be reasonable to peg the maximum civil fine to three times the amount paid for the offending advertisement. If a falsely reported $100,000 expenditure could lead to a $300,000 fine, then an advocacy group with a limited budget (virtually every such group) would be reluctant to engage in extreme examples of false reporting.}

\footnote{112. In libel cases, the Court has developed a multi-factor analysis that examines, among other things, whether the subject of the statement is a public figure, whether the statement involves matters of public concern, whether the speaker acted with reckless disregard for the truth or falsity of the statement, and whether a reasonable reader would perceive the statement as stating actual facts or merely rhetorical hyperbole. \textit{See, e.g.}, Milkovich v. Lorain Journal Co., 497 U.S. 1, 14-17 (1990); Gertz v. Robert Welch, Inc., 418 U.S. 323, 334-39 (1974); Greenbelt Coop. Publ’g Ass’n, Inc. v. Bresler, 398 U.S. 6, 13 (1970).

\footnote{113. The test for obscenity is whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest in sex; whether it portrays specified sexual conduct in a patently offensive manner; and whether, taken as a whole, it lacks serious literary, artistic, political, or scientific value. \textit{See} Miller v. California, 413 U.S. 15, 24 (1973).

\footnote{114. The test for determining whether speech constitutes “fighting words” is based not only on the words themselves, but also on the context in which the words are uttered. \textit{See} Cohen v. California, 403 U.S. 15, 20 (1971) (“No individual actually or likely to be present}
tioneering speech—calls upon courts to engage in delicate line drawing between protected speech and speech that properly may be regulated, with some resulting uncertainty for potential speakers. Although the judiciary must strive for clarity, the goal is not to provide absolute certainty; rather it is to allow an "ordinary person exercising ordinary common sense [to] understand and comply with" the law. Thus, the court asks not whether there is a perfect fit, but instead whether the law is "substantially overbroad" when "judged in relation to [its] plainly legitimate sweep." As in most contexts, we should not allow the perfect to be the enemy of the good. Although not a panacea, self-disclosure would certainly be an improvement over the wooden "magic words" approach for accurately differentiating between electioneering ads and true issue ads.

IV. CONCLUSION

It is constitutionally permissible for Congress to enact legislation that regulates advertisements that are intended to influence the electoral outcome of particular candidates, as long as the legislation does not unduly sweep within its reach advertisements that are intended to discuss issues only. The "magic words" test clearly does not accomplish this permissible objective in an acceptable manner. The FEC, through regulation, and Congress, through some pending legislative proposals, are each attempting to better define the boundary between regulable electioneering and protected issue advocacy. Each approach has some strengths and weaknesses. A system of self-disclosure, in which individuals and advocacy groups are called upon to report the intent of their communications when those communications bear all of the indicia of electioneering

could reasonably have regarded the words on appellant's jacket as a direct personal insult"); see also Eaton v. City of Tulsa, 415 U.S. 697, 700 (1974) (Powell, J., concurring) ("Whether the language used by petitioner in a courtroom during trial justified exercise of the contempt power depended upon the facts"); Hess v. Indiana, 414 U.S. 105, 107 (1973) (per curiam) ("Even if under other circumstances this language could be regarded as a personal insult, the evidence is undisputed that Hess' statement was not directed to any person or group in particular.").

115. In the context of union representation elections, employers are permitted to make "predictions" about the consequences of unionizing but they may not issue "threats." The courts have developed an extensive jurisprudence to distinguish between the two categories, see, e.g., NLRB v. Gissel Packing Co., Inc., 395 U.S. 575 (1969), yet the fact remains that an employer could harbor considerable uncertainty as to whether or not the words he is about to utter are sanctionable.


118. Cf. United States v. Underwood, 130 F.3d 1225, 1227 (7th Cir. 1997); Winfield v. G.L. Bass, 106 F.3d 525, 541 (4th Cir. 1997) (en banc).
speech, would go a long way toward solving the worst of the current sham issue advocacy abuses in a manner that should not chill true issue advocacy.