

Of Bright Lines and Fuzzy Arguments: McCain-Feingold Tries to Rein in Sham Issue Advocacy

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ON APRIL 2, 2001, by a vote of 59–41, the Senate passed the Bipartisan Campaign Reform Act of 2001 (the Act or McCain-Feingold).¹ Among the most controversial and hotly debated provisions of McCain-Feingold is the regulation of “electioneering communications.” The Senate adopted two provisions, under Title II of the Act, that together prohibit for-profit corporations, labor unions, and nonprofit corporations and other special interest groups from spending money from their treasury funds on electioneering communications during federal elections.² An electioneering communication is defined as (1) “any broadcast, cable, or satellite communication”;³ (2) that “refers to a clearly identified candidate”;⁴ (3) within 60 days of a general election or 30 days of a primary election;⁵ and (4) “is made to an audience that includes members of the electorate for such an election.”⁶

The first provision, known as the Snowe-Jeffords amendment, prohibits only for-profit corporations and labor unions from spending money on electioneering communications.⁷ The Snowe-Jeffords amendment provides an exception for nonprofit corporations and special interest groups and permits those organizations to engage in electioneering communi-

cations, so long as the communications are not paid for with funds provided by for-profit corporations or labor unions.⁸ However, it requires such nonprofit corporations and special interest groups to meet certain disclosure requirements if the organization has spent an aggregate of \$10,000 or more on electioneering communications within the preceding calendar year from the date of the advertisement.⁹

In the final week of debate on McCain-Feingold, the Senate passed a second provision, known as the Wellstone amendment, amending Title II of McCain-Feingold.¹⁰ The Well-

¹ JOSEPH E. CANTOR & L. PAIGE WHITAKER, CONG. RESEARCH SERV., CAMPAIGN FINANCE BILLS IN THE 107TH CONGRESS: COMPARISON OF S.27 (MCCAIN-FEINGOLD), H.R. 2356 (SHAYS-MEEHAN), H.R. 2360 (NEY-WYNN), AND CURRENT LAW (2001).

² Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong., § 201–204 (2001).

³ *Id.* at § 201(f)(3)(A)(I).

⁴ *Id.* at § 201(f)(3)(A)(I)(I).

⁵ *Id.* at § 201(f)(3)(A)(I)(II).

⁶ *Id.* at § 201(f)(3)(A)(I)(III).

⁷ *Id.* at § 203.

⁸ *Id.* at § 203(c)(2).

⁹ *Id.* at § 201(f)(2)(E)–(F).

¹⁰ See *id.* at § 204. The Wellstone amendment generated a considerable amount of controversy and created unlikely alliances between proponents and opponents of the McCain-Feingold bill. Many proponents of the bill, for example, like Senators McCain, Feingold, Snowe and Jeffords voted against the Wellstone amendment. Senators McCain and Feingold argued that the amendment was unconstitutional. See Stuart Taylor, Jr., *Censoring 'Issue Ads': A Direct Assault on Free Speech*, *The National Journal*, Sept. 8, 2001. Similarly, some opponents of the bill voted for the amendment because they believed that it would be ruled unconstitutional. See *id.* Nonprofit corporations and special interest groups formed unlikely alliances to fight the amendment as well, from conservative organizations like the National Right to Life Committee to more liberal organizations like the ACLU. Senator Paul Wellstone, the sponsor and author of the amendment, argued that he believed his amendment would pass constitutional scrutiny if challenged. See generally Press Release, Sen. Paul Wellstone, *The Wellstone Amendment to McCain-Feingold Regulating Sham 'Issue Ads' is Constitutional* (Mar. 28, 2001) at www.senate.gov/~Wellstone/cfr8.htm.

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stone amendment voids the exception that exists under Snowe-Jeffords in cases of "targeted communications" for nonprofit corporations and special interest groups.¹¹ A "targeted communication" is an electioneering communication "distributed from television or radio broadcast or cable and satellite television services" to an audience that "consists primarily of residents of the State for which the clearly identified candidate is seeking office."¹² Thus, instead of prohibiting only for-profit corporations and labor unions from engaging in electioneering communications, the Wellstone amendment extends the prohibitions to nonprofit corporations and special interest groups as well.

BACKGROUND OF CAMPAIGN FINANCE REGULATION

Spurred in part by allegations of corrupt electoral practices, Congress attempted in the early Seventies to reform federal campaign finance practices with the enactment of the Federal Election Campaign Act (FECA).¹³ Those reforms became the subject of the Supreme Court's 1976 landmark decision in *Buckley v. Valeo*.¹⁴ While major components of the statute were upheld, a number of restrictions dealing with political expenditures were struck down. In *Buckley*, the Court concluded that in order for expenditure limitations to avoid "invalidation on vagueness grounds" the limitations "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."¹⁵ In the much-cited footnote 52 of its decision, the Court provided examples of what it meant by "express terms" by listing a number of "magic words" that it considered to expressly advocate the election or defeat of a candidate, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject."¹⁶

The Court also expressed concern that FECA's limitations on expenditures were overly broad and thus might inhibit constitutionally protected issue advertisements.¹⁷ The Court dealt with the overbreadth issue in the

same manner as it did with the vagueness problem. Thus, to survive invalidation, FECA's regulatory powers were construed to reach only communications that expressly advocated a clearly identified candidate for federal office.¹⁸ In addition, the Court held that even when the express advocacy test was met, Congress could not limit independent expenditures by individuals and groups to \$1,000 per election cycle.¹⁹

After *Buckley*, the Court issued several rulings applying *Buckley's* bright-line test between express and issue advocacy. In *FEC v. Massachusetts Citizens for Life, Inc.*²⁰ (MCFL), the Court considered two questions. First, whether the prohibition against independent expenditures made directly by corporations under section 316 of FECA²¹ was constitutional.²² Section 316 requires a corporation to set up a separate segregated fund in order to make political expenditures expressly advocating the election or defeat of federal candidates.²³ Second, the Court asked, if section 316 were constitutional, could it apply to MCFL, a nonprofit corporation established solely for ideological purposes.²⁴ The Court held that MCFL had used treasury funds to engage in express advocacy, but ruled that as applied to MCFL, the regulation was unconstitutional.²⁵ The Court set up a three-part test for exempting corporations like MCFL from the regulation: the organization (1) must

¹¹ See S.27 at § 204.

¹² *Id.* (emphasis added).

¹³ 2 U.S.C. § 431-456 (1997 & Supp. 2001).

¹⁴ 424 U.S. 1 (1976) (per curiam).

¹⁵ *Buckley*, 424 U.S. at 44 (emphasis added).

¹⁶ *Id.* at 44, fn. 52.

¹⁷ *Id.* at 41, fn. 48.

¹⁸ *Id.* 43-4.

¹⁹ *Id.* at 44-8. The Court relied on the distinction between political contributions and expenditures and the fact that independent expenditures were not corrupting the way contributions were.

²⁰ 479 U.S. 238 (1986).

²¹ § 441b.

²² MCFL, 479 U.S. at 241.

²³ See § 441b.

²⁴ MCFL, 479 U.S. at 241.

²⁵ See *id.* at 251, 263-4. Actually, the communication involved in MCFL, did not include any of the eight examples of "magic words" mentioned in footnote 52; it merely urged readers to vote "pro-life" and identified the pro-life candidates.

exist "for the express purpose of promoting political ideas"; (2) must "have no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) must not owe its existence to a for-profit corporation or labor union, nor accept any contributions from those groups.²⁶

The Court distinguished corporations that met the MCFL test from for-profit corporations. While the Court held that section 316 burdened the political speech of both for-profit and nonprofit corporations, it found a compelling government interest in regulating the political speech of the former.²⁷ The regulation of for-profit corporations reflected the Court's concern "about the potential for the unfair deployment of [corporate funds for] political purposes" and the ability of for-profit corporations to amass a large political war chest without membership support for its political ideas.²⁸ MCFL, on the other hand, existed purely to promote an ideological program, and its treasury funds directly indicated popular support among its contributors for its political ideas.²⁹ The Court, therefore, did not find a compelling government interest in regulating MCFL's political speech.³⁰

More importantly for purposes of this discussion, the Court affirmed *Buckley's* bright-line test between express and issue advocacy, while indicating that express advocacy was not strictly limited to the eight examples listed in footnote 52. MCFL published and distributed to contributors and noncontributors a newsletter headlined "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," urging readers to "VOTE PRO-LIFE."³¹ Produced for an upcoming primary election, the newsletter contained the names and, in some cases, photographs of every candidate running for state and federal office in Massachusetts.³² MCFL further identified "pro-life" candidates as well as identifying candidates that did not take a "pro-life" position.³³ The Court held that MCFL's newsletter constituted express advocacy, since it directed readers to vote for clearly identified federal candidates; and, therefore, the newsletter fell within the regulatory power of section 316.³⁴

In *Austin v. Michigan State Chamber of Commerce*,³⁵ the Court took the opportunity to fur-

ther clarify its decision in *MCFL*. The Court reviewed section 54(1) of the Michigan Campaign Finance Act (MCFA), which prohibited corporations from making independent expenditures on behalf of candidates in a state election.³⁶ If a corporation wished to make independent expenditures for political purposes, it could do so only through a separate segregated fund, not from the corporate treasury.³⁷ The Michigan Chamber of Commerce (the Chamber), a nonprofit corporation, challenged section 54(1) on the grounds that it violated the First and Fourteenth Amendments.³⁸ Alternatively, the Chamber argued that if the Court upheld section 54(1) on its face, it should be struck down as unconstitutional as applied to it and other nonprofit corporations.³⁹

The Court rejected the Chamber's First and Fourteenth Amendment claims.⁴⁰ More significantly, by distinguishing the organizational structure of the Chamber from that of MCFL, the Court upheld section 54(1) as applied to the Chamber, a nonprofit corporation.⁴¹ Although the "expressive rights" of the Chamber were restricted, the Court held the regulation was "narrowly tailored to serve a compelling state interest."⁴² That is, the government had a compelling state interest in preventing the appearance of corruption by restricting "the influence of political war chests funneled through the corporate form."⁴³ The Court upheld the restriction as applied because the Chamber did not meet the three part test for exemption un-

²⁶ *Id.* at 264.

²⁷ *See id.* at 256-9.

²⁸ *Id.* at 257, 259.

²⁹ *Id.* at 259.

³⁰ *Id.* at 263.

³¹ *Id.* at 243.

³² *Id.* at 243-4.

³³ *Id.*

³⁴ *See id.* at 251.

³⁵ 494 U.S. 652 (1990).

³⁶ *See Austin*, 494 U.S. at 655.

³⁷ *Id.* at 654-5.

³⁸ *Id.* at 654.

³⁹ *Id.* at 661.

⁴⁰ *See id.* at 659-61, 666-9.

⁴¹ *See id.* at 661-6.

⁴² *Id.* at 655.

⁴³ *Id.* at 659 (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500-1 [1985]).

der MCFL,⁴⁴ since for-profit corporations actually funded much of the Chamber's activities, even though it had nonprofit tax status.⁴⁵

Generally, the United States Courts of Appeals have implemented *Buckley*, MCFL and *Austin* by holding that a communication expressly advocates a clearly identified candidate only if it contains the kind of magic words listed in footnote 52.⁴⁶ However, in *FEC v. Furgatch*, the Ninth Circuit held that a communication could expressly advocate for or against a candidate even if it did not contain any magic words.⁴⁷ In 1995, the FEC adopted regulations, consistent with *Furgatch*, that defined "express advocacy" and allowed for the possibility that a communication could expressly advocate a candidate without employing any magic words.⁴⁸ However, every Circuit Court decision, with the exception of *Furgatch*, has interpreted "express advocacy" as requiring the magic words.⁴⁹

HOW MCCAIN-FEINGOLD DEALS WITH "SHAM" ISSUE ADVOCACY

Speaking to the Senate, while urging support for the Snowe-Jeffords amendment in 1998, Senator Feingold stated that supporters of campaign finance reform have "chosen to find a way to pass a bill that is within the Court's rulings and holdings in *Buckley v. Valeo*."⁵⁰ He continued, "the Snowe-Jeffords amendment navigates the difficult political and constitutional shoals that face us in this debate."⁵¹ Turning to the amendment itself, let us examine how it "navigates the difficult political and constitutional shoals."

The Snowe-Jeffords amendment attempts to distinguish genuine "issue ads" from so-called *sham* "issue ads"—advertisements that, in reality, advocate the defeat or election of a candidate—by creating a new category of communications, defined as "electioneering communications." An electioneering communication is defined as (1) "any broadcast, cable, or satellite communication";⁵² (2) that "refers to a clearly identified candidate";⁵³ (3) within 60 days of a general election or 30 days of a primary election;⁵⁴ and (4) "is made to an audience that includes members of the electorate for

such an election."⁵⁵ Electioneering communications, however, do not include communications such as news stories, commentaries, or editorials distributed by a broadcast facility.⁵⁶ Nor does it prohibit any independent expenditures as defined under the FECA.⁵⁷ Thus, it would continue to allow independent expenditures, including those financed by the separate segregated funds of business corporations and labor unions.

The amendment only prohibits for-profit corporations, labor unions or any person on be-

⁴⁴ See *id.* at 662–65.

⁴⁵ See *id.*

⁴⁶ See *Florida Right to Life v. Lamar*, 238 F.3d 1288 (11th Cir. 2001); *Vermont Right to Life v. Sorrell*, 221 F.3d 376 (2nd Cir. 2000); *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997); *Maine Right to Life Comm. v. FEC*, 98 F.3d 1 (1st Cir. 1996) (per curiam).

⁴⁷ See *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987). *Furgatch* set up a three part test to determine express advocacy:

First, even if it is not presented in the clearest, most explicit language, speech is 'express' for the present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed 'advocacy' if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be 'express advocacy of election or defeat of a candidate' when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action. 807 F.2d at 864.

⁴⁸ 11 C.F.R. § 100.22 (2001). The FEC regulation contains *Buckley*'s magic words test as well as including an alternative test similar to the three part test found in the Ninth Circuit's *Furgatch* decision.

⁴⁹ See *Maine Right to Life Comm. v. FEC*, 98 F.3d 1 (1st Cir. 1996) (holding that the FEC exceeded its authority by including in its definition of express advocacy a reasonable person standard); see also, *FEC v. Christian Action Network*, 92 F.3d 1178 (4th Cir. 1997) (holding that in order to regulate a political communication, the communication must expressly advocate a clearly identified candidate through the use of express words); see also, *Vermont Right to Life Comm. v. Sorrell*, 216 F.3d 264 (2d Cir. 2000) (same).

⁵⁰ 144 CONG. REC. S. 27 (daily ed. Feb. 25, 1998) (statement of Russ Feingold) available at feingold.senate.gov/speeches/senfloor/022598speech.html.

⁵¹ *Id.*

⁵² S. 27 at § 201(f)(3)(A)(I).

⁵³ *Id.* at § 201(f)(3)(A)(I)(I).

⁵⁴ *Id.* at § 201(f)(3)(A)(I)(II).

⁵⁵ *Id.* at § 201(f)(3)(A)(I)(III).

⁵⁶ *Id.* at § 201(f)(3)(B).

⁵⁷ *Id.* at § 201(f)(3)(B)(ii).

half of a for-profit corporation or labor union from making disbursements for electioneering communications.⁵⁸ The amendment provides an exception for organizations that fall under sections 501(c)(4) or 527 (e)(I) of the Internal Revenue Code of 1986 (IRC), allowing such organizations to make disbursements for electioneering communications.⁵⁹

Although the Snowe-Jeffords amendment allows most nonprofit corporations and special interest groups to make electioneering communications, it requires such organizations that make "disbursement for electioneering communications in an aggregate amount in excess of \$10,000 during any calendar year" to disclose certain information to the Federal Election Commission (FEC) "within 24 hours of each disclosure date."⁶⁰ The amendment defines "disclosure date" as "the first date during any calendar year by which a person has made disbursements for electioneering communications aggregating in excess of \$10,000,"⁶¹ and as "any other date during such calendar year by which a person has made disbursements for electioneering communications aggregating in excess of \$10,000 since the most recent disclosure date for such calendar year."⁶² Under the amendment, nonprofit corporations and special interest groups would have to disclose in a statement to the FEC the following information within 24 hours of each disclosure date: (1) "[t]he identification of the person making the disbursement" or of the organization that directs or controls the activities of such person as well as the identification of the custodian charged with maintaining the financial records of the organization;⁶³ (2) "the principal place of business of such person, if not an individual";⁶⁴ (3) "[t]he amount of each disbursement of more than \$200 during the period covered by the statement and the identification of the person to whom the disbursement was made";⁶⁵ (4) the election that the electioneering communications pertains to and the name of the candidate that is identified or may be identified;⁶⁶ and (5) the name and address of each person who contributes to the organization an aggregate amount of at least \$1,000.⁶⁷

The amendment makes a further important distinction that applies to the disclosure requirements imposed on nonprofit corporations

and special interest groups. An organization that disburses funds out of a segregated bank account to which individuals contribute for the purpose of electioneering communications must report the names and addresses only of contributors of \$1,000 or more to that account.⁶⁸ On the other hand, an organization that does not disburse its funds from a segregated bank account must report the names and addresses of each individual who has contributed, within the preceding calendar year, an aggregate amount of \$1,000 or more to the organization.⁶⁹

The purpose of the amendment is to permit spending on genuine issue advertisements, while prohibiting "issue ads" that, in reality, advocate the election or defeat of a specific candidate. It does this by prohibiting for-profit corporations and labor unions from paying for any electioneering communications and requiring nonprofit corporations and special interest groups that engage in such electioneering communications to make certain disclosures to the FEC. Essentially, the Snowe-Jeffords amendment creates a new bright-line test, replacing the "magic words" test offered by the Court in *Buckley* with the definition of electioneering communications. Take, for example, the following hypothetical broadcast "issue advertisement" that a labor union might have paid

⁵⁸ *Id.* at § 203.

⁵⁹ S. 27 at § 203(c)(2).

⁶⁰ *Id.* at § 201(f)(1).

⁶¹ *Id.* at § 201(f)(4)(A).

⁶² *Id.* at § 201(f)(4)(B). A group making disbursement #1 for \$10,001 for an electioneering communication in any calendar year would trigger the disclosure requirement and would have to provide a statement to the FEC within 24 hours. If the same group made disbursement #2 for \$10,002 during the same calendar year for another electioneering communication, it would again trigger the disclosure requirement and would have to provide a statement to the FEC within 24 hours; however, if the same group made a disbursement of \$10,000, instead of \$10,002, it would not have to disclose a single thing relating to disbursement #2.

⁶³ *Id.* at § 201(f)(2)(A).

⁶⁴ *Id.* at § 201(f)(2)(B).

⁶⁵ *Id.* at § 201(f)(2)(C).

⁶⁶ *Id.* at § 201(f)(2)(D).

⁶⁷ *Id.* at § 201(f)(2)(E)-(F).

⁶⁸ *Id.* at § 201(f)(2)(E).

⁶⁹ *Id.* at § 201(f)(2)(F).

for during the final week of the 2000 Presidential election:

[Image of Al Gore debating George Bush.] Narrator: Al Gore believes in a worker's right to organize. He supports raising the minimum wage. [Image of Al Gore shaking hands with workers.] He cares about working families. Al Gore, supports a real Patients' Bill of Rights. Al Gore's record is pro-worker and pro-labor. This election day remember America's working families!⁷⁰

Current federal election law defines this type of broadcast advertisement as issue advocacy unregulated by FECA. In order for an advertisement to fall within the regulatory scheme of FECA, the advertisement must "expressly advocate" the election or defeat of a clearly identified candidate.⁷¹ The above hypothetical lacks any "magic words"; therefore, applying *Buckley* and its progeny, this advertisement is considered merely an issue advertisement, unregulated by FECA. While few could seriously deny that this "issue ad" clearly suggests that a vote for Al Gore is better than a vote for George Bush—especially for those concerned about workers' rights—it remains unregulated by federal election law.

Although the above advertisement is fictitious, such "issue ads" were common during the final months of the 2000 Federal elections. According to a report issued by the Brennan Center for Justice at New York University, groups spent a total of \$49 million on electioneering advertisements in 2000, as compared to \$10 million in 1998.⁷² Almost every "issue ad" sponsored by a group in 2000 and perceived by the researchers as an electioneering ad named a candidate, depicted a candidate's image or did both.⁷³ Of those "issue ads" that were perceived as electioneering advertisements, 86% depicted a candidate and aired within 60 days of the general election.⁷⁴ As the Brennan Center's Craig Holman noted, "when the 'magic words' test is applied to campaign advertisements in the real world, it has very little, if any, relevance in defining electioneering activity."⁷⁵ The majority of group-sponsored issue ads during the 2000 election contained no "magic

words"; yet the vast majority of these ads either promoted or attacked a candidate.⁷⁶

Under the Snowe-Jeffords amendment, the above hypothetical advertisement would constitute an "electioneering communication." The advertisement meets the definition of an "electioneering communication" since it was broadcast on television;⁷⁷ it clearly identified the candidate by mentioning his name or depicting his image;⁷⁸ it aired within 60 days of the general election; and it was broadcast to the candidate's general constituency.⁷⁹ Thus, the amendment would bar funds provided by a for-profit corporation or labor union from paying for an advertisement like our hypothetical.

Take a look at another example of a broadcast advertisement paid for by a special interest group calling itself Republicans for Clean Air. This real advertisement ran within days of the 2000 Ohio presidential primary election:

Last year, John McCain voted against solar and renewable energy. That means more use of coal-burning plants that pollute our air. Ohio Republicans care about clean air. So does Governor Bush. He led one of the first states in America to clamp down on old coal-burning electric power plants. Bush's clear air laws will reduce air pollution more than a quarter million tons a year. That's like taking 5 million cars off

⁷⁰ While this advertisement is fictitious, labor unions ran similar "issue ads" in the 2000 election, spending at least \$29 million in soft money. See Ronald Nehring, "Campaign Finance Reform," *Soft Money and Union Activism: Why McCain-Feingold Won't Reform Unions' Political Spending*, Labor Watch 4 (April 2001) (citing data compiled by the Center for Responsive Politics) available at www.capitalresearch.org/LaborWatch/1w-0401.htm.

⁷¹ See *Buckley*, 424 U.S. at 44, 79–80.

⁷² CRAIG P. HOLMAN & LUKE P. MCLAUGHLIN, BRENNAN CENTER FOR JUSTICE, *BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FED. ELECTIONS* (2000).

⁷³ See CRAIG B. HOLMAN, BRENNAN CTR. FOR JUSTICE, *A NARROW AND APPROPRIATE RESPONSE TO CLOAKED ELECTIONEERING: MEASURING THE IMPACT OF THE 60-DAY BRIGHT-LINE TEST ON ISSUE ADVOCACY* 4 (2000).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See HOLMAN & MCLAUGHLIN, *supra* note 72.

⁷⁷ S. 27 at § 201(f)(3)(A)(I)(I).

⁷⁸ *Id.* at § 201(f)(3)(A)(I)(II)(a).

⁷⁹ *Id.* at § 201(f)(3)(A)(I)(III).

the road. Governor Bush, leading, for each day dawns brighter.⁸⁰

The voters of Ohio were unaware that this advertisement was actually personally paid for by two of then-candidate George W. Bush's wealthy Texas friends.⁸¹ Under current federal election law, this "issue ad" was unregulated, since it used no magic words that expressly advocate a clearly identified candidate.

In contrast to current federal election law, the Snowe-Jeffords amendment would place broadcast advertisements, such as the advertisements sponsored by the Republicans for Clean Air, under federal regulation. The advertisement meets the definition of an "electioneering communication" since it was broadcast on television;⁸² it clearly identified the candidate by mentioning his name or depicting his image;⁸³ it aired within 30 days of the primary election;⁸⁴ and it was broadcast to the candidate's general constituency.⁸⁵ While Snowe-Jeffords does not prohibit nonprofit corporations or special interest groups from paying for such advertisements, it would require such organizations to disclose their large contributors.⁸⁶

The scope of the disclosure requirement would also depend on whether the advertisement was paid through a segregated account or not. If the funds were disbursed from a segregated account, then the Republicans for Clean Air would have to disclose only the names and addresses of those individuals who contributed an aggregate amount of at least \$1,000 to the segregated account within the year preceding the communication.⁸⁷ However, if the funds were not disbursed from a segregated account, then the Republicans for Clean Air would have to disclose the names and addresses of all of the organization's contributors who contributed an aggregate amount of at least \$1,000 within the preceding year.⁸⁸

The final version of McCain-Feingold passed by the Senate also contained the Wellstone amendment. That amendment extends the prohibitions against for-profit corporations and labor unions from paying for electioneering communications to nonprofit corporations and special interest groups in cases of "targeted communications."⁸⁹ A "targeted communica-

tion" is defined as an electioneering communication "distributed from a television or radio broadcast station or provider of cable and satellite services" to an audience consisting "primarily of residents of the State for which the clearly identified candidate is seeking office."⁹⁰ If McCain-Feingold with the Wellstone amendment became law, it would also prohibit special interest groups like the Republicans for Clean Air from paying for targeted communications.

CONSTITUTIONAL ANALYSIS

In a letter to Senator Mitch McConnell, the American Civil Liberties Union warned that "the Snowe-Jeffords amendment [] embodies the kind of unprecedented restraint on issue advocacy that violates bedrock First Amendment principles."⁹¹ Scott Bullock, a lawyer with the Institute for Justice, predicted that the amendment would "go down in flames" because "[r]estricting political speech during an arbitrary time before the election is a clear violation of the 1st Amendment."⁹² Similarly, a report written by James Bopp, Jr., and issued by the James Madison Center for Free Speech argues that "there is no constitutional warrant for Congress to regulate issue advocacy or the organizations that primarily engage in it. Period."⁹³

⁸⁰ See HOLMAN & McLAUGHLIN, *supra* note 72.

⁸¹ *Id.*

⁸² S. 27 at § 201(f)(3)(A)(I).

⁸³ *Id.* at § 201(f)(3)(A)(I)(I).

⁸⁴ *Id.* at § 201(f)(3)(A)(I)(II)(bb).

⁸⁵ *Id.* at § 201(f)(3)(A)(I)(III).

⁸⁶ *Id.* at § 203(c)(2); see also *id.* at § 201(f)(2)(E)-(F).

⁸⁷ *Id.* at § 201(f)(2)(E).

⁸⁸ *Id.* at § 201(f)(2)(F).

⁸⁹ *Id.* at § 204(6)(A). There seems to be some disagreement with my reading of Wellstone. See, e.g., discussion in N. Persily, "Soft Money and Slippery Slopes," *ELECTION L.J.* 405, 412 (2002).

⁹⁰ *Id.* at § 204(6)(B).

⁹¹ Letter from Laura W. Murphy & Joel Gora, ACLU, to Mitch McConnell, U.S. Senator, 3 (Feb. 23, 1998) available at www.aclu.org/congress/l021998a.html.

⁹² Matthew Robinson, *New McCain Bill Violates 1st Amendment*, Human Events, Jan. 29, 2001 at <http://human-eventsonline.com/articles/01-29-01/robinson.html>. (quoting Scott Bullock) (internal quotation marks omitted).

⁹³ JAMES BOPP, JR., "McCain-Feingold": ANALYSIS OF S. 27 AS PASSED BY THE SENATE, 10 (2001).

Generally, opponents of the amendment present two constitutional arguments against Snowe-Jeffords. First, that the amendment violates the First Amendment because it restricts political speech.⁹⁴ Second, that it violates an individual's fundamental right of association because it requires nonprofit corporations and special interest groups which engage in electioneering communications to disclose the names and addresses of their contributors.⁹⁵ The amendment does contemplate the possibility that the Court will strike it down as unconstitutional; in that case, it contains an alternative provision that assertedly provides a narrower definition of electioneering communications.⁹⁶ Let us examine and evaluate the two principal constitutional arguments against the amendment.

Opponents of the Snowe-Jeffords amendment argue that the amendment unconstitutionally prohibits political speech.⁹⁷ Bopp notes that the Court in *Buckley* afforded broad protection to issue advocacy.⁹⁸ In order to protect issue advocacy, the Court developed a bright-line test to distinguish between advertisements that expressly advocate a candidate and advertisements that merely advocate an issue.⁹⁹ Campaign advertisements that do not "expressly advocate[] the defeat or election of a clearly identified candidate" fall outside the realm of federal campaign finance laws.¹⁰⁰ To meet the "exacting scrutiny" of the Court, the Snowe-Jeffords amendment must clearly and narrowly define the term "electioneering communications" in order to protect genuine issue advocacy.

While critics like Bopp suggest that *Buckley* allows the government to "only regulate a communication that 'expressly advocates the election or defeat of a clearly identified candidate' ('express advocacy'), by 'explicit words' or 'in express terms,' such as 'vote for,' 'support,' or 'defeat,'"¹⁰¹ they fail to acknowledge that *Buckley* does not prohibit Congress from formulating a new bright-line test designed to regulate communications that clearly advocate the election or defeat of a candidate for federal office.¹⁰² Provided, of course, that the creation of a new bright-line test does not restrict advertisements that merely advocate an issue. In fact, the Court in *Buckley* expressly held that Congress could

regulate communications that clearly advocated an electoral result, so long as the law was neither vague nor over broad.

The Court fashioned its bright-line test in *Buckley* out of concern for the vagueness and overbreadth of the original FECA.¹⁰³ First, the Court expressed concern that the vagueness of

⁹⁴ See *id.* at 7; Taylor, Jr., *supra* note 10; Robinson, *supra* note 92.

⁹⁵ See BOPP, JR., *supra* note 93, at 8.

⁹⁶ S.27 at § 201(f)(3)(A)(ii): "an electioneering communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." If anything, this alternative provision seems vaguer and even more susceptible to constitutional objection than the definition for which it would substitute.

⁹⁷ See BOPP, JR., *supra* note 93, at 7.

⁹⁸ See BOPP, JR., *supra* note 93, at 12 (arguing that "the Court concluded that issue advocacy was constitutionally sacrosanct.").

⁹⁹ See *id.*

¹⁰⁰ *Buckley*, 424 U.S. at 43-4.

¹⁰¹ BOPP, JR., *supra* note 93, at 10 (emphasis added); see also, Testimony of Bradley A. Smith, Associate Professor of Law, Capital University Law School, Adjunct Scholar, Cato Institute, before the Committee on the Judiciary, Subcommittee on the Constitution, United States House of Representatives (Feb. 27, 1997) ("under the Supreme Court's ruling in *Buckley v. Valeo*, Congress may not, constitutionally, restrict individual or group expenditures that do not include explicit words of advocacy of election or defeat of a candidate.") (emphasis added) (internal quotation marks omitted) at www.cato.org/testimony/ctbs022797.html; see also, Joel Gora, *Buckley V. Valeo: A Landmark of Political Freedom* 33 Akron L. Rev. 7, 29 (1999) ("The [express advocacy] doctrine provides a bright-line, objective test that protects political speech by focusing solely on the content of the speaker's words, not the motive in the speaker's mind or the impact on the speaker's audience, or the proximity of the election, or the phase of the moon.") (emphasis added). *But cf.* Testimony of Glenn J. Moramarco, Senior Attorney, Brennan Center for Justice at NYU before the House Committee on the Judiciary, Constitution Subcommittee on Constitutional Issues Raised by Recent Campaign Finance Legislation (June 12, 2001) ("We are now in a world where everyone has become accustomed to thinking that it is not electioneering unless the speaker utters a 'magic word'—like 'vote for,' 'vote against,' 'elect,' or 'defeat.'") at www.house.gov/judiciary/moramarco_061201.htm.

¹⁰² See Testimony of Glenn J. Moramarco, *supra* note 101 ("the Court never said that no legislature could ever devise alternate language that would be both sufficiently narrow and sufficiently precise.").

¹⁰³ *Buckley*, 424 U.S. at 41-3.

the statute's prohibition against expenditures "relative to a clearly identified candidate" and "for the purpose of influencing an election" might stifle political speech.¹⁰⁴ The Court reasoned that those who wished to engage in protected speech might instead censor their speech out of fear that they were engaging in illegal communications.¹⁰⁵ Second, the Court expressed concern that FECA was overly broad and might be used to punish protected speech as well as speech that clearly advocated the defeat or election of federal candidate.¹⁰⁶ In order to constitutionally shield the FECA from its vagueness and overbreadth concerns, the Court devised, as one possibility, its express advocacy bright-line test.

Proponents of the Snowe-Jeffords amendment argue that the amendment clearly and narrowly defines electioneering communications—addressing the two main concerns of the Court in *Buckley*. Indeed, it is hard to imagine a sponsor of a broadcast advertisement having difficulty determining whether its advertisement meets the test for an electioneering communication. For instance, a sponsor of an advertisement will know if its advertisement names a candidate or depicts a candidate's image, or whether it is running the advertisement within 30 days of a primary election or 60 days within a general election. Thus, it is unlikely that an organization which sponsors a political advertisement would censor its own political speech out of fear of violating federal election law. Moreover, the amendment does not prohibit speech. A member of a corporation or labor union choosing to do so could make independent expenditures, or speak publicly in support of a candidate, as could corporate and union PACs.

Likewise, the amendment narrowly defines electioneering communications so that it allows the broadcast of genuine issue ads and would only prohibit *sham* issue ads that, in reality, advocate the defeat or election of a candidate. According to the study by the Brennan Center, application of the Snowe-Jeffords bright-line test to political advertisements depicting a candidate and paid for by nonprofit corporations and special interest groups within 60 days of a general election captured 99.4 per cent of the issue ads it found in its survey.¹⁰⁷ Only 0.6 per

cent of the advertisements which would have been captured by the Snowe-Jeffords amendment were found by the researchers to be genuine issue ads.¹⁰⁸ That number of protected communications captured by the provision would seem to be *de minimis*, particularly since the only consequence would be a fairly minimal reporting requirement. Thus, the Snowe-Jeffords amendment should satisfy the Court's overbreadth concern. The Snowe-Jeffords amendment is clearly and narrowly crafted, while closing what proponents of the amendment perceive as a major loophole that allows for-profit corporations and labor unions to engage in advertisements that do not employ a single "magic word" but are, nevertheless, designed to advocate the defeat or election of a federal candidate. The empirical evidence of the 2000 election proves exactly this point, highlighting the ineffectiveness of the "magic words" test.¹⁰⁹ The Brennan Center report further found that only 10% of advertisements paid for by *candidates'* own campaigns, which under current federal election law are defined as electioneering, actually used any of the magic words listed in footnote 52 of *Buckley*,¹¹⁰ further demonstrating that the use (or nonuse) of "magic words" is irrelevant to the effectiveness of television advertisements as tools for electioneering. The only significant impact of the Snowe-Jeffords amendment would be to prohibit hypocritical evasions of an otherwise valid law.

Even more importantly, *Buckley* never addressed the authority of Congress to regulate electoral communications in a regime that permitted unlimited independent expenditures. Since the Court held that independent expenditures could not be limited in amount under any circumstances,¹¹¹ it had no occasion to think seriously about permissible regulation of such expenditures. Thus, its entire discussion

¹⁰⁴ *Id.*

¹⁰⁵ *See id.* at 41, fn. 48.

¹⁰⁶ *See id.* at 79–80.

¹⁰⁷ HOLMAN, *supra* note 73, at 4.

¹⁰⁸ *Id.*

¹⁰⁹ HOLMAN & McLAUGHLIN, *supra* note 72.

¹¹⁰ *Id.*

¹¹¹ *See Buckley*, 424 U.S. at 44–8.

of "magic words" and express advocacy was superfluous. Which is not to suggest that the Court's discussion can be totally ignored. Obviously, it provides persuasive authority when analyzing otherwise vague restrictions on speech. But it does surely permit a fresh look at the issue when we are talking not about forbidding expenditures (in excess of \$1,000), but regulating allowable expenditures. For example, the scheme considered in *Buckley* presumed that groups would be totally forbidden from spending more than \$1,000 on "issue advocacy" communications if "express advocacy" were to be interpreted too broadly. Once the ceiling on independent expenditures was removed, the consequence of excess expenditures on such communications would be to restrict funding of such messages by business corporations and unions to their separate segregation funds, and to require certain disclosure of funding sources.

The truth is that the most vociferous opponents of the Snowe-Jeffords amendment are really opposed to any restraints on independent expenditures from corporations and union treasuries. Having lost the battle over contribution limits in *Buckley*, they thought they had snared victory from the jaws of defeat with the advent of *issue advocacy*. They now use the rhetorical device of "magic words" in what should be a vain effort to preserve that loophole.

Opponents also question the constitutionality of the amendment's disclosure requirement.¹¹² To require groups to disclose their contributors, argue opponents of the amendment, violates the fundamental right of association.¹¹³ Critics fear that the disclosure requirement for nonprofit corporations and special interest groups under the amendment would effectively require groups to turn over their membership lists to the government.¹¹⁴ Fearing harassment, intimidation or retaliation for associating with an unpopular group, an individual might choose not to contribute or, even, belong to such a group, especially if that group must then turn over to the government a list of all members who have contributed financially.¹¹⁵ Joel Gora, professor of law at Brooklyn Law School, argues "[d]isclosure alone would be a prohibitive barrier to even slightly controversial groups."¹¹⁶

Critics of the disclosure requirements cite *NAACP v. Alabama*,¹¹⁷ as proof that the Supreme Court, if given the opportunity, would declare the disclosure requirements under the Snowe-Jeffords amendment facially unconstitutional.¹¹⁸ In *NAACP v. Alabama*, a case unrelated to election law, the Court reviewed a judicial order obtained by the State of Alabama, requiring the National Association for the Advancement of Colored People (NAACP) to turn over its membership list to the State.¹¹⁹ The Court concluded that requiring the NAACP to turn over its membership list might result in deterring members of the NAACP from exercising their constitutional right to association; and without a compelling government reason, the Court would not require the NAACP to disclose its members to the State of Alabama.¹²⁰

The disclosure requirement under Snowe-Jeffords involves a different issue than the one decided by the Court in *NAACP v. Alabama*. The Snowe-Jeffords amendment requires nonprofit corporations and special interest groups to disclose only the names and addresses of donors who contribute a substantial amount to an electioneering communication; it does not require, as critics suggest, that those organizations turn over their entire membership list (or even contributor list) to the government.¹²¹ An organization that spends more than \$10,000 on electioneering communications must disclose only the names and addresses of donors who contribute \$1,000 or more.¹²² Moreover, the disclosure requirement does not apply to an organization that spends \$10,000 or less on electioneering communications, and would not require it to disclose a single name and address.¹²³ And an organization, if it chose to,

¹¹² See BOPP, JR., *supra* note 93, at 8.

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See Taylor, Jr., *supra* note 10.

¹¹⁶ *Id.* (quoting Joel Gora) (internal quotation marks omitted).

¹¹⁷ 357 U.S. 449 (1958).

¹¹⁸ See Bopp, Jr., *supra* note 93, at 8.

¹¹⁹ *NAACP*, 357 U.S. at 451.

¹²⁰ *Id.* at 466.

¹²¹ S. 27 at § 201(f)(2)(E)-(F).

¹²² *Id.* at § 201(f)(2)(E)-(F).

¹²³ *Id.* at § 201(f)(1).

could set up a separate segregated bank account for electioneering communications.¹²⁴ If an organization chooses to set up a segregated account, then it must disclose only the names and addresses of those individuals who have contributed at least \$1,000 or more to that account.¹²⁵ The disclosure requirement of *Snowe-Jeffords* does not require nonprofit corporations and special interest groups to turn over membership lists to the government. The sole function of the disclosure requirement is to prevent individuals from hiding "behind the cloak of anonymity while making huge, de facto campaign contributions in the form of issue ads."¹²⁶

Since *Buckley*, the Court has heard several cases involving election-related disclosure requirements.¹²⁷ In *McIntyre v. Ohio Elections Commission*,¹²⁸ the Court further defined the general rule regarding disclosure requirements.¹²⁹ It struck down an Ohio provision that prohibited distribution of anonymous campaign literature, requiring the disclosure of the name of the author on the material.¹³⁰ The Court concluded that the ban on anonymous campaign literature did not serve the State's asserted interest in preventing fraud and libel, since a number of other state regulations already served that purpose, and the regulation was not narrowly tailored to serve those interests.¹³¹

The *McIntyre* Court distinguished its opinion from *Buckley* because it rested on "different and less powerful" state interests than the disclosure requirements at issue in *Buckley*.¹³² In *Buckley*, the Court identified "three 'sufficiently important' government interests" that the disclosure requirements in FECA could serve.¹³³ First, the Court recognized that the disclosure requirements may serve an "anticorruption interest."¹³⁴ Second, the Court recognized that the disclosure requirements may serve an "information interest" by disclosing to the electorate the "sources of a candidate's financial support" because it alerts the electorate "to the interests to which a candidate is most likely to be responsive and thus facilitates predictions of future performance in office."¹³⁵ Finally, the Court recognized that the disclosure requirements may serve an "enforcement interest" because the requirements enforce other campaign regulations.¹³⁶

In the *McIntyre* situation, the Court explained, the *Buckley* analysis had no relevance to "the kind of independent activity" engaged in by a lone pamphleteer.¹³⁷ The "anticorruption interest" did not justify Ohio's disclosure requirement since *McIntyre* involved an incorruptible school referendum, while *Buckley* reached potentially corruptible candidates.¹³⁸ Nor did the "enforcement interest" justify Ohio's disclosure requirement, since Ohio could have enforced its other campaign regulations without compelling the disclosure of a lone pamphleteer.¹³⁹ That left the Court with only one other possibility—that is, justifying Ohio's disclosure requirement because it served an "information interest." The *McIntyre* Court held that an "information interest" alone did not justify the Ohio disclosure requirement.¹⁴⁰

McIntyre involved a different situation than *Buckley*. At issue in *McIntyre* was the disclosure of a lone pamphleteer involved in a small, local election, whereas *Buckley* "concerned [the] mandatory disclosure of campaign-related expenditures"¹⁴¹ relating to expensive and costly

¹²⁴ *Id.* at § 201(f)(2)(E).

¹²⁵ *Id.*

¹²⁶ Taylor, Jr., *supra* note 10.

¹²⁷ See *Buckley v. American Constitutional Law Found.*, 525 U.S. 182 (1999) (finding that state disclosure statute requiring monthly disclosures of the names, addresses and amounts paid to professional petition-circulars unconstitutional); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (finding that state disclosure statute unconstitutionally applied to a minority political group which had suffered harassment and discrimination in the past).

¹²⁸ 514 U.S. 334 (1995).

¹²⁹ See *id.* at 355–6.

¹³⁰ *Id.* at 338, fn. 3.

¹³¹ *Id.* at 349–53, 357.

¹³² *Id.* at 356.

¹³³ Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. Rev. 265, 270, 273 (2000) (quoting *Buckley*, 424 U.S. at 66).

¹³⁴ *Buckley*, 424 U.S. at 67; see also, Hasen, *supra* note 133, at 270.

¹³⁵ *Id.*; see also Hasen, *supra* note 133, at 270.

¹³⁶ *Buckley*, 424 U.S. at 67–8; see also Hasen, *supra* note 145, at 270.

¹³⁷ *McIntyre*, 514 U.S. at 354.

¹³⁸ Hasen, *supra* note 133, at 272–3.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *McIntyre*, 514 U.S. at 353.

federal candidate elections. Moreover, the Court in *Buckley* "construed 'independent expenditures' to mean only those expenditures that 'expressly advocate the election or defeat of a clearly identified candidate.'"¹⁴² To the contrary, the Ohio code regulated a broad range of activity without a compelling government interest. The Court, in *McIntyre*, recognized that *Buckley* may "permit a more narrowly drawn statute."¹⁴³

Indeed, *Buckley* seems to leave little room for objection to the Snowe-Jeffords disclosure requirements. It held that so long as "independent expenditures" applied only to express advocacy communications, the same considerations that supported constitutionality of the restrictions themselves supported the disclosure provisions. The Court found the "informational interest" underlying disclosure provided a compelling interest in that "it increases the fund of information concerning those who support the candidates" and "helps voters to define more of the candidates" constituencies."¹⁴⁴

While Snowe-Jeffords should easily pass constitutional muster, the Wellstone Amendment is highly problematic in extending the prohibition against electioneering expenditures to all nonprofit corporations and special interest groups. While the Court in *Austin* upheld similar restrictions against the Michigan Chamber of Commerce, it did so on the basis that the Chamber did not meet the three-part test for exemption under MCFL. The Wellstone Amendment eliminates the distinction between MCFL and non-MCFL corporations.

It is difficult to imagine how the Court could uphold the Wellstone Amendment without overruling MCFL, since the very purpose of the Wellstone Amendment is to apply the same standard to exempt and nonexempt corporations. However, overruling MCFL is a distinct possibility. The constitutional distinction between MCFL and *Austin* is an artifact of the populist jurisprudence of the late Justices Brennan and Marshall, who switched sides in the two cases. In *Austin*, Brennan and Marshall joined with four other members of the Court to uphold Congressional power to restrict electioneering expenditures funded out of corporate treasuries. But in MCFL, Brennan and Mar-

shall joined three other free-speech advocates on the Court to hold that such restrictions could not be applied to ideological corporations. It is quite conceivable that a present Court majority would reconcile the two positions by either allowing unfettered spending by all corporations or removing the MCFL exemption, thus upholding the Wellstone Amendment. Only time will tell.

CONCLUSION

The Snowe-Jeffords amendment redefines the *Buckley* Court's bright-line test. Opponents of the amendment have attempted to elevate the *Buckley* Court's "magic words" test specified in footnote 52 beyond *dicta*. There is no reason to believe that the Court intended footnote 52 to be the final word; it did leave it open for Congress to create another test to distinguish between express and issue advocacy, so long as it was neither vague nor overbroad, especially in a changed regime which allows unlimited independent expenditures. Nothing in the *Buckley* decision prohibits Congress from crafting a new bright-line test. The Snowe-Jeffords amendment is an attempt by Congress to do just that.

In order for the Snowe-Jeffords amendment to pass the Court's exacting scrutiny, it must satisfy the Court's two main concerns: vagueness and overbreadth. Snowe-Jeffords' bright-line test clearly satisfies the vagueness problem. Overbreadth presents a slightly tougher hurdle, since the Snowe-Jeffords' test would still capture a small percentage of genuine issue advertisements. For example, a genuine issue ad supporting (or opposing) the McCain-Feingold bill would presumably run afoul if broadcast in Arizona or Wisconsin 60 days prior to an election in which the bill's sponsors were running for reelection. But such problems would appear to be so *de minimus* as to fall below the constitutional radar screen; and if the ad were sponsored by a nonprofit, the only

¹⁴² *Id.* (quoting *Buckley*, 424 U.S. at 80).

¹⁴³ *Id.*

¹⁴⁴ 424 U.S. at 81.

detriment would be a requirement to identify persons who contributed more than \$1,000 to its dissemination.

Thus, based on existing precedent, the Snowe-Jeffords provision of a campaign finance bill should be upheld. On the other hand, in the area of campaign finance regulation, judicial opinion appears to be in such flux, that any prediction is risky, and any new appointments to the United States Supreme

Court could easily change the constitutional balance.

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