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Issue Advocacy: Redrawing the Elections/Politics Line

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I. The Issue Advocacy Problem

In the closing weeks of the 1996 election, Montana's airwaves were flooded with the following television advertisement:

> Who is Bill Yellowtail? He preaches family values, but he took a swing at his wife. Yellowtail's explanation? He 'only slapped her,' but her nose was broken. He talks law and order, but is himself a convicted criminal. And though he talks about protecting children, Yellowtail failed to make his own child support payments, then voted against child support enforcement. Call Bill Yellowtail and tell him we don't approve of his wrongful behavior. Call (406) 443-3620.[1]

The anti-Yellowtail ad, financed by an organization cryptically named Citizens for Reform,[2] was a classic instance of contemporary "issue advocacy." It was an issue ad not because it discussed any issues, but because it avoided "express advocacy" of either Democrat Yellowtail's defeat or the election of Rick Hill, Yellowtail's Republican opponent, in the race for Montana's seat in the House of Representatives. The ad featured harsh criticism of Yellowtail by name, was broadcast on the eve

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1. The quotation in text is actually a composite from several sources. The principal source is Public Citizen, *Phony 'Issue Ads': The Newest Loophole* (visited May 11, 1999) <http://www.citizen.org/congress/reform/issue_ads.htm>. The Public Citizen statement quotes the ad as stating "her nose was *not* broken" (emphasis added). In other sources, the ad states "her nose *was* broken" (emphasis added). *See, e.g.*, Joe Lieberman, *Tax-Exempt Groups Abused Spirit, Letter of Law in '96 Elections* (last modified Feb. 9, 1998) <http://www.senate.gov/~lieberman/s020998a.html>; *Will Closing a Campaign Finance Loophole Strangle Nonprofit Issue Advocacy?*, RESPONSIVE PHILANTHROPY (Nat'l Comm. for Responsive Philanthropy Quarterly, visited May 11, 1999), <http://www.ncrp.org/articles/rp/campfinref.htm>. The latter reading makes more sense and I have amended the Public Citizen quotation accordingly.

2. *See* DEBORAH BECK ET AL., ISSUE ADVOCACY ADVERTISING DURING THE 1996 CAMPAIGN 22 (1997).

of the election, and was paid for by an organization that spent $2 million supporting Republican candidates in elections across the country.[3] The ad contained an electioneering message but, because it carefully refrained from any call to vote against Yellowtail or for Hill, the ad fell short of express advocacy and was, instead, an issue ad. As a result, it was exempt from regulation under the Federal Election Campaign Act[4] (FECA)—even the provisions requiring the sponsor to disclose who paid for the ad.

The world of campaign finance regulation has conventionally been divided into two parts—contributions and expenditures. But in today's world the contribution/expenditure distinction increasingly pales in significance when compared to the difference between campaign contributions and expenditures on the one hand and issue advocacy on the other. Contributions and expenditures are both subject to reporting and disclosure requirements,[5] and contributions and expenditures by business corporations and labor unions may be prohibited.[6] By contrast, reporting and disclosure laws do not apply to issue advocacy campaigns, and there is no restriction on corporate or union issue advocacy.[7] Moreover, although contributions to candidates, political parties, and organizations that make contributions to candidates may be subject to dollar limitations, contributions for issue advocacy may not be subject to such limits.[8] A federal district court even held recently that the statutory ban on campaign contributions by foreign nationals does not apply to contributions for issue ad campaigns.[9]

Issue advocacy, like soft money, is campaign activity that is beyond the scope of federal regulation. Soft money and issue advocacy are often intertwined, and soft money pays for much of the issue advocacy undertaken by political parties.[10] But whereas the soft money exemption

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3. *See id.* at 22 (noting that Citizens for Reform ran advertisements opposing Democratic candidates like Bill Yellowtail in 15 congressional districts).

4. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

5. *See* 2 U.S.C. § 434 (1994) (detailing reporting and disclosure requirements); 2 U.S.C. § 431(9)(A) (1994) (defining "expenditure"); 2 U.S.C. § 431(8)(A) (1994) (explaining the term "contribution").

6. *See* 2 U.S.C. § 441b (1994) (prohibiting national banks, corporations, and labor unions from making contributions in connection with elections).

7. *See* Buckley v. Valeo, 424 U.S. 1, 39-44, 78-80 (1976) (construing the requirements and restrictions in the FECA to apply to express advocacy only).

8. *See id.* at 42-44 (exempting those expenditures made for issue discussion or advocacy of a political result from FECA restrictions).

9. *See* David Johnston, *Ruling May Hurt Campaign Finance Cases*, N.Y. TIMES, Oct. 11, 1998, at A27 (citing Judge Paul L. Friedman's pretrial ruling in the federal prosecution of "important Democratic fund-raiser" Yah Lin Trie that "the statute does not on its face . . . proscribe soft money by foreign nationals").

10. *See* ELIZABETH DREW, WHATEVER IT TAKES: THE REAL STRUGGLE FOR POLITICAL POWER IN AMERICA 116-18, 186 (rev. ed. 1998) (describing how the National Republican Congressional Committee used soft money to fund various issue advocacy ads).

is largely the product of legislative and administrative action,[11] the exclusion of issue advocacy from regulation is a matter of constitutional interpretation.[12]

The express advocacy/issue advocacy distinction grows out of the need to draw a line between *election campaign* spending and *general political* spending. Such a line is needed so long as we operate under a constitutional regime which simultaneously (i) protects political speech from government regulation; (ii) treats political spending as a form of political speech; but (iii) permits regulation of political spending that is election related.

These three characteristics define the present campaign finance regime under *Buckley v. Valeo*.[13] But they would also frame campaign finance regulation under either of the principal alternatives to *Buckley*. If the Constitution were reinterpreted—or amended—to permit greater regulation of election-related speech, to justify regulation in terms of the egalitarian values dismissed in *Buckley*, and to permit limitations on expenditures by candidates and by independent committees, there would still be a need to determine what is an election-related expenditure and what is not. By the same token, if the Constitution were reinterpreted to elevate contributions to the status of expenditures, to invalidate all dollar limitations on campaign finance practices, and to rely exclusively on disclosure laws to guard against corruption or undue influence,[14] it would still be necessary to determine what constitutes the election-related activity that could be subject to disclosure requirements.

Drawing a line between elections and politics is, in some sense, logically and practically impossible. Elections are—or ought to be—about political issues and ideas; politics, in turn, is often focused on elections. Election-related speech will typically refer to political issues, and political speech will frequently refer to elected officials or candidates for office. The *Buckley* Court put it well:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in

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11. *See generally* Note, *Soft Money: The Current Rules and the Case for Reform*, 111 HARV. L. REV. 1323, 1324-28 (1998). It has, however, been argued that soft money contributions to a political party for an issue advocacy campaign enjoy the same constitutional protection as issue advocacy itself. *See* Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179, 196-99 (1998).

12. *See supra* note 7 and accompanying text.

13. *See Buckley*, 424 U.S. at 14, 16-19, 23, 29.

14. Justice Thomas has suggested eliminating the distinction in the First Amendment status of expenditures and contributions. *See* Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 635-44 (1996) (Thomas, J., concurring in the judgment and dissenting in part) (calling for strict scrutiny review of both restrictions and contributions); *see also* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 688-89 (1997) (arguing for a campaign finance regulatory regime limited to disclosure).

> practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.[15]

Yet, even the weakest form of campaign finance regulation necessarily requires that a distinction be made between election-related spending and other political spending.

To say that we need to draw a line between elections and politics does not, of course, tell us where that line should be. In *Buckley*, the Supreme Court drew a distinction between express advocacy and other political activity now known as issue advocacy. Under *Buckley*, only "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate" may be subject to regulation.[16] By way of example, a footnote in *Buckley* listed "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject'" as a non-exhaustive list of examples of "express words of advocacy."[17]

Buckley's express advocacy test appears to reflect three concerns. First, despite, or perhaps, because of the close connection between elections and politics, the Supreme Court sought a standard that clearly distinguishes election-related spending from other political spending. To avoid vagueness and the chilling effect on political speech that can result from vague regulation, *Buckley* requires the definition of election-related speech to be sharply drawn.

Second, the Court seemed worried about unwelcome administrative or judicial probing of the intentions of speakers. Extensive intrusion into the internal communications of an organization or the inner workings of a speaker's mind to determine whether the speaker intended to influence an election would raise serious First Amendment problems. *Buckley* instead grounded its standard on the content of the communication.[18] Whether a message is campaign related must be assessed according to its words.

Third, the Court's definition of election-related speech appears intended to maximize the protection of general political speech and to minimize the degree to which election regulation may trench on political speech. Election-related speech must be defined narrowly—even though this will enable some election-related speech to evade regulation—in order to assure that general political speech is not restricted.

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15. *Buckley*, 424 U.S. at 42.
16. *Id.* at 44, 79-80.
17. *Id.* at 44 n.52.
18. *Id.* at 43-44.

The Supreme Court has given only minimal attention to the definition of election-related spending since *Buckley*.[19] The lower federal courts have, for the most part, assumed that the First Amendment prohibits any attempt to regulate political spending that refrains from using *Buckley*'s "magic words" of express advocacy.[20] This has enabled sophisticated political players to effectively evade many campaign finance regulations, including the prohibitions on contributions and expenditures from corporate and union treasury funds, the dollar limits on individual contributions, and reporting and disclosure requirements.

This Article offers an alternative definition of election-related activity that addresses both the practical realities of contemporary political campaigns and the free speech concerns that worried the Court in *Buckley*. In Part II, I recount how the express advocacy doctrine evolved and consider its impact on campaign finance regulation. In Part III, I examine the constitutional values that have justified the regulation of elections and the implications from the law of elections for the regulation of election-related speech. Finally, in Part IV, I present and defend a definition of election-related speech that respects both the First Amendment—particularly the three concerns that seemed to move the Supreme Court in *Buckley*—and the values the Court has recognized that justify campaign finance regulation.

II. The Current Doctrine and Its Consequences

The Supreme Court has considered the meaning of express advocacy only once since *Buckley*. In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*,[21] decided ten years after *Buckley*, the Court examined the "special edition" of an anti-abortion group's newsletter, which listed state and federal candidates contesting an upcoming primary, identified the candidates' positions on three litmus test issues, provided photographs of those with one hundred percent favorable voting records but not of other candidates, and exhorted readers to vote for anti-abortion candidates.[22] The Court concluded that the Special Edition constituted express advocacy.[23] The newsletter never explicitly called for votes for a particular candidate, but it could not "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)

19. *See infra* text accompanying notes 22-28.
20. *See infra* text accompanying notes 29-61.
21. 479 U.S. 238 (1986).
22. *Id.* at 243-44.
23. *Id.* at 249.

candidates."[24] *Massachusetts Citizens for Life, Inc.*, thus, modestly broadened *Buckley*'s definition of what constitutes express advocacy,[25] but the case is consistent with *Buckley* in relying exclusively on a close examination of the content of the message[26] and, especially, on the presence of exhortations to vote for clearly identified candidates.[27]

Most of the lower federal courts that have considered the question have adopted very restrictive definitions of express advocacy.[28] This tendency is nicely illustrated by the decisions in *Federal Election Commission v. Christian Action Network*.[29] That case considered a 1992 television advertisement that (as described by the district court) referred to Bill Clinton's support for "'radical' homosexual causes,"[30] presented "a series of pictures depicting advocates of homosexual rights, apparently gay men and lesbians, demonstrating at a political march,"[31] and combined "the visual degrading of candidate Clinton's picture into a black and white negative,"[32] "ominous music,"[33] and "unfavorable coloring"[34] in a manner that "raised strong emotions [among] viewers."[35] Both the district court and the court of appeals concluded that the message did *not* constitute express advocacy of Clinton's defeat.[36] Although the advertising named Clinton and used his picture, was broadcast in the weeks immediately preceding the November 1992 general election, and was "openly hostile" to the gay rights positions it attributed to Clinton, the ad was "devoid of any language that directly exhorted the public to vote."[37] Indeed, the court of appeals determined that the message fell so far short of express advocacy that it slapped the Federal Election Commission (FEC) with attorneys' fees and costs under the Equal Access to Justice Act for bringing the case.[38]

Only the Ninth Circuit has sought to consider the impact of such a narrow definition of express advocacy on the effectiveness of the FECA.

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24. *Id.* at 248-50.

25. *See id.* at 249 (describing the assertions in the special edition as "marginally less direct than 'Vote for Smith,'" an example of express advocacy provided in *Buckley*).

26. *See id.* (noting *Buckley*'s dependence on "the use of language such as 'vote for,' 'elect,' [and] 'support,'" and examining the special edition for similar content).

27. *See id.* ("The publication not only urges voters to vote for 'pro-life' candidates, but also identifies and provides photographs of specific candidates fitting that description.").

28. *See infra* note 50.

29. 894 F. Supp. 946 (W.D. Va. 1995), *aff'd mem.* 92 F.3d 1178 (4th Cir. 1996).

30. *Id.* at 948.

31. *Id.*

32. *Id.* at 956.

33. *Id.*

34. *Id.*

35. *Id.* at 954.

36. *Id.* at 953.

37. *Id.*

38. Federal Election Comm'n v. Christian Action Network, Inc., 110 F.3d 1049, 1050 (4th Cir. 1997).

In *Federal Election Commission v. Furgatch*,[39] the court found that a newspaper advertisement published on the eve of the 1980 presidential election that combined heated criticism of President Carter's record with the caption and exhortation "Don't Let Him Do It" constituted express advocacy.[40] Although the ad made no reference to voting against Carter, the court found that "'Don't let him' is a command. The words 'expressly advocate' action of some kind."[41] Voting against Carter in the upcoming election "was the only action open to those who would not 'let him do it.'"[42] *Furgatch* emphasized the need to look not just at the "magic words"[43] cited in *Buckley*, but at the communication "as a whole, . . . with limited reference to external events"[44] such as the timing of the ad in determining whether the message constituted an exhortation to vote for or against a candidate.[45]

Furgatch constitutes only a modest expansion of *Buckley*'s definition of express advocacy. The court stressed that a message could constitute express advocacy only so long as it is "susceptible of no other reasonable interpretation but as an exhortation to vote."[46] The message must be "unmistakable and unambiguous, suggestive of only one plausible meaning."[47] If "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," it is not express advocacy.[48]

Other federal courts that have considered the issue have rejected *Furgatch*'s slight broadening of the definition of express advocacy and, especially, *Furgatch*'s call to consider whether a message as a whole, with some reference to its timing, constitutes an exhortation to vote for or against a candidate.[49] They have instead rigidly insisted on the presence

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39. 807 F.2d 857 (9th Cir. 1987).

40. *Id.* at 864.

41. *Id.*

42. *Id.* at 865.

43. *Id.* at 863.

44. *Id.* at 864.

45. *Id.* at 863, 863-65 ("We conclude that context is relevant to a determination of express advocacy.")

46. *Id.* at 864.

47. *Id.*

48. *Id.*

49. A partial exception to the general rule is the opinion of the Tenth Circuit in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 59 F.3d 1015 (10th Cir. 1995), *rev'd*, 518 U.S. 604 (1996). The Tenth Circuit found that a Republican Party ad that criticized the record of the Democratic candidate for a U.S. Senate seat but refrained from using the "magic words" was not express advocacy under *Buckley*. But the court also concluded that the ad contained an "electioneering message" within the meaning of an FEC advisory opinion concerning the definition of party-coordinated spending, and held that the ad was, thus, subject to FECA's dollar limits on coordinated spending. *See id.* at 1023. The Tenth Circuit opinion was reversed on other grounds by a fragmented Supreme Court. *See Colorado Republican Fed. Campaign Comm. v. Federal Election*

of words that explicitly call for the election or defeat of a candidate.[50] In the view of these courts, any standard that turns on administrative or judicial interpretation of a message—even a standard of no "reasonable minds can differ"—is too vague and poses too great a danger of chilling protected political speech.[51] For example, the First Circuit Court of Appeals and a federal district court in New York declared unconstitutional an FEC regulation codifying *Furgatch*'s definition of express advocacy.[52] The Fourth Circuit, in *Christian Action Network*, sharply chastised the FEC for attempting to find express advocacy in "'the combined message of words and dramatic moving images, sounds and other non-verbal cues such as film editing, photographic techniques, and music, involving highly

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Comm'n, 518 U.S. 604 (1996). The Supreme Court plurality opinion held that the Colorado Republican Party expenditures for the ad constituted independent spending, not coordinated spending, and were therefore not subject to FECA's limits on coordinated spending. None of the four opinions in *Colorado Republican* addressed whether the FEC's "electioneering message" standard satisfied the constitutional requirements for the definition of election-related speech. *See infra* note 193 and text accompanying notes 191-193.

50. *See, e.g.*, Federal Election Comm'n v. Christian Action Network, Inc., 110 F.3d 1049, 1056-57 (4th Cir. 1997) (rejecting the FEC's argument that "whether a given communication constitutes 'express advocacy' depends upon all of the circumstances, internal and external to the communication, that could reasonably be considered to bear upon the recipient's interpretation of the message" rather than on explicit words or language advocating election or defeat of a clearly identified candidate); Faucher v. Federal Election Comm'n 928 F.2d 468, 471-72 (1st Cir. 1991) (invalidating an FEC regulation that would treat as express advocacy partisan advocacy in a voter guide that avoids explicitly calling for election or defeat of a clearly identified candidate); Maine Right to Life Comm., Inc. v. Federal Election Comm'n, 914 F. Supp. 8, 9 (D. Me. 1996) (concluding that "part of the FEC's definition of 'express advocacy' is beyond the FEC's power as limited by [prior] cases"), *aff'd*, 98 F.3d 1 (1st Cir. 1996); *see also* Kansans for Life, Inc. v. Gaede, No. 98-4192-RDR, 1999 U.S. Dist. LEXIS 2285, at *8 (D. Kan. Feb. 23, 1999) (holding that an ad aired during a primary campaign that "contrasts the positions of two candidates on the issue of abortion and asserts that one candidate is honestly stating his position on the issue while the other is not," but avoids the express advocacy of the election or defeat of a candidate, is issue advocacy and may not be subject to a disclosure requirement); Vermont Right to Life Comm., Inc. v. Sorrell, 19 F. Supp. 204, 214 (D. Vt. 1998) (construing, in order to save from invalidation, a Vermont statute applying reporting and disclosure requirements to a communication "which expressly or implicitly advocates the success or defeat of a candidate" to encompass only those communications that in express terms advocate the election or defeat of a clearly identified candidate).

51. *See Christian Action Network*, 110 F.3d at 1055-56, 1061 (surmising that too flexible a standard for interpretation would result in the FEC always concluding that the challenged speech is advocacy); *see also Kansans for Life, Inc.*, 1999 U.S. Dist. LEXIS 2285, at *9 (holding that the Kansas Governmental Ethics Commission advisory opinion requiring disclosure of sources of funds for a political message "which, when viewed as a whole, leads an ordinary person to believe that he or she is being urged to vote for or against a particular political candidate for office" sets an "unconstitutionally vague standard").

52. *See Maine Right to Life Comm.*, 98 F.3d at 1; Right to Life of Dutchess County, Inc. v. Federal Election Comm'n, 6 F. Supp. 248, 253 (S.D.N.Y. 1998) (holding that 11 C.F.R. § 100.22(b) (1996), based on *Fugatch*, violated the First Amendment as interpreted by the Supreme Court in *Buckley*); *see also Kansans for Life, Inc.*, 1999 U.S. Dist. LEXIS 2285, at *10 (enjoining the Kansas Governmental Ethics Commission from enforcing a definition of express advocacy that is broader than an explicit call for a vote for or against a particular candidate).

charged rhetoric and provocative images . . . taken as a whole'" rather than in explicit words of advocacy.[53]

These courts have been both candid and strikingly nonchalant in their recognition that the "magic words" approach will exclude much election-related spending from regulation. Even as it punished the FEC with fees and costs for its effort to look to the meaning of the broadcast rather than for explicit words of advocacy, the Fourth Circuit in *Christian Action Network* acknowledged, quoting from the FEC's brief, that "'[m]etaphorical and figurative speech can be more pointed and compelling, and can thus more successfully express advocacy, than a plain, literal recommendation to "vote" for a particular person.'"[54] The federal district court in *Maine Right to Life Committee, Inc. v. Federal Election Commission*[55] agreed that "[l]anguage . . . is an elusive thing"[56] and that communication depends "heavily on context";[57] yet in the same breath it held that the FEC's effort to define express advocacy with some reference to context was unconstitutional.[58] Judge Hornby further conceded that "the result 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,"[59] but concluded that such an unrealistic express advocacy standard was constitutionally required.[60]

For both pragmatic and principled reasons, the express advocacy/issue advocacy distinction articulated in *Buckley* and elaborated by the lower courts must be reconsidered, and a new standard for distinguishing election-related spending from other political spending must be developed. Pragmatically, the current test is an open invitation for evasion. It is child's play for political advertisers and campaign professionals to develop ads that effectively advocate or oppose the cause of a candidate but stop short of the formal express advocacy that the courts permit to be regulated. The most common tactic for political advertisers is to include some language calling for the reader, viewer, or listener to respond to the message by doing something other than voting. In *Christian Action Network*, for example, the ad called on viewers to telephone the sponsor "[f]or more information on traditional family values."[61] Other ads urged voters to telephone the candidate targeted by the sponsor and ask him why

53. *Christian Action Network*, 110 F.3d at 1064 (quoting from the FEC's brief).
54. *Id.*
55. 914 F. Supp. 8 (D. Me. 1996).
56. *Maine Right to Life Comm.*, 914 F. Supp. at 11.
57. *Id.*
58. *Id.* at 12-13.
59. *Id.* at 12.
60. *Id.* at 13.
61. Federal Election Comm'n v. Christian Action Network, 110 F.3d 1049, 1050 (4th Cir. 1997).

he opposes tax cuts or term limits.[62] A survey by the Annenberg Public Policy Center of 107 issue advocacy advertisements that aired on television or radio during the 1996 election cycle found that 70.1% urged audience members to either contact a public official or the organization sponsoring the ad to express their views concerning a particular policy position.[63] A similar study by the Annenberg Center of 423 issue ads aired in 1997-98 found that 77.5% urged audience members to "call" or to "tell" an elected official something or call the sponsoring organization.[64] By combining sharp criticism of a candidate with an exhortation to call the sponsor or the candidate criticized, these ads can inoculate themselves from the charge that they constitute express advocacy.

The combination of a crabbed legal definition of express advocacy and the ingenuity of politicians and interest groups acutely sensitive to the opportunities for circumventing campaign finance regulation has led to an explosion of issue advocacy. In the 1996 elections, between $135 million and $150 million was spent on issue advocacy.[65] According to news accounts, issue ads dominated the airwaves in the two special congressional elections held in late 1997 and early 1998.[66] The Annenberg Center estimates that between $275 million and $340 million was spent on issue advocacy in connection with the 1998 congressional elections[67]—roughly a doubling from 1996 and a remarkable increase in spending from a presidential to a non-presidential election year.

Issue ads are increasingly indistinguishable[68] from advertising that is technically express advocacy. Indeed, voters are often unable to determine

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62. *See, e.g.*, Wisconsin Mfrs. & Commerce v. Wisconsin Elections Bd., 978 F. Supp. 1200 (W.D. Wis. 1997) (describing a radio advertisement that urged listeners to call a candidate to "remind" him that they want term limits).

63. *See* BECK ET AL., *supra* note 2, at 7. Less than a third of the ads urging the audience to communicate its views actually provided a telephone number or address for the viewer or listener to contact. *See id.* at 8.

64. *See* Jeffrey D. Stanger & Douglas G. Rivlin, *Issue Advocacy Advertising During the 1997-1998 Election Cycle* (visited Mar. 20, 1999) <http://appcpenn.org//issueads/report.htm>.

65. *See id.* The numbers are necessarily imprecise, and the identities of the sources of funds unknown, because issue ads are not subject to reporting and disclosure requirements.

66. *See* Richard L. Berke, *Interest Groups Prepare to Spend on Campaign Spin*, N.Y. TIMES, Jan. 11, 1998, at A1 (reporting that issue advocacy spending by independent interest groups dominated spending by candidates in a special election in a California congressional district); James Dao, *Soft Money Finds Its Way Into 2 Hard-Fought Races*, N.Y. TIMES, Oct. 28, 1997, at B6 (reporting that the Republican National Committee was financing $750,000 in television commercials for issue ads against the Democratic candidate in a New York congressional district special election).

67. *See* Stanger & Rivlin, *supra* note 64.

68. Issue ads may be distinguishable in one respect: They are more likely to contain "pure attack"—that is, messages that make a case against an opposing position or candidate, rather than advocate the position supported by the ad's sponsor or compare opposing positions—than ads placed by candidates. *See* BECK ET AL., *supra* note 2, at 9-10 (stating that 41% of issue ads were pure attack ads, compared to 24% of presidential candidate ads); Stanger & Rivlin, *supra* note 64 ("While only 23.9% of candidate ads attacked, . . . 51.5% of issue ads did so during the final two months of the [campaign] cycle.")

whether an ad is sponsored by a candidate or by an interest group.[69] In the first Annenberg study, less than 5% of the issue ads that aired in the 1996 campaign actually called for support or opposition to pending legislation.[70] By contrast, nearly 90% of the ads referred to public officials or candidates for office by name, and nearly 60% of the television ads included pictures of officials or candidates.[71] The second Annenberg study found that more than 80% of the issue ads aired between September 1 and Election Day 1998 referred to candidates by name; only rarely did issue advocacy campaigns interject new, independent opinions or reflect the views of political outsiders.[72]

The 1996 Annenberg study found that more than 97% of issue advertising was aligned with either Republican or Democratic positions.[73] In fact, many of the leaders of issue advocacy organizations initially made their careers in party politics and use the issue organizations to advance partisan goals. Most notable among them are former Reagan political director Lyn Nofziger, whose Citizens for the Republic spent more than $2 million on attack ads in the 1996 congressional election; Angela "Bay" Buchanan, who participated in Nofziger's effort while serving as campaign manager for the presidential primary bid of her brother Pat Buchanan; and former Reagan political chair Peter Flaherty, who, as head of Citizens for Reform, ran the anti-Yellowtail ad discussed at the outset of this article.[74]

In some cases, the political parties provided the issue groups with the funds they needed to pay for their advertising. Americans for Tax Reform funded its $4.6 million issue advocacy program in 1996 out of a transfer from the Republican National Committee.[75] More importantly, the two major parties each spent tens of millions of dollars on issue advocacy in the 1996 and 1998 campaigns.[76] Indeed, the two parties together appear to have accounted for more than half the total of issue advocacy spending in

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69. *See* David Magleby with Marianne Holt, *Issue Advocacy in 1998 Congressional Elections*, *in* OUTSIDE MONEY: SOFT MONEY & ISSUE ADS IN COMPETITIVE 1998 CONGRESSIONAL ELECTIONS, A REPORT OF A GRANT FUNDED BY THE PEW CHARITABLE TRUSTS 26-27 (David B. Magleby & Marianne Holt, ed.) (suggesting that while federal election law requires candidate and non-candidate sponsors to distinguish themselves in their campaign ads, the distinction fails to allay voter confusion as to the source of the ads).

70. *See* BECK ET AL., *supra* note 2, at 7.

71. *See id.* at 8.

72. *See* Stanger & Rivlin, *supra* note 64.

73. *See* BECK ET AL., *supra* note 2, at 8.

74. *See id.* at 22; DREW, *supra* note 10, at 5-6, 22-28.

75. *See* BECK ET AL., *supra* note 2, at 16; DREW, *supra* note 10, at 223.

76. *See* BECK ET AL., *supra* note 2, at 3, 34, 55 (noting that in 1995 and 1996 the Democratic National Committee spent $44 million on issue ads and in 1996 the Republican National Committee spent $24 million on issue ads); Stanger & Rivlin, *supra* note 64 (estimating that Democratic and Republican parties accounted for 80.7% of the $275 to $340 million spent on issue advocacy advertising during the 1997-1998 election cycle).

the 1995-96 election cycle, and for 70% of the issue advocacy advertising between September 1 and Election Day 1998.[77]

In reports released in the fall of 1998, FEC auditors determined that in 1995-96 the Democratic National Committee (DNC) closely coordinated $46 million in issue advocacy expenditures with the Clinton-Gore '96 campaign.[78] The auditors found that the DNC and the Clinton campaign worked together on the production and placement of television ads paid for by the DNC, and that the DNC and the Clinton-Gore primary campaign committee shared a standard form memorandum for authorization of production and purchase of air time for media advertising: "One section of this memorandum states 'The cost will be allocated a ____% for the DNC and _____% for Clinton/Gore '96.' The next line states 'attorneys to determine.'"[79] The FEC general counsel contended that "it is difficult to distinguish between the activities of the DNC and the [Clinton] Primary Committee with respect to the creation and publication of the media advertisements at issue."[80] FEC auditors also found that the Republican National Committee (RNC) paid more than $18 million directly and through Republican state party committees on behalf of the Dole campaign for ads that were aired between April and August 1996—a period in which the Dole campaign was bumping up against the spending ceiling it had accepted as a condition for prenomination public funding.[81]

As a pragmatic matter, then, the current express advocacy/issue advocacy distinction serves less to assure a place for independent debate concerning vital issues ignored by the major party candidates than to facilitate the wholesale evasion of campaign finance laws by candidates, parties, and interest groups.

Principle also calls for a reexamination of the express advocacy/issue advocacy distinction. The current doctrine implicitly treats the regulation

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77. *See* BECK ET AL., *supra* note 2, at 34, 55; Stanger & Rivlin, *supra* note 64. Similar patterns have developed in state races. *See* MICHAEL J. MALBIN & THOMAS L. GAIS, THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES 91 (1998).

78. *See* FEDERAL ELECTION COMM'N, REPORT OF THE AUDIT DIVISION ON CLINTON-GORE '96 PRIMARY COMMITTEE, INC. 24 (1998) [hereinafter CLINTON-GORE REPORT].

79. *See id.* at 18.

80. *Id.* at 108.

81. *See* FEDERAL ELECTION COMM'N, REPORT OF THE AUDIT DIVISION ON THE DOLE FOR PRESIDENT COMMITTEE, INC. (PRIMARY) 16, 34-36, 46 (1998) [hereinafter DOLE REPORT].

The FEC staff determined that due to both the coordination between party committees and candidate committees and the electioneering content of the party committee media ads, the DNC and RNC had made expenditures on behalf of the Clinton and Dole campaigns, respectively, and that these expenditures ought to be counted against the spending limits both candidates had agreed to accept as a condition of public funding. The FEC staff recommended that the candidates pay to the Treasury a portion of the spending beyond the spending limit—nearly $25 million. The FEC unanimously rejected the staff recommendation and refused to order any repayments attributable to party issue advocacy expenditures. *See* Jill Abramson, *Election Panel Refuses to Order Repayments by Clinton and Dole*, N.Y. TIMES, Dec. 11, 1998, at A1.

of campaign finances as an obnoxious, minimally defensible exception to the general rule of unrestricted political speech. The failure of campaign finance rules limited to express advocacy to actually reach critical campaign finance activities is almost celebrated as an illustration of just how unrestricted political speech is. But this misses the distinctive role that elections play in our system of democratic self-governance, as well as the role campaign spending plays in elections. Elections are our central form of collective political decision-making, and thus they are our most important mechanism for securing democratically accountable government. Campaign communications are a crucial part of elections, and, as the Supreme Court has indicated, may be regulated in order to advance the goals of deliberative, democratic decision-making. The Court has repeatedly determined that reporting and disclosure requirements, contribution limitations, and restrictions on the political activities of corporations ensure the ability of elections to function as an institution of democratic self-governance.[82]

Campaign finance regulation ought not to be seen as a disfavored exception from the general rule of unregulated political behavior, but instead as part of the electoral process—a process which, by its very nature, requires a considerable degree of regulation. Both the regulation of elections and the protection of speech reflect important constitutional values. The existence of a distinctive jurisprudential regime for election speech makes the location of the line that distinguishes electoral speech from other political speech very important. The placement of the election/politics line should not focus exclusively on the values on the politics side of the line, but should attend to the vital interests at stake on both sides of the line.

III. The Jurisprudence of Elections

This Part suggests that there is a distinctive jurisprudence of elections, sketches some of its elements, and indicates how that jurisprudence has sustained a considerable degree of government regulation of the electoral process. Subpart A examines a basic feature of the jurisprudence of elections: the balancing of individual rights and collective choice. Subpart B suggests that due to the mix of individual and collective concerns, the Supreme Court has been willing to accord a measure of discretion to the

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82. *See, e.g.*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 654-55 (1990) (upholding a prohibition on corporate expenditures from the general fund supporting or opposing a candidate); California Med. Ass'n v. Federal Election Comm'n, 453 U.S. 182, 184-85 (1981) (upholding the FECA's maximum contribution limit imposed upon unincorporated associations contributing to multicandidate political committees); Buckley v. Valeo, 424 U.S. 1, 66 (1976) (concluding that the "governmental interests sought to be vindicated" by the FECA disclosure requirements are sufficiently important to withstand First Amendment challenges).

political branches in regulating the electoral process. Subpart C considers how the Supreme Court has determined the scope of this distinctive jurisprudence of elections outside the campaign finance setting. Subpart D explores the implications of the jurisprudence of elections for campaign finance regulation.

A. Individual Rights and Collective Choice

There is a distinctive jurisprudence of elections that attempts to reconcile strong protection for individual rights of political participation with the collective social interest in organizing the process of public choice. The jurisprudence of elections proceeds from the special constitutional protection accorded the right to vote. The right to vote, according to the Supreme Court, provides "a voice in the election of those who make the laws under which, as good citizens, we must live."[83] As the Supreme Court noted in *Reynolds v. Sims*:[84] "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. . . . [T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."[85] Consequently, restrictions on the right to vote are subject to exacting judicial scrutiny under the Equal Protection Clause.[86] The First Amendment also protects political activity incident to an election, including the nomination of candidates, the organization of parties, and the placement of candidates on the ballot.[87]

Yet, the Supreme Court has "emphasized on numerous occasions the breadth of power enjoyed by the States in determining voter qualifications and the manner of elections."[88] The right to vote is not simply a matter of individual political participation. It takes on its significance because of its role in our system of democratic collective self-governance. As the Court has observed, "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of

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83. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

84. 377 U.S. 533 (1964).

85. *Id.* at 561-62.

86. *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667, 670 (1966) (restating that the right to vote is a fundamental right in any "'free and democratic society'" and declaring that "where fundamental rights . . . are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized").

87. *See, e.g.*, Eu v. San Francisco Democratic Cent. Comm., 489 U.S. 214, 224 (1989) (invalidating various state requirements concerning party organization); Tashjian v. Republican Party of Conn., 479 U.S. 208, 215-16 (1986) (invalidating a state law that prohibited the party from enabling independents to vote in its primary); Anderson v. Celebrezze, 460 U.S. 780, 795 (1983) (invalidating Ohio's early filing deadline for independent presidential candidates); Williams v. Rhodes, 393 U.S. 23, 31 (1968) (holding that an Ohio law inhibiting the ability of new political parties to gain access to an election ballot unconstitutionally burdened both the right to vote and the right to associate).

88. Bullock v. Carter, 405 U.S. 134, 141 (1972).

the democratic system."[89] Government regulation of the electoral process is not antithetical to freedom of political expression and association. Rather, the Court has declared, "reasonable regulations of parties, elections and ballots"[90] are necessary to make an election work as a mechanism for aggregating diverse preferences into results that reflect majority sentiment, command public support, and produce an effective, accountable government.

Unlike general political activity, an election produces a result that binds an entire polity. People can and will disagree about matters subject to debate; majority views must coexist with dissenting opinions. But electoral outcomes govern the entire polity, the losers as well as the winners. Elections choose the public officers who make, enforce, or adjudicate laws, or, in the case of ballot propositions, they actually enact laws directly. The election's outcome directly affects what government does thereafter. That is, of course, the whole point of having an election. Elections transform a multiplicity of voices into an instrument of governance. Freedom of expression and association are a vital part of the electoral process. Voters must be free to put forward and consider a range of alternatives and to seek to persuade their fellow voters concerning their electoral choices. But the fact that winners and losers are bound alike by the electoral outcome creates the need for rules that both protect the rights of individuals and ensure the fairness and integrity of the process as a whole, thus enhancing the democratic legitimacy of the government that results.

Elections also have a distinctive timing. The marketplace of ideas is always open. A speaker whose views are rebuffed by society today may continue to articulate his views and seek acceptance tomorrow. But elections occur at a moment in time. In our nonparliamentary system that moment is fixed and regular. For all federal and most state offices Election Day is at the beginning of November in an even-numbered year. Primary Election Days vary from jurisdiction to jurisdiction but the day is usually fixed and regularly recurring within a particular jurisdiction. Once Election Day passes, the election is over and the question of who will be a party nominee or who will hold a contested public office is resolved until the next election.

Like the binding effect, the precise and temporal nature of an election places a premium on rules that promote careful and considered choice, a fair and effective electoral process, and a politically legitimate result. New developments, changes in opinion about election issues, and even new information about old events that comes to light after Election Day can

89. Burdick v. Takushi, 504 U.S. 428, 441 (1992).

90. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997).

change voters' minds about what should have happened in the election, but they cannot change the election's result. Moreover, the regular, fixed temporal location of Election Day serves to concentrate public attention on election-related concerns in the weeks and days immediately preceding the election. Political activity and discussion of political issues may occur at any time of the year; but the period immediately before an election is the distinctive time in which people do most of their information-gathering, thinking, and arguing about how they are going to vote. And it is the time in which they are most attentive to election-related messages. Indeed, this is often a period in which other political activity drops off as people and organizations interested in politics focus their energies on the election.

B. Election Regulation and Constitutional Line-Drawing

Elections require mechanisms for achieving a democratic collective result. There must be rules for determining eligibility to participate, setting the electoral agenda, sequencing the comparison of electoral alternatives, and focusing electoral deliberation. In a polity characterized by a multiplicity of voters who, with varying degrees of intensity, hold conflicting views across a wide range of issues, there is no one right mechanism for calculating collective preferences. Different electoral rules and procedures will give different weights to various conflicting but legitimate substantive values, such as political stability and responsiveness to change, majority rule, and minority representation. The rules for electoral choice will inevitably affect electoral outcomes. They may constrain election-related political activity. They will also be, at least in part, the product of political judgments. Most importantly, the rules for running an election—for determining who can run for office, who can vote in what election, and who can nominate whom—run head-on into associational and free speech rights.

The Supreme Court's jurisprudence in this area reflects the dilemma that democracy needs rules, but the notion of democracy does not itself determine what those rules will be. The strict scrutiny that courts apply when reviewing government efforts to regulate political speech and association is in tension with the basic indeterminacy concerning what principles should govern the electoral process. Given the multiple, conflicting values at stake, it would be difficult to show that any particular rule, including rules that regulate election-related political expression, are strictly necessary for democratic decision-making. Perhaps as a result, strict judicial scrutiny of laws regulating elections is not always invoked and, as shown below, even when it is invoked it is not always applied.

The Court has often deferred to legislatures to determine the substantive values a polity may seek to advance through its election rules. For example, the avoidance of factionalism and the narrowing of choice in

order to produce a majority (rather than a plurality) winner have repeatedly been treated as legitimate electoral goals.[91] When a state asserts these and other interests allegedly connected to the effective functioning of the electoral process as a justification for a particular election regulation, the Court has often accepted the claims uncritically, relaxing the burden on the state to prove that a restriction on election-related political activity is necessary to advance such an election-related interest, and has discarded the narrow-tailoring requirement. As the Court stated in *Munro v. Socialist Workers Party*,[92] "[w]e have never required a State to make a particularized showing of the existence" of the factors—such as voter confusion, ballot overcrowding, or frivolous candidacies—that have been held to justify restrictions on the listing of candidates on the ballot.[93] Similarly, in *Timmons v. Twin Cities Area New Party*,[94] the Court found that a state could bar one party from nominating the candidate of another party without providing "empirical verification of the weightiness of the State's asserted justifications" of avoiding voter confusion and preventing party splintering.[95]

Despite the fundamental rights at stake, the Court has often expressed a preference for contextualized approaches and balancing tests rather than per se rules. The doctrine governing ballot-access restrictions on third parties and independents, for example, "provides no litmus-paper test for separating those restrictions that are valid from those that are invidious. . . . Decision in this context, as in others, is very much a 'matter of degree.'"[96] In *Timmons* the Court observed that "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms."[97]

To be sure, state discretion is not unlimited and even fuzzy lines can have bite. The Court has been especially concerned to protect the equal right to vote in the face of other asserted state interests. States may not limit the electorate, dilute the representation of minority groups, unduly constrain electoral competition, or exclude new parties or independents who demonstrate some substantial support.[98] Still, what is striking about

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91. *See* Munro v. Socialist Workers Party, 479 U.S. 189, 196 (1986) (holding that avoidance of "unrestrained factionalism at the general election" justified Washington State's restrictions on ballot access); Williams v. Rhodes, 393 U.S. 23, 32 (1968) (conceding that a state has "an interest in attempting to see that the election winner be the choice of a majority of its voters").

92. 479 U.S. 189 (1986).

93. *Id.* at 194-95.

94. 520 U.S. 351 (1997).

95. *Id.* at 364.

96. Storer v. Brown, 415 U.S. 724, 730 (1974) (quoting Dunn v. Blumstein, 405 U.S. 330, 348 (1972)).

97. *Timmons*, 520 U.S. at 359.

98. *See* Williams v. Rhodes, 393 U.S. 23, 35 (1969) (finding ballot access laws unconstitutional because they made it "virtually impossible for any party to qualify on the ballot except the Republican

the jurisprudence of elections is the Court's willingness to let legislatures determine some of the substantive values that election rules may advance and, at times, to defer to legislatures in setting the balance between individual rights and the need to organize collective decision-making.

The Court's deference may sometimes go too far. Certainly, the Court's willingness to sustain state laws that bolster the two major parties has been cogently criticized for "entrenching the duopoly"[99] and for permitting "partisan lockups of the democratic process."[100] Nevertheless, although particular decisions may be wrong, the Court's recognition that election rules vindicate collective interests as well as individual rights is correct. This insight should affect not only the substance of constitutional doctrine but the nature of constitutional line-drawing as well. In the absence of clear, incontestable principles for organizing elections governments may need more discretion in structuring elections than in regulating other political activity.

C. *Locating the Election/Politics Line*

Election-related activities are different, and necessarily subject to more regulation, than other forms of political activity. What are the implications of the distinctive nature of elections for where and how the elections/politics line is to be drawn?

One possibility is that given the dangers inherent in governmental regulation of the political process, an election ought to be defined very narrowly, and treated as an unusual and highly insulated exception to the general rule that political activity is protected from regulation. The Supreme Court has frequently taken this approach, thus implying that the domain of elections ought to be tightly focused on the casting and counting of ballots.

Certainly, balloting is at the heart of the electoral process. The Court has been most zealous in defense of individual election-related rights when a state law would interfere with the right of an otherwise qualified citizen to cast a ballot.[101] On the other hand, it has been relatively deferential

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and Democratic Parties"). For a discussion of these other constitutional concerns involved in elections, see *infra* notes 112-16 and accompanying text.

99. *See generally* Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331.

100. *See generally* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

101. *See* Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (finding unconstitutional the denial of the right to vote based on a one-year residency requirement); Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626-27 (1969) (determining that a requirement that citizens either rent or own land or have a child in school in order to vote in a school district election is unconstitutional); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (finding poll taxes unconstitutional); *see also* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEXAS L. REV. 1705, 1709, 1709-12 (1993)

to state laws that restrict the inclusion of candidates' names on ballots.[102] In *Burson v. Freeman*,[103] the Court extended the notion of the ballot to include the place and time of balloting, stressing the close connection between casting a ballot and the place of balloting.[104] The law in *Burson* banned electioneering within one hundred feet of a polling place.[105] It was a content-based prohibition on speech, but the restriction on political activity was not subject to strict scrutiny. Instead, the Court applied the more relaxed standard that it applies to laws that limit the placement of candidates and parties on the ballot[106] and deferred to the state "as [the] recognized administrator of elections."[107]

The ballot is surely the fulcrum of an election, but it is not the election tout court. Elections entail the casting and counting of ballots, but for the election to serve as a mechanism of collective choice there must be considerable election-related activity before balloting can occur. Candidates test the waters, seek support, sound their themes, and announce their candidacies for nomination. Over time, some candidates drop away, others gather strength. As the number of candidates is winnowed down to a relative handful, and Election Day approaches, voters can focus on the finalists. During the election campaign, candidates, parties, interest groups and interested individuals undertake efforts to persuade the voters how to cast their ballots. The campaign period enables voters to inform themselves about the candidates and decide how they will vote. The election campaign is, thus, a central part of the process of structured choice and democratic deliberation that constitutes an election. A fair opportunity for all participants in the electoral process to present arguments to the voters is critical to the legitimacy of the election as a mechanism of collective decision-making.

The Court has often defined an election broadly to include pre-Election Day activities or has deferred to statutes that regulate pre-Election Day activities as part of the electoral process. In *Terry v. Adams*,[108] for example, the Court treated private political activity that preceded an election, and informally but effectively supplanted that election, as a part

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(explaining that the Court has applied strict scrutiny in voting cases involving participation, which is defined as "the right to cast a ballot that is counted").

102. *But see* Williams v. Rhodes, 393 U.S. 23, 30-34 (1968) (holding that restrictive ballot access laws violate the Equal Protection Clause when the burden they impose on voting and associational rights rises to invidious discrimination).

103. 504 U.S. 191 (1992).

104. *Id.* at 211.

105. *Id.* at 193-94.

106. *See id.* at 209.

107. *Id.* at 211.

108. 345 U.S. 461 (1953).

of the election in order to protect the equal right to vote.[109] The Court has indicated that Congress can treat party nomination procedures as part of an election[110] and that Congress can use the notion of a pre-election campaign season to define the obligations of broadcasters.[111] The Court has also indicated that the rules that translate Election Day results into the structure of government are part of the election: the one person, one vote doctrine,[112] the minority vote dilution doctrine,[113] and the judicial review of partisan gerrymandering[114] all grow out of the right to vote even though none of these doctrines concern Election Day activities. Finally, due to the nexus between voting and representation, legislative apportionment has become part of the domain of elections.[115]

To be sure, the ballot nicely symbolizes the mix of individual and collective concerns at stake in the regulation of elections. Indeed, as the Court noted in *Burson*, the state-created ballot is itself an artifact of the state's involvement in the electoral process.[116] The state-created ballot promotes the integrity of elections by safeguarding voter choice from private interference. Yet, by requiring voters to use an official, state-controlled ballot, states have displaced the role of parties, candidates, and individual voters in preparing ballots and in framing the choices available to the electorate. The questions concerning which candidates and parties

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109. *Id.* at 466 (upholding the lower court's reliance upon the principle stated in *Smith v. Allwright*, 321 U.S. 649, 664 (1944), that the "right to participate in the choice of elected officials without restriction by any State because of race . . . is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election").

110. *See* Morse v. Republican Party of Va., 517 U.S. 186, 218 n.31 (1996).

111. *See* CBS, Inc. v. FCC, 453 U.S. 367, 368-88, 396-97 (1981) (declaring that Congress may require broadcast networks to give federal candidates reasonable access during election campaigns and that the FCC has the statutory authority to determine when a campaign has begun for purposes of enforcing the reasonable access rule).

112. *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964) ("[I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.").

113. *See* Rogers v. Lodge, 458 U.S. 613, 616-22 (1982) (observing that at-large voting systems may be used to minimize the voting strength of minority groups); White v. Regester, 412 U.S. 755, 765-770 (1973) (noting that multimember districts can minimize the voting strength of minorities).

114. *See* Davis v. Bandemer, 478 U.S. 109, 120, 118-21 (1986) (upholding the justiciability of claims that political gerrymandering "dilute[s] the vote of political groups").

115. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 550 (1969) (establishing that a state amendment providing county supervisions with the option to allow the board of supervisors to be elected at-large rather than by district is subject to the purview of The Voting Rights Act of 1965); Karlan, *supra* note 101, at 1717, 1712-17 (asserting that voters are concerned with "direct and virtual representation" as well as "aggregation rules within the legislature because these rules can determine the practical effectiveness of the representatives who champion [their] interests").

116. *Burson*, 504 U.S. at 200-06 (examining the history of election regulation in the United States leading to the adoption of the state-created secret ballot).

can be listed on ballots, whether states can limit the ability of parties to endorse the candidates of other parties, and whether states must count write-in ballots arise solely because of the state's displacement of privately provided ballots with the state's ballot. The state-created ballot, like many voting rules, simultaneously constrains and advances collective choice. But the ballot is not all there is to an election, and the election certainly includes campaign activity that precedes the casting of ballots.

With the election not limited to the act of balloting, there is no obvious definition of when an election begins or ends. Drawing the election/politics line requires a contextualized assessment of the relationship between the law or practice at issue and the role of the election as a mechanism for the creation of a democratically accountable government. Like some of the rules internal to the law of elections, the scope of the law of elections is more a matter of degree than of bright lines. Certainly, the closer a practice is to casting a ballot, the easier it is to treat as part of the election. But the real test is how closely connected the activity is to the values and concerns central to elections—values like political equality, openness to participation, informed deliberation, and structured choice—rather than to the ballot itself.

D. Campaign Finance Regulation

What are the implications of the jurisprudence of elections for the regulation of campaign finance? Some of the basic concerns of election law—openness to participation, informed choice, political equality, and the impact of the election on representative governance—are implicated by campaign finance regulation. The centerpiece of the *Buckley* doctrine—that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities"[117]—grows out of the role the campaign plays in enabling an election to be a mechanism for democratic choice. Candidates and others with an interest in the outcome of an election need to be able to communicate their views to the voters. More importantly, the legitimacy of decision-making by election turns on the ability of voters to receive the information they need to cast informed votes. Money is not speech, but in a large and heterogeneous society, money can play an important role in disseminating election-related information to the voters. Of course, strict scrutiny of limitations on campaign expenditures does not exactly distinguish election-related activity from political activity in general. *Buckley* expressly linked election

117. *Buckley*, 424 U.S. at 14.

expenditures to the broad protection the First Amendment generally affords political speech and association.[118] Yet, strict scrutiny of limitations on campaign activity is also consistent with the notion that there is a distinctive jurisprudence of elections under which an opportunity for wide-open campaigning is essential to the legitimacy and the effectiveness of the election as a mechanism for collective choice.

By the same token, the Court's validation of some forms of campaign finance regulation represents a departure from the general rules respecting political speech, and suggests a concern for the distinctive role that elections play in our political system. *Buckley*'s approval of contribution limits[119] must be attributable to the view that such limits advance the central purpose of an election: the selection of the officials who will constitute a government. To be sure, one strand of *Buckley* and subsequent campaign finance cases denigrated contributions as a lower order of indirect speech—"speech by proxy."[120] But this never seemed persuasive, given both the need for contributions to fund expenditures and the role of contributions in political association.[121] Rather, it is the other strand of the analysis—the concern that campaign finance rules affect the behavior of government—that sustains the Court's approval of contribution limits despite their impact on political speech and association. Large private contributions raise the danger that officeholders will be too attentive to the interests of donors and prospective donors and insufficiently concerned about the public interest. Campaign contributions may be limited, according to *Buckley*, not because they are not political speech, but because a "political quid pro quo from current and potential office holders" to donors and potential donors threatens "the integrity of our system of representative democracy."[122]

Similarly, the collective nature of electoral choice, as well as the connection between elections and office holding, plays a role in the Court's willingness to sustain rules requiring donors in the electoral context to disclose their identities. Despite their potential for infringing on privacy

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118. *Id.* at 14-15.

119. *Id.* at 20.

120. *See* California Med. Ass'n v. Federal Election Comm'n, 453 U.S. 182, 196 (1981) (plurality opinion) (stating that this type of speech is "not the sort of political advocacy . . . entitled to full First Amendment protection"); *Buckley*, 424 U.S. at 21.

121. *See, e.g.*, Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 251-56 (1986) (Brennan, J., plurality opinion and O'Connor, J., concurring in part and concurring in the judgment) (describing the significant burden the FEC's regulation might impose on the ability of corporations to make political contributions and, consequently, on their rights of political association); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 296 (1981) (holding that the right to pool money through contributions is an important part of freedom of association).

122. *Buckley*, 424 U.S. at 26-27.

of association and belief, disclosure requirements can be an important source of voter information. As *Buckley* put it:

> [D]isclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek . . . office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.[123]

It is uncertain whether the benefits of increased information would offset the chilling effect of disclosure in an ordinary political speech context. The Court has certainly suggested otherwise.[124] But in the electoral setting, voter choice is not just a matter of personal information and belief. Instead, citizens as voters are under a political obligation to make choices that inevitably bind the polity as a whole and set the course of government for the next political term. There is a collective interest in increasing the amount of relevant information available to the voters in the hope of improving the quality of collective decision-making.

Buckley even upheld FECA's provisions requiring disclosure of the names and addresses of people who make independent expenditures or who contribute to organizations that make such expenditures.[125] The Court sustained these rules although it had already concluded that independent spending presented no danger of corruption and that there was a distinct possibility that disclosure might chill such independent activity. The Court's rationale was that such disclosure "increases the fund of information concerning those who support the candidates."[126] This "informational interest" in the sources of independent spending can be as strong as the interest in the sources of candidates' funds because disclosure

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123. *Id.* at 66-67 (quoting H.R. REP. No. 92-564, at 4 (1971)).

124. In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), the Court held that a state law requiring campaign literature to include the name and address of the issuer violates the First Amendment. *McIntyre* involved a handbill distributed in the context of a referendum. The Court was careful to distinguish the constitutional issues posed by such a disclosure requirement in a ballot proposition election from an election involving candidates; the Court specifically distinguished the portion of *Buckley* that sustained the FECA provision applying reporting and disclosure requirements to independent expenditures. *Id.* at 355-56. The Court also indicated that Ohio's "compelled self-identification on all election-related writings" imposed a far greater burden on First Amendment rights than FECA's requirements, which involved reporting campaign finance data to the FEC. *Id.* Still, it is fair to say that *McIntyre* placed far greater weight on the anti-corruption function of disclosure and less on its informational value than did *Buckley*.

125. *Buckley*, 424 U.S. at 80-81.

126. *Id.* at 81.

by independent committees "helps voters to define more of the candidates' constituencies."[127]

The Court's deference to Congress's judgment concerning the specific dollar limitations on contributions and the thresholds for reporting and disclosure resembles the Court's deference to political judgments concerning line-drawing in other areas of election regulation. In upholding FECA's limits on donations and the Act's low reporting and record keeping thresholds, the *Buckley* Court stated that "we cannot require Congress to establish that it has chosen the highest reasonable threshold."[128] That "line" was "best left . . . to congressional discretion."[129] It was upheld because it was not "wholly without rationality,"[130] a standard even more relaxed than that used in reviewing ballot access rules in the cases previously discussed.[131] The Court has also deferred to congressional judgments that certain campaign finance restrictions are constitutionally appropriate not because of their direct effects in preventing corruption or informing voters, but because of their indirect benefits in preventing evasion or circumvention of the regulations that directly address the prevention of corruption and the provision of election-related information.[132]

A central concern of election law is equality of participation. Equality concerns play out differently in the campaign finance context than in other areas of election law, such as the right to vote or to be a candidate. In those areas, a concern for political equality has been used to strike down laws restricting participation.[133] But in the campaign finance setting, equality is often asserted as a justification for spending restrictions that limit participation. Such egalitarian restriction may be justified, but it is certainly in tension with the goals of wide-open political participation and electoral communication. It is simply unclear how far the notion of political equality sustains or requires limits on the election-related uses of unequal, private resources.

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127. *Id.*

128. *Id.* at 83.

129. *Id.*

130. *Id.*

131. *See supra* notes 91-95 and accompanying text.

132. *See* California Med. Ass'n v. Federal Election Comm'n, 453 U.S. 182, 197-98, (1981) (npholding limits on the amount of money a person may contribute to a multicandidate political committee in order to prevent circumvention of the limits on individual donations to candidates that were sustained in *Buckley*).

133. *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626-27 (1969) (determining that a requirement that citizens either rent or own land or have a child in school in order to vote in a school district election is unconstitutional); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667, 670 (1966) (restating that the right to vote is a fundamental right in any "'free and democratic society'" and declaring that "where fundamental rights . . . are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized").

This uncertainty about the meaning of equality is reflected in campaign finance doctrine. *Buckley* announced that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,"[134] and proceeded to invalidate FECA's limits on expenditures by candidates and independent spenders.[135] Yet, the Court has upheld federal and state restrictions on expenditures by business corporations on the theory that the financial resources these organizations can deploy for political purposes "have little or no correlation to the public's support for [their] ideas."[136] Prohibiting corporations from using treasury funds[137] to finance campaign expenditures "ensures that expenditures reflect actual public support for the political ideas espoused by corporations."[138] To be sure, the Court linked these restrictions to the assertedly "unique state-conferred"[139] advantages that enable corporations to "amass large treasuries," and it resolutely opposed the imposition of limits on expenditures by other campaign participants[140] such as wealthy individuals, where there may be a similar gap between the funds available for election-related activity and the extent of public support for the positions espoused by the spenders.

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134. Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

135. *Id.* at 51.

136. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990).

137. Typically, the prohibition on the use of corporate treasury funds for electoral purposes is accompanied by permission for the corporation to set up a separate, segregated fund—more colloquially known as a political action committee (PAC)—which may solicit persons affiliated with the corporation, such as officers, directors, or shareholders, for funds that may then be used for election contributions and expenditures. A similar restriction on the use of treasury funds, in tandem with permission to create a PAC, applies to unions. *See* 2 U.S.C. § 441b(a),(b)(2)(C) (1994). In theory, the funds contributed to a corporate or union PAC reflect support by the individuals solicited for the electoral goals of the PAC rather than simply the size of the corporate or union treasury. *See id.* § 441(b)(3) (1994).

138. *Austin*, 494 U.S. at 660. By a pragmatic political symmetry, the FECA prohibits the use of both corporate and union treasury funds for federal campaign activities. *See* 2 U.S.C. § 441b(a), (b)(2)(C) (1994). There has been no post-*Buckley* decision that directly addresses the application of that prohibition to unions. In *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 207-11 (1982), the Court reviewed the history of these restrictions and indicated that the restraints on unions continue to be valid, less because of the "substantial aggregations of wealth amassed by the special advantages that go with the corporate form," but because such restrictions "protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *Id.* at 207-08. In *Austin*, however, the Court had before it a Michigan statute that restricted corporations but not unions. When the Michigan Chamber of Commerce attacked the law as fatally underinclusive, the Court sustained the distinction, finding that "the funds available for a union's political activities more accurately reflects [*sic*] members' support for the organization's political views than does a corporation's general treasury." *Austin*, 494 U.S. at 666. There is, thus, no clear post-*Buckley* position on the constitutional status of restrictions on union campaign finance activities.

139. *Id.*

140. *Id.*

The Court's decisions validating restrictions on corporate activities suggest that the place of equality in campaign finance law is not fully resolved.[141] But the campaign finance cases reflect the other central election law concerns with the function of an election in creating an effective, politically accountable government. Reporting and disclosure requirements have been held to advance that function by increasing the prospects for informed choice. Similarly, contribution restrictions have been sustained on the theory that they reduce the danger that the campaign finance process will make elected officials too attentive to their financial backers' private interests.

The scope of constitutionally permissible campaign finance regulation is determined not just by the substantive values of campaign finance law, but by the definition of which finance practices are considered to be a part of the election campaign. The current use of "express advocacy" to determine which contributions and expenditures are campaign related is an open invitation to circumvention. The legal definition of election-related speech needs to be redrawn in light of the principles underlying election regulation. Reconsidering express advocacy is also necessary to vindicate the more basic principle that if an activity may be subject to regulation then it ought to be subject to effective regulation.

IV. Express Advocacy Reconsidered

The definition of election-related speech should reflect the concerns that justify campaign finance regulation. Under *Buckley*, these concerns include providing voters with information about those who are spending money to influence the outcome of an election, curtailing the potential effects of large contributions on officeholders, and restricting the ability of corporations and unions to convert treasury funds into election war chests. At bottom, all three goals enhance the central purpose of elections: the aggregation of popular preferences into a government. Disclosure affects voter choice, and voters' choices ultimately bind other voters by producing a government for the entire polity. Contribution limits are set in light of the effect campaign finance practices may have on the government that emerges from the election. Limits on corporate and union war chests are intended to prevent corporate and union treasury funds from distorting

141. There is also a tension within the Court's treatment of corporation campaign finance activity. *Compare Austin*, 494 U.S. at 660 (upholding a Michigan prohibition on the use of corporate treasury funds in candidate elections), *and* Federal Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 210-11 (1982) (arguing that the potential influence of corporations on elections "may require different forms of regulation in order to protect the integrity of the electoral process" (quoting California Med. Ass'n v. Federal Election Comm'n, 453 U.S. 182, 201 (1981))), *with* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 794-95 (1978) (holding that, in ballot proposition elections, corporate political speech is protected by the First Amendment).

election results by making them less representative of popular sentiment. All three justifications for regulation, then, grow out of the connections among campaign finance practices, electoral decision-making, election results, and the role of elections in creating and shaping government. The definition of election-related speech, subject to disclosure or limitation, should take these concerns into account.

The definition of election-related speech must also be consistent with the First Amendment values that led the Court to adopt the express advocacy standard in the first place. Certainly, the definition should avoid vagueness. Vague standards chill speech that could not be constitutionally proscribed, can lead to an unnecessary and excessive reduction in political activity, and vest considerable discretion in administrators and courts. Vague standards force speakers to divert precious funds from communicating political messages to retaining lawyers and litigating cases. Moreover, clarity ought to be a goal of election regulation even apart from the First Amendment. To be effective, election regulation ought to proceed in "real time"—that is, in the heat of the political campaign. It would be far better if mandatory disclosures were made, and contribution limits and corporate spending prohibitions observed, during the election campaign than if these rules were honored only by the imposition of fines and penalties years after Election Day. Clear rules facilitate compliance and enforcement as well as avoid chilling effects.

Similarly, the test should not include an intrusive evaluation of the speaker's intent. A test that depended, for example, on a judgment of whether the speaker intended to influence the election would introduce many of the same pitfalls as vagueness. While it may be fair to assume that a speaker knows what he or she intends to achieve, no speaker can be confident of what some governmental entity might conclude as to intent. So a test based on intent carries some of the same dangers of chilling, litigiousness, and delayed enforcement as does a vague standard. Moreover, it introduces an additional danger of governmental inquiries into the inner political motives of an individual or into the internal communications of an organization.

Finally, the test should focus on speech that is part of the election campaign, without sweeping into the regulatory realm too much political speech that is unrelated to elections. To use the legal jargon, the definition should not be overbroad. A test, for example, that treated as election related any ad that mentioned the name of a candidate, no matter when that ad was aired, would be overbroad. It would restrict all sorts of political speech—discussion of the McCain-Feingold Bill or the Hyde Amendment, for example—that may not be part of an electoral contest. That is not to say that a law defining electoral speech would be invalid because one could imagine an ad that technically falls within the definition but is unlikely to

affect voting decisions. Rather, the First Amendment requires only that the law be drawn in a way that minimizes the likelihood that this negative effect will occur.

Buckley's bright-line express advocacy standard satisfies each of these criteria. But the *Buckley* test's exclusive focus on the presence of words expressly advocating the election or defeat of a clearly identified candidate has proven inadequate to the task of defining election-related speech in the context of contemporary election campaigns. There are other ways of avoiding vagueness, examination of a speaker's intentions, and overbreadth without limiting the inquiry to the presence of literal words of advocacy in the script of the speaker's ad.

To frame a test that more accurately maps the election/politics divide requires some attention to the context of the communication. As even Judge Hornby, a zealous defender of a narrow definition of express advocacy, has acknowledged, "it is a commonplace that the meaning of words is not fixed, but depends heavily on context as well as the shared assumptions of speaker and listener."[142] The meaning of content is shaped by context, and the impact of a communication will be affected by its context. Context and content together are necessary to assess whether a communication is election related. But to avoid vagueness and frame a test that is easy to apply, the test should incorporate only those features of the context that are easy to measure, are obvious to the speakers, and determine whether the communication is likely to affect the outcome of an election.

What does it mean to say that a communication is part of an election? Consistent with the avoidance of vagueness and of unnecessary restrictions on non-election-related behavior, a legislature should be permitted to define as part of the election those communications that refer to the participants in the election, occur during the election, and have characteristics that make them reasonably likely to have some impact on the outcome of the election. "Reasonably likely" means possible, not probable. It can never be certain before an election which activities will affect the result. On the other hand, it does not include communications that are likely to have little effect. Nor does the notion of possible effect refer to the outcome of a particular election; one election may be a foregone conclusion that would not be affected by any political activity, while another election may be so tight that truly trivial activities could have decisive impact. Rather, the focus should be on a class of similar elections, such as races for the House of Representatives. If there is some reasonable likelihood that a communication could affect the outcome of a class of elections then a legislature should be permitted to treat it as part of an election.

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142. Maine Right to Life Comm., Inc. v. Federal Election Comm'n, 914 F. Supp. 8, 11 (D. Me. 1996), *aff'd* 98 F.3d 1 (1st Cir. 1996).

Whether a communication should be treated as part of an election campaign for purposes of campaign finance regulation (including disclosure rules, contribution limits, and rules governing the use of corporate and union treasury funds) should turn primarily on three criteria: (i) content, (ii) timing, and (iii) the amount of money involved. Obviously, if a communication includes the magic words of express advocacy, it may be regulated regardless of when it airs or how much it costs. But beyond that, a legislature should be permitted to broaden the definition of electoral speech so long as it sensitively defines these three criteria in a way that permits effective regulation, avoids vagueness, and protects non-election-related speech.

Specifically, it should be constitutional to adopt a definition that regulates as election speech any communication that (i) refers to a clearly identified candidate; (ii) is made within a defined period before an election (probably four weeks before a general election and two weeks before a primary); and (iii) involves a sufficiently large expenditure—at least one percent, and possibly at least five percent—of the average expenditure of the winning candidate for the office in question in the two preceding elections.

In addition, there need to be specific rules for two regularly recurring situations: advertising by major political parties, and voter guides issued by organizations interested in political issues. Given the nature of our parties, major-party advertising which refers to a clearly identified candidate ought to be treated as electoral communication no matter when it occurs. Expenditures for voter guides should be treated as part of an organization's internal communications, and therefore exempt from regulation regardless of their references to candidates, timing, or cost, to the extent that the voter guide is distributed to the organization's membership or to regular recipients of the organization's publications. Additional expenditures to distribute the voter guide to a wider public should be treated as electoral communications to the extent that they satisfy the three elements of reference to a candidate, timing, and amount.

Such a standard is clear, easy to enforce, and tightly focused on speech that has the potential to influence an election. It places a minimal burden on issue-oriented organizations. It targets the sophisticated political participants best able to accommodate their actions to legal requirements. It is unlikely to chill any non-electoral speech, and it respects the associational autonomy of politically active groups. It is surely underinclusive, particularly in its temporal definition of the electoral campaign and its exclusion of voter guides distributed within an organization, but that represents a necessary accommodation to First Amendment values. In any event, this test would come a lot closer to accurately mapping the election/politics distinction, and thereby vindicating

the purposes of election regulation, than does the existing definition of express advocacy.

A. Content: Clearly Identified Candidate

This component of the test corresponds to one element of the existing express advocacy doctrine. Some reference to a clearly identified candidate is necessary to distinguish election-related communication from other forms of political speech.[143] If no reference to a candidate were required, the test would be far too open-ended and would easily encompass pure discussions of political issues. A clear reference to a candidate—either naming the candidate or using the candidate's likeness—is, thus, a necessary condition for regulation even if it is not sufficient to distinguish electoral from other political speech. Some reference to a candidate is also required to put speakers and broadcasters on notice that their messages are subject to regulation. Finally, despite the increasing sophistication of campaign advertising, it seems unlikely that a message that makes no reference at all to a clearly identified candidate will have a significant impact on an election.[144]

Virtually all of the blatant uses of issue advocacy to avoid campaign finance regulation in the 1996 election involved use of a candidate's name or likeness. As the 1996 Annenberg study found, hardly any so-called issue advocacy advertising actually discussed issues without mentioning candidates.[145] Conversely, a group or individual interested in communicating views to the public on a political issue could avoid regulation simply by avoiding reference to a candidate. There is no vagueness and no need to analyze the intent of the speaker.

Should a communication explicitly call for the election or defeat of a clearly identified candidate, then there would be no problem regulating it, as *Buckley* currently provides that such a statement is express advocacy.[146] Yet, not all communications that refer to a candidate ought to be treated as part of an election campaign: a candidate's name may be mentioned in passing as part of a shorthand reference to pending legislation or a political program, such as the McCain-Feingold bill or the Clinton health care plan. An organization should be able to use a candidate's name or likeness in order to underscore what the organization opposes, build

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143. This test is aimed at a demarcation of the elections/politics distinction in the context of elections for public office. Consideration of the elections/politics distinction in the context of voting on ballot propositions is beyond the scope of this article.

144. Given the central role of the major political parties in elections, it might be constitutionally permissible to treat clear references to a *group* of candidates by party affiliation—"House Republicans" or even "Democrats"—as tantamount to references to those candidates by name.

145. *See supra* text accompanying notes 71-72.

146. Buckley v. Valeo, 424 U.S. 1, 43 (1976).

membership, and rally support—such as when liberal organizations attack Newt Gingrich or Jesse Helms, and conservative organizations attack Bill Clinton or Ted Kennedy—without being automatically subject to election regulation.[147]

Reference to a candidate is, thus, a necessary but not sufficient condition for election regulation. On the other hand, the requirement of express advocacy—a literal exhortation to vote for or against a candidate—is so easy to evade that many election-related statements concerning candidates will be exempt from coverage.

Following *Furgatch*, some proposed campaign finance reforms would continue to focus primarily on the content of the speech, but would permit greater interpretation of that content "with limited reference to external events such as proximity to the election."[148] Thus, the FEC has by regulation defined express advocacy to include communications which

> [w]hen taken as a whole and with limited reference to external events, such as 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 encourage some other kind of action.[149]

The House of Representatives used similar language in one of several alternative definitions of express advocacy in the Shays-Meehan Bipartisan Campaign Reform Act of 1998,[150] which passed the House in the summer of 1998. Under Shays-Meehan, an election-related communication is one that advocates the election or defeat of a candidate by "expressing unmistakable and unambiguous support for or opposition to one or more clearly identified candidates when taken as a whole and with limited reference to external events, such as proximity to an election."[151]

The FEC and Shays-Meehan definitions of express advocacy provide a good measure of election-related speech, but they would be difficult to apply during the heat of election, are open to considerable variation in interpretation, and rely so heavily on adjectives like "unmistakable" and

147. *See* Federal Election Comm'n v. Survival Educ. Fund, Inc., 65 F.3d 285, 295 (2d Cir. 1995); Federal Election Comm'n v. National Org. for Women, 713 F. Supp. 428, 434-35 (D.D.C. 1989).

148. 11 C.F.R. § 100.22(b) (1996).

149. *Id.*

150. H.R. 3526, 105th Cong. § 201(b) (1998) (proposing amendments to 2 U.S.C. § 431 (1994)).

151. *Id.* § 201(b)(20)(A)(iii).

"unambiguous" that they signal the means of their evasion. With the Fourth Circuit in *Christian Action Network* finding that the ad at issue in that case could reasonably be interpreted as an anti-gay-rights ad and not an anti-Clinton ad,[152] it should be easy for political advertisers to conjure up just enough ambiguity to avoid coverage. In any event, the openness to interpretation of the FEC and Shays-Meehan definitions render them susceptible to attack as unconstitutionally vague—an attack that has already persuaded two federal courts in challenges to the FEC regulation.[153]

The content of a political communication is clearly a pivotal component in the determination of whether a message is part of an election campaign, but content alone is not enough. The express advocacy test is solely content based, but it is fatally underinclusive. The explosion of election-related advertising that cleverly avoids the magic words of literal advocacy demonstrates the inadequacy of the current express advocacy standard. A "reasonable" viewer standard would reach election-related communications, but such a test creates problems of vagueness and uncertainty as well as the possibility of administrative abuse. A better approach, focusing on the likelihood that the message would have an impact on an election (which is, after all, the basis for regulation) would involve going beyond the message's text to include consideration of its timing and the amount of money spent on its production and dissemination to the electorate.

B. Timing: Election-Period Speech as Presumptively Election Related

Both the FEC regulation and the provision of the Shays-Meehan bill would take "proximity to an election" into account in determining whether a communication is election related.[154] This approach recognizes that for many television watchers and radio listeners, the meaning of a political message that features a candidate (without an express exhortation to vote for or against that candidate) and some discussion of issues might depend on when the ad is aired. Unfortunately, "proximity" to an election is too hazy and uncertain a concept to be the basis of an enforceable definition. Rather than make "proximity" a factor in the assessment of whether a communication is part of an election campaign, the definition of election communications should be tied to a precise time period.

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152. *Christian Action Network, Inc.*, 110 F.3d at 1059-60.

153. *See supra* note 52 and accompanying text. *But see* Michael D. Leffel, Note, *A More Sensible Approach to Regulating Independent Expenditures: Defending the Constitutionality of the FEC's New Express Advocacy Standard*, 95 MICH. L. REV. 686, 708-710 (1995) (arguing that the FEC regulation is not unconstitutionally vague).

154. *See supra* text accompanying notes 148-53.

As previously noted, elections have a distinctive timing. Discussion of political issues may go on without resolution, but election-related activity is focused on persuading voters to make a choice among contending candidates on or shortly before a precise date on which they have a political obligation to choose. Although election-related activity precedes the actual moment of voting, the pace and sequence of election-oriented messages are focused on influencing voters' Election Day decisions. Thus, it is entirely appropriate for the timing of a message to be a factor in the determination of whether a message is part of an election campaign.

Communications that refer to a clearly identified candidate or group of candidates and that are published, broadcast, or otherwise disseminated in the period immediately before Election Day ought to be presumed to be part of the election. First, this is the high point of the election campaign, the period in which the voters are most likely to be considering their Election Day decisions. Information and arguments concerning candidates presented in the period shortly before Election Day raise the reasonable possibility of having an impact on the election.

Second, the danger that communications referring to candidates that are disseminated in this period will have any impact on political activity other than the election itself is limited. Typically, in the days and weeks immediately before Election Day, politics becomes increasingly focused on the election. Legislative bodies whose members are up for election generally go out of session. Executive branch officials who are up for election devote themselves to their campaigns. In this period, political communications that expressly refer to clearly identified candidates are likely to have their principal impact on voters' Election Day decisions, rather than on either general political discourse or particular government actions.

Third, the timing of the message does affect its meaning. An election-eve message that combines references to candidates and to issues is far more likely to affect voter thinking about the election than about political issues generally, precisely because the message is mailed, published, or broadcast on the eve of the election. Judge Hornby recoiled from the FEC's reference to proximity to the election as a factor in determining whether a communication is express advocacy, complaining that under the FEC's approach "what is issue advocacy a year before the election may become express advocacy on the eve of the election and the speaker must continually re-evaluate his or her words as the election approaches."[155] But the import and impact of a communication is likely to vary with

155. Maine Right to Life Comm., Inc. v. Federal Election Comm'n, 914 F. Supp. 8, 13 (D. Me. 1996), *aff'd* 98 F.3d 1 (1st Cir. 1996).

proximity to an election. A broadcast denunciation of President Clinton's health care policies will mean one thing and can have one effect when those policies are being debated by Congress more than a year before the election, and will have another meaning and a different effect a few weeks before Election Day when Congress is in recess and the President and members of Congress are on the campaign trail.

Indeed, the 1998 Annenberg Center study demonstrated that issue ads aired in the immediate pre-election period differ from issue ads broadcast at other times of year. The study, which examined 423 ads, found that issue ads released in the immediate pre-election period were far more likely to refer to candidates or officeholders by name, far less likely to discuss legislation, and far more likely to be "attack" ads than those aired in the preceding twenty months. In 1997-1998, only 35% of the ads released before September 1, 1998 mentioned a candidate; but 80% of the ads aired after that date named a candidate.[156] Conversely, 81% of issue ads aired before September 1 mentioned pending legislation, while only 22% of ads disseminated after September 1 mentioned pending legislation.[157] Just one-third of issue ads released before September 1 were attack ads, but a little over half of the issue ads in the two months before Election Day were attack ads.[158]

If regulation is to be based upon the timing of the message, the legislature must define the pre-election period. The real vice in the FEC's definition of express advocacy was not the inclusion of a reference to the timing of the message, but its failure to prescribe precisely what constituted temporal proximity to an election.[159] There must be a bright-line definition that makes it clear to speakers, regulators, and courts whether the speech falls within the pre-election period. The harder question is, of course, what the temporal scope of the pre-election period should be. That decision should be based on an assessment of political science data regarding when voters focus on and make decisions concerning their election choices, as well as on empirical data concerning the slowdown in other political activity that occurs as political actors focus their energies and attention on the upcoming election. Ideally, the pre-election period would begin when the rising line of voter attention to the election crosses the falling line of other political activity on the graph of political life.

Of course that graph does not exist, and any actual determination of the pre-election period is necessarily arbitrary. There are currently numerous proposals for some time-based definition of election-related

156. *See* Stanger & Rivlin, *supra* note 64.

157. *See id.*

158. *See id.*

159. *See* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,295 (1995) (elaborating on the definitions in 11 C.F.R. 100.22 (1996)).

speech. One group of political scientists has proposed that corporations, unions, trade associations, and issue groups be required to report expenditures with respect to an identifiable federal candidate within six months of an election.[160] This, however, is far too broad a definition. In a jurisdiction with both a primary and a general election, it could turn more than a year in every two-year election cycle into the pre-election period.

A Brookings Institution-American Enterprise Institute task force has proposed that all paid communications that use a federal candidate's name or likeness within ninety days of a primary or general election should be considered election related and subject to regulation.[161] The proponents note that ninety days before an election is the same period in which members of the House of Representatives are barred from using the congressional frank for mass mailings to their districts.[162] This period is also too long for regulating issue advocacy by non-incumbents. The congressional frank—one of the many advantages an incumbent enjoys—represents the use of public resources, and it is likely that material sent by a member of Congress is going to be part of that member's reelection drive. Communications by independent organizations do not involve public resources, are not necessarily pro-incumbent, and may in fact be aimed at affecting public opinion and legislative deliberations concerning a political issue. A ninety-day period—reaching from early November to early August for the general election, and from a June primary back to March—simply defines too much of the political year as part of the election campaign.

A provision of the Shays-Meehan Bill would treat as express advocacy a communication with respect to a clearly identified candidate "in a paid advertisement that is broadcast" on television or radio within sixty days of an election in a state in which the candidate is running.[163] Sixty days is certainly more reasonable than ninety days, and it is consistent with the 1998 Annenberg Center data which show a sharp shift in issue advocacy ad content from discussion of pending legislation in the period before sixty days before Election Day to discussion of candidates in the sixty-day period immediately before Election Day.[164] But a sixty-day rule still would convert four months of an election year into a period in which

160. *See* Citizens' Research Foundation, *New Realities, New Thinking: Report of the Task Force on Campaign Finance Reform*, (May 27, 1997), <http://www.usc.edu./dept/CRF/DATA/newrnewt.htm> (setting a $50,000 threshold for covered expenditures).

161. *See* Thomas E. Mann, *Introduction*, *in* CAMPAIGN FINANCE REFORM: A SOURCEBOOK 1-3 (Anthony Corrado et al. eds., 1997).

162. *See* 39 U.S.C. § 3210(a)(6)(A) (Supp. II 1996).

163. The time restriction on a senator's use of the frank is 60 days before an election in which the senator is a candidate. *See* 39 U.S.C. § 3210(a)(6)(C) (1994).

164. *See supra* text accompanying note 72.

communications referring to candidates are presumptively part of an election. This would include the month of September, which will often be a period in which Congress is seeking to resolve pending matters prior to adjournment.[165] There is also no reason to have a special time-based definition of express advocacy limited to broadcasting since issue advocacy campaigns can make intensive use of mass mailings and telephone banks as well as broadcast advertising.[166]

My armchair analysis suggests that the period ought to be about four weeks before a general election and two weeks before a primary. The general election period ought to be longer because the general election tends to dominate the rest of politics more than does a primary. The legislature is more likely to be out of session, and elected officials are more likely to be out on the hustings rather than involved in governance. Public attention is also more likely to be focused on the general election, and to focus on it earlier than on the primary. As a result, messages that mix candidate and issue references may be more likely to affect electoral choice rather than political views for a longer period before a general election than before a primary.[167]

Four weeks seems to be about the outer limit of the pre-election period in terms of both the attention of the voters and the diversion of political actors from other political activity.[168] A longer period would raise a greater danger of regulating discussion of political issues and of messages that affect political debate generally rather than electoral choice. It is really only in the month before a general election that other political activity drops off sharply, that political debate is focused primarily on the upcoming election, and that the public's interest begins to turn to the election. Indeed, this is the period in which most issue advocacy advertising appears to occur.

Even four weeks may be too long. In 1998, a Congress tangled up in budget and impeachment issues remained in session deep into October and

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165. *Cf.* West Virginians for Life, Inc. v. Smith, 960 F. Supp. 1036, 1039 (S.D.W. Va. 1996) (invalidating a West Virginia law providing that voter guides distributed within 60 days of an election are presumed to be election related for purposes of a state law requiring reporting and disclosure of election expenditures).

166. *See* BECK ET AL., *supra* note 2, at 14, 16, 32, 44, 45, 63 (reporting the amounts various advocacy groups spent on different types of activities); *see also* DREW, *supra* note 10, at 223 (reporting that Americans for Tax Reform planned to use the Republican National Committee's $4.6 million gift to mail seventeen million pieces of literature and make four million telephone calls).

167. Unfortunately, the 1998 Annenberg Center study did not compare issue ads broadcast in September 1998 with those broadcast in October 1998 to determine if the frequency of references to pending legislation and to candidates changed between 60 days and 30 days before the 1998 congressional elections. *See* Stanger & Rivlin, *supra* note 64.

168. *Cf.* Planned Parenthood Affiliates v. Miller, 21 F. Supp.2d 740, 746 (E.D. Mich. 1998) (enjoining enforeement of a Michigan regulation prohibiting a corporation from using a candidate's name or likeness on a communication made within 45 days of an election—the absentee voting period—unless the corporation uses separate, segregated funds for the communication).

did not break for the November elections until two weeks before Election Day.[169] As a result, even as the general election loomed, political debate did not shift entirely away from pending legislative action. There is some temptation to tie the onset of the election-eve period to the adjournment of Congress, provided that it is thirty days or less before the election; but that could create uncertainty and would give the incumbent Congress too much power to manipulate the length of this period. If the party in power believed that it would be the primary beneficiary of issue advocacy advertising, it could avoid formal recess or adjournment altogether in order to limit disclosure and facilitate the use of corporate or union funds in the election. Another possibility is to define the pre-election period as thirty days before Election Day unless Congress is still in session, in which case the pre-election period would begin on the earlier of congressional adjournment or two weeks before Election Day.

Like the number of petition signatures needed to place a candidate on the ballot or, more pertinently, the number of feet from the polling place in which a state may bar electioneering,[170] this seems like an issue where the courts ought to give federal and state regulators some leeway. Given the difficulty of proving that a communication affects readers or viewers, it would be inappropriate to require "empirical verification"[171] or a "particularized showing"[172] that there is some abrupt rise in the impact of communications at five or ten or twenty days before an election. Just as there are no magic words, there are no magic days. But it is reasonably likely that election-eve communications that mention clearly identified candidates are more likely to affect readers', viewers', or listeners' views about their electoral choices than their views about political issues unanchored to candidates. Regulating such communications is not likely to interfere with a robust issues debate because most political debate on the eve of the election is about the election itself rather than about issues per se. A bright-line test is constitutionally desirable even if no particular bright line is empirically decisive. Applying the approach taken in *Burson* and *Munro* to legislative line-drawing in election regulation, any line thirty days or less before the election ought to be constitutionally acceptable.[173]

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169. *See* William M. Welch, *"Running-in-Place" Congress Comes to a Close*, USA TODAY, Oct. 22, 1998, at A8.

170. *See generally* Burson v. Freeman, 504 U.S. 191 (1992) (upholding a Tennessee law prohibiting campaigning within 100 feet of a polling station on Election Day); Jenness v. Fortson, 403 U.S. 431 (1971) (affirming a Georgia law requiring 5% of eligible voters to sign a candidate petition to gain ballot access if that candidate's party representative received less than 20% of the vote at the most recent presidential or gubernatorial election).

171. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364 (1997).

172. Munro v. Socialist Workers Party, 479 U.S. 189, 194 (1986).

173. *See Burson*, 504 U.S. at 206-11 (relaxing the burden of proof for showing that a restriction on electioneering near a polling place is narrowly tailored to prevent voter intimidation and election fraud); *Munro*, 479 U.S. at 194-95, 195 (refusing to require "a State to make a particularized showing

C. *Amount of Money: Raising the Threshold for Regulation*

Consistent with the notion that the definition of election-related activity should focus on communications that have a reasonable likelihood of affecting electoral outcomes,[174] only substantial expenditures referring to candidates and occurring within the defined pre-election period should be subject to regulation. The threshold ought to be at least one percent of the average expenditure of the successful candidate for the office in question over the last two or three elections, and possibly higher—up to five percent. In 1996, the average successful candidate for the House of Representatives spent $674,000, so that a one percent test would place the threshold for regulation at about $6700 and a five percent test would make the threshold $33,500.[175] For the presidential general election, the figure would be one percent of the limit on the major party candidates receiving public funding. In 1996, the public grant was about $61.8 million,[176] so the threshold for determining whether an expenditure concerning a presidential candidate in the general election is election related would be around $620,000. (Given that many expenditures might target one or a small number of states, it might be appropriate to develop state spending thresholds which are less than the national threshold for presidential elections.)

These thresholds are significantly higher than FECA's current thresholds for reporting by independent committees engaged in express advocacy,[177] and are generally higher than the thresholds used by the states to trigger reporting requirements.[178]

Employing a higher monetary threshold in the definition of election-related expenditures could reduce the danger of subjecting general political

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of the existence of voter confusion . . . prior to the impositions of reasonable restrictions" because "[s]uch a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action"). *But cf.* Allison Rittenhouse Hayward, *Stalking the Elusive Express Advocacy Standard*, 10 J.L. & POL. 51, 93 (1993) (calling for a five-day election-eve standard for the definition of express advocacy).

174. *See supra* Part IV introduction.

175. *See* Center for Responsive Politics, *1995-96 Big Picture: Who Paid for the Last Election: Campaign Statistics at a Glance*, <http://www.opensecrets.org/pubs/bigpicture/bpstats.html>.

176. *See* Federal Election Commission, "Financing the 1996 Presidential Campaign," <http://www.fec.gov/pres96/presgen.htm> (on file with *The Texas Law Review*).

177. *See* 2 U.S.C. § 434(b)(5)(A) (1994) (requiring that express advocacy expenditures of more than $200 to any person be reported).

178. *See, e.g.*, Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503, 505 (7th Cir. 1998) (challenging an Indiana law requiring reports of expenditures greater than $100); Vermont Right to Life Comm., Inc. v. Sorrell, 19 F. Supp.2d 204, 216 (D. Vt. 1998) (upholding a Vermont law with a $500 trigger for reporting election expenditures by giving the statute a narrow construction); Virginia Soc'y for Human Life, Inc. v. Caldwell, 500 S.E.2d 814, 816-18 (Va. 1998) (upholding a Virginia law with a $100 reporting threshold).

speech to regulation. Although most media advertisements aired or published in the immediate pre-election period that clearly identify a candidate for office are likely to be election related, it is conceivable that some may address issues and concerns other than the upcoming election. One way to mitigate the overbreadth concern is to focus regulation on political communications that are more likely to have an effect on voter decision-making and to exempt communications that are unlikely to have much consequence. That can be accomplished by raising the monetary threshold. I do not mean to argue that a specific monetary threshold is constitutionally mandated. But with the higher monetary threshold it is more likely that the other elements of the standard of election speech—specific reference to a candidate and either *Buckley*'s express advocacy test[179] or a precise pre-election period[180]—will optimally balance the competing constitutional concerns of vindicating the norms of election regulation and minimizing the burden on general political speech.[181]

The FECA sets low reporting and disclosure thresholds.[182] With major-party candidates spending above a half million dollars in contested congressional elections,[183] it is unlikely that expenditures of a thousand

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179. *See supra* text accompanying notes 15-16.

180. *See* discussion *supra* Subpart IV(B).

181. It is possible that some pre-election speech that mentions a candidate's name will have nothing to do with elections or politics. At the Symposium at which this paper was first presented, Professor Dan Lowenstein raised the hypothetical situation of an advertisement taken out by Major League Baseball on the occasion of the World Series honoring past baseball champions which, in a long list of honorees, mentions Jim Bunning, just-elected Senator from Kentucky, who, at the time the ad runs, might be a candidate for re-election. If Bunning is just one of a number of past and present athletes mentioned in the ad, then raising the monetary threshold would make it very unlikely that the portion of the ad costs attributable to him (and attributable to publication or broadcasting in his home state) would cross the monetary threshold of potential electoral impact. Alternatively, the definition of election-related speech might provide that (i) clear identification of a candidate, (ii) broadcast or publication in the pre-election period, (iii) expenditures that cross the monetary threshold of potential electoral impact constitute a *rebuttable* presumption of election-relatedness, but that presumption could be rebutted on a showing that based on the content and context of the speech, the viewers or readers are unlikely to treat it as an election-related communication. That would resolve Lowenstein's Bunning case.

182. FECA defines as a "political committee," any committee or other group of persons that receives contributions greater than $1000 during a calendar year or makes expenditures greater than $1000 during a calendar year. *See* 2 U.S.C. § 431(4)(A), (B) (1994). "Contributions" and "expenditures" are defined as moneys used "for the purpose of influencing any election for Federal office." *See* 2 U.S.C. § 431(8)(A)(i), (9)(A)(i) (1994). A political committee is required to identify each person who makes a contribution greater than $200 within the calendar year. *See* 2 U.S.C. § 434(b)(3)(A) (1994 & Supp. 1997). In addition, persons who make independent expenditures in excess of $250 in a calendar year are required to report to the FEC and to identify the source of any contribution in excess of $200 to the person making independent expenditures. *See* 2 U.S.C. § 434(b)(3)(A) (1994).

183. In 1996, the average candidate for a seat in the House of Representatives spent $517,000. Preliminary figures place the average cost of a House campaign in 1998 at $512,000. *See* COMMITTEE

dollars will have any perceptible impact on electoral outcomes. Nor is it likely that voter decision-making would be enhanced if the sources of a few hundred dollars are required to be disclosed. If the purpose of the definition of election-related communication is to vindicate the underlying concerns of campaign finance regulation—to provide voters with information concerning the identities of those who support or oppose particular candidates, to deter the potential for corruption, to reduce the role of political war chests not correlated with the extent of public support for the political positions taken—these concerns are simply not affected by such small sums. Knowing about them provides the voters with little in the way of useful information. These amounts are unlikely to trigger quid pro quo obligations to the individuals or organizations who provide them. Nor are they likely to raise the potential for undue influence on electoral outcomes. Only larger sums of money running from one to five percent of the average spending for the office in question present any realistic possibility of actually affecting the election. Given current spending patterns in congressional races, for example, the threshold for regulating so-called issue advocacy spending in a race for the House of Representatives ought to be in the neighborhood of at least ten thousand dollars.[184] Consistent with the principle of justifying regulation of election-related speech in terms of the possibility of an impact on the election while minimizing the regulatory burden on general political speech, the threshold for the definition of election-related speech should be increased.

Cases like *McIntyre v. Ohio Elections Commission*[185] reflect considerable judicial discomfort with governmental regulation of grass-roots political activity. Justice Stevens' opinion for the Court dwelt on the "personally crafted" nature of Ms. McIntyre's leaflet,[186] and Justice Ginsburg's concurrence spoke of the "individual leafleteer who, within her local community, spoke her mind."[187] Not only is there less public benefit in regulating small spenders, but there may be a greater burden on political expression and personal autonomy if the regulation includes individuals or grass-roots groups whose small expenditures are more likely to reflect deeply held personal views.

Focusing regulation on communications involving larger sums of money also enhances the prospects for compliance and enforcement. A

FOR ECONOMIC DEVELOPEMENTS, INVESTING IN THE PEOPLE'S BUSINESS: A BUSINESS PROPOSAL FOR CAMPAIGN FINANCE REFORM 18 (1999).

184. Although a uniform national threshold for regulation of so-called issue advocacy in House races could be adopted, the threshold for regulation in Senate races would need to vary according to state population or voting age population.

185. 514 U.S. 334 (1995).

186. *Id.* at 355.

187. *Id.* at 358 (Ginsburg, J., concurring).

higher threshold targets only the major electoral players; that is, those participants in political spending who are best able to understand the law and comply with its requirements. Entities that spend larger sums of money are more capable of carefully separating their electoral from their other political efforts and, thus, are simply less likely to stumble across the election/politics line. Consequently, a higher threshold minimizes the regulation of non-electoral speech. A higher threshold also enables regulators to husband their resources and target their efforts on assuring compliance by the major actors. This also increases the possibility of compliance within the election campaign itself.[188]

This last point is, strictly speaking, a pragmatic argument, not a constitutional one. Yet, in the campaign finance reform area pragmatic and constitutional concerns may be intertwined. Campaign finance regulations do place some burdens on political speech. These burdens are justified only to the extent that they advance the goals of campaign finance regulation. A definition of election speech that is difficult for campaign participants to comply with, or for regulators to enforce, raises the unwelcome prospect of burdens without benefits and ultimately mocks the constitutional values underlying campaign finance regulation. A more enforceable definition is more constitutionally permissible because the restrictions on political communications resulting from regulation are justified by more effective attainment of the norms underlying the restrictions.

As with the definition of the pre-election period, there is no magic to a one percent threshold and no clear justification for one percent as opposed to any other limit. As with the other questions of election law line-drawing, these ought to be "matters of degree" for which political decision-makers enjoy some discretion. The critical point is that a definition more carefully focused on larger expenditures, determined relative to the actual levels of spending by candidates, does a better job of achieving the goals of campaign finance regulation and is more respectful of First Amendment interests.

D. Specific Rules

The proposed definition of election-related communications is intended to balance the protection of general political speech from government regulation against the interest in effective enforcement of campaign finance laws that are consistent with, indeed, supportive of, the basic role of elections in creating a structure of democratic self-governance. The

188. On the difficulties of enforcing disclosure requirements and the importance of factoring enforcement concerns into the substance of regulation, see MALBIN & GAIS, *supra* note 77, at 33-50.

definition expands *Buckley*'s coverage of election-related speech beyond the easily evaded express advocacy standard to include clear references to a candidate during the election campaign that involve the expenditure of a threshold sum of money, but it uses a relatively short pre-election period and a high expenditure threshold to protect individuals, groups, and grass-roots organizations engaged in true issue advocacy from the toils of the election laws. For some identifiable groups or activities, however, the balance of interests may tip in favor of a different definition of election-related communication. The two special cases that come to mind are issue advocacy by major political parties and voter guides issued by advocacy groups.

1. Issue Advocacy by the Major Political Parties.—The Annenberg Center found that the major parties accounted for more than half the issue advocacy expenditures in the 1996 election and for more than 70% of issue advocacy expenditures in the two months preceding Election Day 1998.[189] Major political party advocacy presents a much stronger case for regulation,[190] while raising fewer of the concerns that would demand a narrower definition of election-related activities. Unlike many ideological advocacy groups, the major political parties receive corporate and union funds in their soft money accounts.[191] Indeed, major party "issue advocacy" provides an important conduit for corporate and union participation in elections. Moreover, the two major parties are powerful organizations in their own right. Between them they control the overwhelming majority of federal and state offices. Unlike the case for small, independent, or grass-roots organizations, the reporting and disclosure of contributions to and expenditures by the parties is unlikely to have a chilling effect on the parties, their supporters, or the vendors from whom they buy services. In addition, as skilled campaign professionals, the major political parties are in the best position to conform their activities to legal requirements. As they are already subject to considerable regulation, requiring the parties to report on more of their candidate-related campaign activities would not create a significant new administrative burden. Most importantly, the *raison d'etre* of the two major political

189. *See* BECK ET AL., *supra* note 2, at 3, 34, 55; Stanger & Rivlin, *supra* note 64.

190. Political party issue ads were also particularly likely to consist of attacks on a candidate. The 1998 Annenberg study found that 23.9% of ads aired by candidates in the last two months of an election were attack ads, and that 32.0% of the ads aired by non-party issue organizations in that period were attack ads, but that 59.5% of party issue ads in the pre-election period were attack ads. *See* Stanger & Rivlin, *supra* note 64, at 8.

191. *See* Center for Responsive Politics, *Who Paid for This Election? Top Soft Money Donors, 1997-98* (visited May 26, 1999) <http://www.opensecrets.org/pubs/whopaid/soft/topdonors.htm> (reporting that most donors of soft money in amounts in excess of $300,000 were either corporations or unions).

parties is to fight and win elections.[192] They make communications concerning issues primarily to advance the prospects of their candidates for winning elective office. Given the electoral focus of the major parties, party communications concerning issues will typically be election related.

The First Amendment should tolerate a much broader definition of election speech when it comes to the activities of the major political parties. The pre-election period could be expanded, and the monetary threshold lowered, to encompass more party expenditures that mention candidates. Indeed, given the close connections between parties and their candidates, I think that all party advertising that refers to a clearly identified candidate for federal office ought to be treated as election-related activity. As a practical matter, however, some monetary threshold would be desirable to focus enforcement efforts on more substantial activities; similarly, the determination of whether a person referred to in an advertisement is a candidate for federal office is likely to have a significant temporal element.

Such an approach is not precluded by *Colorado Republican Federal Campaign Committee v. Federal Election Commission*.[193] That decision held that a party's spending in support of a candidate may be considered "independent spending" and is not necessarily subject to FECA's restrictions on spending that is "coordinated with a candidate."[194] *Colorado Republican*, however, did not consider whether party expenditures concerning clearly identified candidates that refrain from literal advocacy ought to be treated as election related or, rather, ought to be exempt from election regulation.[195] Party independent spending, like

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192. *See, e.g.*, JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 12, 12-13 (1995) (elaborating on the view, most rigorously advocated by Anthony Downs and Joseph A. Schlesinger, that the "competition for office" is "the singular, defining characteristic of the major American political party").

193. 518 U.S. 604 (1996).

194. *See id.* at 619 (holding that the lower court's "conclusive presumption that all party expenditures are 'coordinated'" was an error as a matter of law).

195. *Colorado Republican* involved advertising by the Colorado Republican Party which criticized the record of the likely Democratic nominee for Colorado's U.S. Senate seat, but did not expressly call for the Democrat's defeat. The District Court determined that the ad "[a]t best . . . contains an indirect plea for action" which fell short of express advocacy. Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm., 839 F. Supp. 1448, 1455 (D. Colo. 1993). The Tenth Circuit agreed that the ad would not constitute express advocacy "within the narrow definition of *Buckley* and *[Massachusetts Citizens for Life]*," but found that it contained an "electioneering message" within the meaning of an FEC advisory opinion determining that such messages by political parties were subject to FECA's limitations on party coordinated spending. Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm., 59 F.3d 1015, 1023 (10th Cir. 1995). The Supreme Court found that the Republican Party's spending was independent of the campaign of any Republican candidate and, thus, was not subject to FECA's dollar limitations on party coordinated spending. *Colorado Republican*, 518 U.S. at 613. The Court did not address whether the party ad was exempt from regulations altogether as issue advocacy.

other forms of independent spending, is subject to FECA's reporting and disclosure requirements and contribution limitations and prohibitions; these are the very regulations that would be avoided if a communication is defined as issue advocacy.[196] *Colorado Republican* establishes that a major party can support its candidates in a manner independent of the candidate's campaign, but that is in no way inconsistent with a determination that a party's expenditures concerning a clearly identified candidate are part of the election that the candidate is contesting.

Certainly, party communications that are actually coordinated with a candidate ought to be treated as election-related speech subject to regulation even if the party ads avoid express advocacy of the election or defeat of particular candidates.[197] Such coordination is likely to be difficult to prove during the heat of a campaign.[198] More importantly, formal coordination should not be required in order to find that major-party spending that explicitly refers to a candidate is express advocacy. The institutional commitment of parties to the election of candidates, and the lack of danger that expanded regulation would interfere with communications solely concerning issues, support a broader definition that treats party advertising concerning clearly identified candidates as election-related speech, subject to disclosure requirements and limits on the size and sources of contributions. Disclosure is unlikely to chill contributions to the major parties. Indeed, the greater public interest in information concerning the financial support for the two major parties which dominate our political system, together with the increased reliance of the major parties on funding from sources that are specially restricted, militates in favor of a broader definition for election-related speech for major-party spending.

2. *Voter Guides*.—One of the most frequent causes of legal conflict under the existing express advocacy/issue advocacy distinction is the treatment of "voter guides," that is, compilations of how a candidate has

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196. *See* 2 U.S.C. § 434 (1994).

197. According to the FEC staff, this was the case with the Republican National Committee advertisements for the Dole campaign in 1996 and the Democratic National Committee advertisements for Clinton-Gore in 1995-96. *See* DOLE REPORT, *supra* note 81, at 79; CLINTON-GORE REPORT, *supra* note 78, at 16-20.

198. The FEC staff findings concerning the 1996 major party presidential candidates followed extensive "reviews of bank records, media flight reconciliations for time buys, affidavits and invoices issued by broadcast stations, internal documents prepared by the [candidate committee] relating to the planning and purchase of TV air time, production invoices and related documents, most of which were obtained as a result of subpoenas issued by the [FEC]." CLINTON-GORE REPORT, *supra* note 78, at 20. The audit took nearly two years to complete. For an analysis of the difficulties of proving coordinated activity between a party or political committee and a candidate, see Darrell M. West, Checkbook Democracy: How Money Hijacked American Campaigns (presented at the Brown University Conference on Democratic Equality, Apr. 9, 1999) (unpublished manuscript on file with author).

voted, or the positions a candidate has taken, with respect to issues of interest to the organization publishing the guide.[199] These guides also frequently include some characterization of how a candidate's votes or issue positions match up against the organization's own positions. Voter guides present a particularly thorny problem because they are the rare form of issue advocacy that actually provides information concerning issues, yet they can, and are surely intended to, affect how people will vote in an election. The FEC has tried to regulate corporate and labor organization voter guides that are distributed to the general public. The FEC standard turns in part on the presence or absence of "an electioneering message" or whether the guide "score[s] or rate[s] the candidates' responses in such a way as to convey an electioneering message."[200] The Shays-Meehan Bill would exempt voter guides and voting record information from the definition of express advocacy only insofar as such information is presented "in an educational manner."[201] Both the FEC regulation and Shays-Meehan would also condition the exemption of voter guides on the absence of coordination between the entity issuing the voter guide and any candidate or party.[202]

Classifying voter guides according to the content of their messages—much like the attempt to develop an entirely content-based measure of issue advocacy generally—is unlikely to pass constitutional muster. Concepts like "electioneering" or "educational manner" are inherently vague and create uncertainties for both the publishers of voting guides and enforcement agencies. Would a voter guide that combines a statement of a candidate's votes or positions on certain issues with a statement of the sponsoring organization's positions on the same issues be engaged in electioneering or depart from presentation in an educational manner? What

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199. *See, e.g.*, Wisconsin Right to Life, Inc. v. Paradise, 138 F.3d 1183 (7th Cir. 1998) (dismissing a suit brought to enjoin the application of the state registration requirement to organizations that publish voter guides, noting that the state policy of not applying registration requirements to issue advocacy groups rendered the suit nonjusticiable); Clifton v. Federal Election Comm'n, 114 F.3d 1309, 1311 (1st Cir. 1997) (claiming that FEC regulation of voter guides is "'invalid as not authorized' by the Federal Election Campaign Act of 1971"), *cert. denied*, 118 S. Ct. 1036 (1998); Faucher v. Federal Election Comm'n, 928 F.2d 468, 471 (1st Cir. 1991) (addressing whether a regulation of voter guides is inconsistent with specific sections of FECA); Vermont Right to Life Comm., Inc. v. Sorrell, 19 F. Supp.2d 204 (D. Vt. 1998) (upholding disclosure and reporting requirements that would foree the Right to Life Committee to place disclaimers on its voting guides and other publications); North Carolina Right to Life, Inc. v. Bartlett, 3 F. Supp.2d 675, 677 (E.D.N.C. 1998), *aff'd*, 1999 U.S.App. LEXIS 2350 (4th Cir. Feb. 17, 1999) (noting that North Carolina laws restricting publication of voter guides violated the plaintiffs' First Amendment rights); West Virginians for Life, Inc. v. Smith, 960 F. Supp. 1036, 1037 (S.D.W. Va. 1996) (contending that West Virginia's voter guide law was overbroad because it regulated issue advocacy).

200. *See* 11 C.F.R. § 114.4(c)(5)(ii)(D)-(E) (1998).

201. Campaign Reform Act of 1998, H.R. 3526, 105th Cong. (codified at 2 U.S.C. § 201(b)(20)(B)(i) (1998)).

202. *See id.* § 201(b)(20)(B)(ii); 11 C.F.R. § 114.4(c)(5)(ii)(A) (1999).

about a guide that underscores the names of candidates who generally support the organization's positions or the name of the candidate in each pair of opposing candidates whose positions come closer to those of the issuing organization? Surely such information can be *both* educational *and* electioneering, in the sense of a communication intended to influence voting decisions.

Rather than attempt to distinguish educational from electioneering, I would draw a different line. I would distinguish between voting record information distributed internally—to an organization's officers, members, affiliates, or the regular recipients of publications and other mailings of the organization—and externally, that is, to the general public. Communications within an organization concerning the organization's positions on political issues implicate the core of freedom of association. The officers, members, and other persons who have voluntarily chosen to affiliate with an organization have a distinct interest—different from and greater than that of the general public—in learning the organization's views concerning candidates. Conversely, there is little benefit in terms of the goals of campaign regulation in treating such communications as regulated speech. There is only a limited informational gain from applying disclosure requirements to the expenditure of funds for internal dissemination of voter guides since officers, members, and regular recipients of organization publications presumably already know quite a bit about the organization and its views on issues. Nor does communication among persons who have a common affiliation raise the same concern about the projection of an organization's war chest into the electoral arena, which is the principal rationale supporting restrictions on corporate and union electoral activity. Indeed, FECA's restrictions on corporations and unions do not apply to such internal communications.[203] Similarly, if the internal communication of a voter guide is not coordinated with a candidate, it could not be treated as a contribution, and regulation could not be justified in terms of the goals that support contribution limitations.

The distribution of a voter guide to the general public is a different story.[204] The associational interest is diminished and the danger of the

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203. *See* 2 U.S.C. § 441b(b)(2)(A) (1994).

204. *Compare* United States v. UAW-CIO, 352 U.S. 567 (1957) (reversing the dismissal of an indictment brought against a labor union, under FECA's predecessor statute, for paying for television broadcasts aimed at the general electorate that endorsed candidates), *with* United States v. CIO, 335 U.S. 106 (1948) (affirming dismissal of indictment against a labor union brought under FECA's predecessor statute for spending money to distribute to union members a union newspaper containing union endorsements of political candidates). Professor C. Edwin Baker drew a similar distinction in an earlier article. *See* C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 49-50 (1998) (distinguishing between activities of "politically engaged advocacy organizations" when "they employ their established media or other regular communication methods" and such "groups' special attempts to spread an electoral message beyond their membership or usual audience").

projection of economic power into the political arena is strengthened where there is no preexisting connection between the organization and the persons who receive the message. Given the lack of such a connection between sponsor and audience, and the increasingly cryptic names of many of the organizations participating in election campaigns, disclosure of the source of funds for the organization distributing a voter guide can be critical to the voter's appraisal of the information provided. Moreover, so long as the organization disseminating the voter guide operates at arm's length from the candidate, its activities would be treated as independent expenditures and not as contributions. Thus, spending limits would not apply,[205] and the only burden on a sponsor who crossed the monetary threshold would be reporting and disclosure.

E. The Definition of Election-Related Speech and the Scope of Campaign Finance Regulation

I noted at the outset of this article that the definition of election-related speech and the scope of campaign regulation are separate questions. Certainly, the determination of what forms of campaign finance regulation are constitutionally permissible does not determine what kinds of activities fall into the category of campaign activities. Yet, although the two questions are logically distinct, in practice they may be connected.

It is easier to justify an expansion of the category of election-related speech when the consequences are minimally burdensome: reporting and disclosure by organizations spending relatively large sums of money; limiting large individual donations; requiring corporations and unions to finance these communications from their PACs rather than from treasury funds;[206] and forcing parties to reclassify certain activities as independent expenditures rather than issue advocacy, with attendant disclosure requirements and contribution restrictions, but no expenditure limitations.[207] Not only would the proposed redefinition of election-related speech address some of the blatant evasions which currently make a mockery of the entire campaign finance enterprise, but the principal consequences—increased information and more effective enforcement of constitutionally valid contribution restrictions, as well as limitations on

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205. Of course, if the organization publishing the voter guide is a business corporation or a labor union, then FECA's restrictions, 2 U.S.C. § 441b (1994), would apply to the use of treasury funds (but not PAC funds) for its production and dissemination.

206. Under Supreme Court precedent many ideological groups that take the corporate form, such as right-to-life organizations, are exempt from this requirement. *See* Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 263 (1986).

207. In his comment, *Regulating Election Speech Under the First Amendment*, 77 TEXAS L. REV. 1837 (1999), Professor Robert Post suggests that an expansion of the definition of election-related speech would be easiest to justify for the least burdensome of existing campaign finance laws—the reporting and disclosure requirements.

corporate and union campaign activities—are consistent with the broader values of the First Amendment.

If the Constitution were amended or interpreted to permit greater regulation of election-related speech, particularly if it permitted the imposition of expenditure limits on candidates and independent spending, the definition of election-related speech would become more difficult. An expansion of the goals and techniques of campaign finance regulation would surely reflect a reconsideration of the place of equality of participation in the definition of a fair and democratic process. If the Constitution were held to permit regulation that equalizes the opportunity to influence election outcomes by limiting candidate, party, and, especially, independent committee spending, the determination of what is considered to be election-related spending would become even more important than it is currently.

The impact of simultaneously expanding both the definition of an election and the permissible regulation of election-related communications would have greater implications for political speech than either step taken alone. Conceivably, a broader definition of election-related speech might discourage the Court from supporting expanded campaign finance regulation; alternatively, the possibility of spending limits might lead courts to be wary of expanding the definition of what constitutes campaign spending.

At this point, a judicial redefinition of the goals and techniques of campaign finance in the direction of greater equalization would be a dramatic step, entailing a repudiation of most of the last quarter-century's campaign finance jurisprudence. Judicial reconsideration of the placement of the election/politics line in light of existing campaign practices would constitute a significant change in the express advocacy doctrine, but it would be a much more modest and nuanced action than a validation of spending limits, and it would be entirely consistent with continued adherence to the principal elements of *Buckley*. Indeed, given the emergence of major election-spending campaigns that take the form of issue advocacy, some redrawing of the election/politics line is both necessary and appropriate, not to increase the regulation of campaign finances or to change the campaign finance system, but to vindicate the regulatory norms the Supreme Court upheld in *Buckley* and to restore FECA as it stood following the *Buckley* decision.

V. Conclusion

Some distinction between election-related spending and other political spending is essential for any campaign finance regime, whether a minimal regulatory regime focused purely on disclosure or more ambitious efforts to limit contributions or expenditures. The current limited definition of

express advocacy fails to correspond to the actual demarcation between an election campaign and the rest of politics. Instead, it has become an open invitation to evasion of campaign finance regulation. A better definition of election-related speech would incorporate both the legitimate governmental interest in designing a fair and legitimate process for collective selection of a democratic government and the First Amendment interest in protecting non-election-related speech. It would provide a clear line, although the actual location of that line would necessarily reflect political judgments about the relative importance of a number of conflicting values rather than an extrapolation from incontestable principles. Such a line ought to look to the timing of the communication and the amount of money spent on it, as well as to the express words of the message. The identity of the speaker—whether or not it is a major political party—and the nature of the communication (whether it is an internal communication from an organization to its members) are relevant as well. The resulting definition would be both more effective in practice and more accurate in theory in mapping the elusive but essential election/politics line.

I should address, briefly, three of the many criticisms that I anticipate will be leveled at this proposal. These correspond to the types of arguments that Albert O. Hirschman flagged in *The Rhetoric of Reaction: Futility, Perversity, Jeopardy*.[208] First, it may be that this approach, like so many campaign finance reforms, will prove futile. In the twenty-five years since Watergate sparked the amendments to FECA that produced our current regulatory regime, politicians and organizations seeking to influence electoral politics have repeatedly demonstrated their ability to frustrate legislative efforts to restrict the flow of campaign dollars. The rise of such institutions as independent committees, bundling, soft money, and issue advocacy demonstrates the capacity of electoral actors to frustrate reform.

One argument, then, is that a redefinition of election-related spending, whatever its appeal in theory, is, like other forms of campaign finance reform, doomed to failure. Certainly, a quarter-century of campaign finance reform has done little to constrain the role of money in politics. Yet, the futility thesis fails to acknowledge that some reforms—public funding, individual contribution limits—have had consequences. The very need for politicians and political organizations to invent new campaign finance techniques is a back-handed testimonial to the effectiveness of some rules in curtailing or eliminating some practices. Moreover, some reforms—such as public funding of congressional elections—were never attempted, while others were hamstrung from the outset by judicial

208. ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY (1991).

interpretation. Central components of the current campaign finance regime—such as the narrow express advocacy definition of election-related spending—have operated to curtail the effectiveness of regulation. It will not be clear if the redefinition of election-related speech is futile unless it is tried.

The argument for the futility of reform may really be an argument about its perversity. Campaign finance reform has repeatedly demonstrated the law of unanticipated consequences. Restrictions on individual donations to candidates contributed directly to the rise of PACs and to the emergence of bundling, much as the limits incident to the public funding of presidential candidates stimulated the rise of independent committees, soft money, and issue advocacy. Campaign reform rules in some sense work in that they limit the activities they directly address, but they may also lead to new practices that not only permit the circumvention of the rules but increase the role of special interest groups, political intermediaries, and other financial power brokers to the detriment of our democratic system.

Again, this may very well be a valid criticism, providing a useful caution about the need to think through the possible consequences of reform. How will those now engaged in issue advocacy react if they are subject to regulation? Certainly, they are likely to engage in more issue spending earlier in the political cycle—probably in the weeks immediately before any statutory pre-election period and possibly even earlier than that.[209] Expanding the definition of regulated election-related speech may also lead to a shift in spending from elections to political advocacy outside the electoral context—what might be called "actual issue advocacy," in contrast to the so-called issue advocacy that is really election-related speech. We could see more ads like the "Harry and Louise" campaign deployed by the health insurance industry to stir grass-roots opposition to the Clinton health plan in 1993 and 1994.[210]

Would the costs of these developments offset, if not outweigh, the gains from expanding the definition of election-related speech? Displacing issue advocacy to the earlier weeks of the campaign does raise the danger that issue ads could set the tone of the campaign before it even gets

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209. It is not certain whether my approach to the definition of election-related speech would have had an impact on the multi-million dollar issue advocacy campaign undertaken by the Democratic National Committee (DNC) in support of the Clinton-Gore ticket in the 1995-96 election cycle. Much of the DNC spending occurred in 1995, or well before the onset of the formal pre-election period. However, as I suggest a broader definition of election-related speech when it comes to the activities of the major political parties, the election time period may be less of a problem than the determination of whether the President was already a candidate for re-election in 1995. To the extent that the party spending was coordinated with representatives of the Clinton-Gore campaign, it could also be covered by rules concerning major-party coordinated expenditures. *See supra* text accompanying notes 193-99.

210. *See* HAYNES JOHNSON & DAVID S. BRODER, THE SYSTEM: THE AMERICAN WAY OF POLITICS AT THE BREAKING POINT 205-13 (1996).

underway. Of course, nothing now prevents parties and special interest organizations from focusing their advocacy on the opening phases of an electoral cycle if it is in their self-interest. If the proposed definition of election-related speech would force parties and committees to air their ads earlier than they would if not subject to regulation, then regulation could make issue advocacy less effective. More issue advocacy in the earlier weeks of a campaign may reduce the benefits of subjecting such advocacy to regulation in later weeks, but the result would still be an overall gain in terms of advancing the goals of election regulation. Certainly, it would be more feasible for candidates targeted by issue ads to attempt a rejoinder. The news media would have more time to explore the content of the allegations in, and the sources of the funds behind, issue ads if the ads were to appear earlier in a campaign rather than in the final weeks. Increasing the information available to the voters concerning campaign finances could increase the quality of electoral decision-making.

As for the possibility that the regulation of so-called issue ads might stimulate greater actual issue advocacy, with political groups devoting more resources to mass media campaigns aimed at affecting legislative deliberations rather than election outcomes, it is hard to tell if society would be worse off. Again, there is currently no constraint on such activity, and, as the Harry and Louise ads suggest, true issue advocacy may be growing even though so-called issue advocacy focused on electoral campaigns is unrestrained. Moreover, such campaigns may be less harmful to democratic decision-making than campaigns targeted at elections. Actual issue campaigns would be aimed at affecting the climate of public opinion in which public officials act, but not at the selection of public officials and the make-up of the government. The effects of these campaigns may be more limited and uncertain. They may affect public opinion without affecting public officials, and even if they affect public action on some issues, there will be many other public issues that have not been targeted by issue campaigns. Still, some recognition of the hydraulic nature of political money, and some acknowledgment of the fact that private wealth blocked from so-called issue advocacy is likely to show up somewhere else in the political process is necessary to temper expectations concerning the practical benefits of expanding the definition of election-related speech to encompass so-called issue advocacy.

Finally, the third criticism of the regulation of issue advocacy is that such regulation would undermine the value of political competition. The argument for the constitutionality of a broader definition of election-related activity relies in part on the Supreme Court's election law decisions, particularly the ballot access cases. These cases have been criticized for their valorization of the two-party system, their willingness to allow the major parties to insulate themselves from challenges from third parties and

independents, and their failure to subject restrictions on voters' choices and political associations to the strict judicial scrutiny appropriate when fundamental rights are at stake. Certainly, the Court's assertion of the virtues of the two-party system in justifying limits on minor parties and independents raises important concerns about the ability of incumbents to use election regulations to fortify themselves against challengers. Viewing the issue advocacy problem through the prism of the ballot access cases thus arguably entrenches these cases and the protections they provide the political status quo in constitutional law, and may be said to jeopardize the value of open and unfettered political competition.

The ballot access cases do raise questions about the degree of appropriate judicial deference to rules about the electoral process that have been adopted by incumbents. Still, it is far from clear that extending the approach of the ballot access cases, particularly the assumption that election regulation involves the balancing of individual rights and the collective concern in organizing the electoral process, would be harmful. The ballot access cases seem pretty well entrenched already. Indeed, over time, the Court appears to have become increasingly deferential to state policies in this area. These cases may be mistaken, but it is not clear that applying their reasoning to campaign finance regulation does any new harm. As long as these cases are established constitutional law, we might want to see how they can be useful in analyzing the issues posed by governmental regulation of campaign spending.

More importantly, the ballot access cases do get at something significant about elections. These cases usefully underscore the role of the election as a mechanism for collective choice, and the need to review state regulations of the electoral process not only from the perspective of individual rights, but in terms of their impact on the role of the election in producing a government. The particular lines the Court has drawn may reflect an undue suspicion of third parties and independents, an unwarranted hostility to write-in ballots, and an excessive deference to political incumbents' tributes to the two-party system. But the basic idea that elections must be regulated if they are to perform their function of providing a mechanism for collective decision-making, and that election regulation involves the reconciliation of conflicting individual and collective concerns, is not only right but an appropriate basis for thinking about the regulation of election-related spending.