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CAMPAIGN FINANCE "REFORM": THE GOOD, THE BAD, AND THE UNCONSTITUTIONAL

JAMES BOPP, JR.

Campaign finance reform soon will be debated in the U.S. Senate. The problems with the current campaign financing system that are identified by the most vocal reformers, however, are not real problems for Americans who want more of a say in who is elected and what policies public officials pursue. And although incumbent officeholders in Washington, D.C., may feel threatened by negative advertising and want to manipulate the campaign rules to their advantage, this does not justify imposing further restrictions on the freedom of speech and association. The U.S. Supreme Court already has addressed the remedies proposed by the "reformers" and found them unconstitutional under the First Amendment.

The Supreme Court and numerous federal courts following it have struck down almost all laws that attempt to restrict campaign spending or campaign advertising by individuals or organizations (including corporations, unions, political action committees [PACs], and political parties). Pursuant to the First Amendment, the Supreme Court limits the regulation of political expression to a very narrow class of speech: explicit or express words advocating the election or defeat of clearly identified candidates—such as "vote for" or "elect." But not every type of express or explicit appeal for votes is subject to regulation. For example, the Supreme Court has held that:

- A political candidate has an absolute First Amendment right to spend an unlimited amount of his own money expressly advocating his own election (unless he voluntarily waives that right in order to receive public financing).
- Individuals and organizations also have an absolute First Amendment right to spend an unlimited amount of their own money expressly advocating the election or defeat of particular candidates so long as there is no coordination between the individual or organization and the candidates. And governments may not presume that there is coordination under certain scenarios—unless there really is some.

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In addition, all other election-related speech that discusses candidates and issues (including their voting records or positions) but does not explicitly call for the election or defeat of particular candidates is protected as "issue advocacy." Although it undoubtedly influences elections, issue advocacy is absolutely protected from regulation by the First Amendment. Consequently, "reforms" that attempt to redefine "express advocacy" to include types of issue advocacy, or to create new categories of speech subject to regulation, or that effectively would ban issue advocacy by corporations and labor unions are doomed to a court-ordered funeral. So is legislation that effectively would require any group engaging in issue advocacy to register and report as a PAC or that would impose burdensome disclosure requirements on issue advocacy.

Political parties enjoy the same unfettered right to receive contributions for and to engage in issue advocacy. And there are even fewer reasons to fear their exercise of this important right because political parties have an interest in a broader array of issues than narrow interest groups do, and their donors know they exist to advance those issues. The Supreme Court also has found that proposed bans on political parties receiving and spending soft money cannot be justified on the ground that it might prevent corruption. Instead, the Supreme Court has determined such a goal is insufficient to restrict the discussion of candidates and their positions on issues.

To adopt true reform, Congress first needs to recognize that today's perceived abuses are simply the predictable result of past "reforms" in which the suppression of free speech was the principal focus. Today's complex laws cause wasteful distortions in the electoral process and lessen transparency and public accountability. There are, however, constitutional measures that would correct these flaws. Specifically, raising or eliminating contribution limits, which have been eroded by inflation, would allow elected officials to concentrate more on their public duties than on raising funds, make the flow of campaign money more transparent, and improve public accountability. And removing barriers that prevent political parties from exercising a moderating influence on political campaigns would serve to reduce the weight of narrow interests.

These reforms would encourage more direct citizen participation in campaigns, thereby reducing the incentive for indirect involvement through independent expenditures and issue advocacy. Such true reforms not only are constitutional, but they also reinforce the sovereignty of the people over government officials and decrease the threat of corruption by making it more likely that any influence will be exposed. Bearing this in mind,

- Congress should not rush to pass measures that would cause uncertainty in the short run and inevitably be struck down as unconstitutional. Because Members of Congress take an oath to support and defend the Constitution, they should pay special attention in the legislative process to any constitutional defects in pending legislation.
- Congress should not try to challenge the Supreme Court's rulings on the First Amendment, especially when the people's freedom to speak is at stake and Members' self-interest in retaining office conflicts with those rulings.

Instead, to enhance political participation and improve transparency and accountability in the process, Congress should:

1. **Raise** the individual contribution limit to at least $2,500, indexing it for inflation; raise the aggregate individual contribution limit; and raise the individual and PAC contribution limits to political parties from $20,000 and $15,000, respectively, to at least $50,000.
2. **Remove** the limits on coordinated expenditures by political parties with their own candidates.

—James Bopp, Jr., is an attorney with Bopp, Coleson & Bostrom in Terre Haute, Indiana; Of Counsel with Webster, Chamberlain & Bean in Washington, D.C.; General Counsel for the James Madison Center for Free Speech; and Chairman of the Election Law Subcommittee, Free Speech and Election Law Practice Group of The Federalist Society.

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> [The First Amendment] reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." In a republic where the people [and not their legislators] are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course we follow as a nation.[2]

Amendments to the Federal Election Campaign Act (FECA) will be debated in the U.S. Senate as early as mid-July 1999 and in the U.S. House of Representatives in September 1999. Many of the so-called reform proposals floating around Washington, D.C., however, are nothing more than incumbent protection acts that would make entrenched politicians even less responsive to citizen input.[3] Some politicians have remarked that many of their colleagues "feel threatened by negative advertisements and want to control what is said during campaigns";[4] others simply want to reduce the level of spending devoted to political campaigns.[5]

The supposed problems with the current campaign finance system that have been identified by "reformers" and echoed by the media are not problems from the standpoint of

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1. The author thanks attorney Glenn Willard of Bopp, Coleson & Bostrom for research and writing assistance.

2. *Buckley* v. *Valeo,* 424 U.S. 1, 14–15 (1976) (citations omitted).

3. See e.g., James C. Miller, *Monopoly Politics* (Hoover Institution Press, 1999) (Chapter 5: Incumbent's Advantage); David M. Mason and Steven Schwalm, "Advantage Incumbents: Clinton's Campaign Finance Proposal," Heritage Foundation *Backgrounder* No. 945 (June 11, 1993); Bradley A. Smith, "Campaign Finance Regulation," Cato Institute Policy Analysis No. 238 (September 3, 1995).

4. Comments of House Majority Whip Tom DeLay (R–TX), *Money & Politics Report,* Bureau of National Affairs, Inc., May 26, 1999, p. 1.

Americans who want a greater say in who is elected and which policies public officials will pursue. Considering the enormous power and influence of government, there may be too little money spent during political campaigns, not too much.[6] Short of reducing the power and scope of government, which is a good reform in itself, Congress should not try through regulations to reduce the amount of money spent in political campaigns. Instead, it should concentrate on reforming or eliminating the current campaign finance laws that distort the ways citizens can participate in the electoral process.

But even if there were universal agreement regarding specific problems with current campaign finance laws, Congress must be careful that its reforms are constitutional and that its proposed "cure" is not worse than the "disease." Any law that attempts to limit citizens' freedom of speech and association further is not worth the price. For example, even if the rising aggregate costs of campaigns were accepted universally as a problem, that still would not provide a justification for Congress to limit spending on political campaigns. As the Supreme Court held in *Buckley* v. *Valeo,*[7] political speech and associational expression are the people's exclusive domain:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.[8]

Thus, the effort by the "reformers" to take this power from the people is both wrong and doomed to fail because it is unconstitutional.

Chief among the wrongheaded and unconstitutional sets of proposals is the Bipartisan Campaign Finance Reform Act of 1999, sponsored in the Senate (S. 26) by Senators John McCain (R–AZ) and Russell Feingold (D–WI) and in the House (H.R. 417) by Representatives Christopher Shays (R–CT) and Martin Meehan (D–MA). Although announced with the promise of reducing the "corrupting influence of big money,"[9] these bills would do nothing of the sort. Instead, they shake a fist at the First Amendment and, if passed, would be destined for a court-ordered funeral.

There are, however, constitutional measures that Congress could adopt that would address some real concerns caused by the current set of campaign finance laws. These concerns include the distortions and evasions caused by complex laws, the lack of transparency in political contributions that result from such distortions, and the almost constant need for public officials to engage in raising a large number of small contributions. To adopt true reform, Congress would need first to recognize that today's perceived abuses simply are the predictable result of past "reforms" in which the suppression of political speech was the principal focus of the "reformers." In contrast, adopting measures that would enhance political speech and improve transparency and public accountability would deal more effectively with the problems,

5. See statement of Senator Russell Feingold (D–WI) on the introduction of S. 26: "The prevalence—no—the dominance of money in our system of elections and our legislature will in the end cause them to crumble." Cong. Rec. S422, 423 (daily ed., January 19, 1999).
6. See James Bopp, Jr., *Constitutional Limits on Campaign Contribution Limits*, 11 Regent U. L. Rev. 235, 284–85 (1998–99) ("as the level of government benefits increases, competition for government transfers of wealth will naturally tend to increase campaign expenditures").
7. 424 U.S. 1 (1976).
8. *Id.* at 57; see also Wanda Franz and James Bopp, Jr., *The Nine Myths of Campaign Finance Reform,* 10:1 Stanford L. & Pol'y Rev. 63 (1998).
9. Cong. Rec. S422, 422 (daily ed., January 19, 1999) (statement of Senator Feingold on the introduction of S. 26).

and they unquestionably would be upheld by the courts. Such measures include raising or eliminating contribution limits that have been eroded by inflation and removing barriers that prevent political parties from exercising a moderating influence in political campaigns.

Bearing this in mind,

- Congress should not rush to pass measures that would cause uncertainty and inconsistent application of the laws in the short run and inevitably be struck down as unconstitutional. The proposals in the Bipartisan Campaign Finance Reform Act of 1999, and similar proposals that attempt to restrict the political speech of individuals and organizations, are the opposite of true reform, and they are unconstitutional.
- When something as serious as the people's First Amendment freedom is at stake, Congress should not encourage or permit a few Members to short-circuit the legislative process and push "reform" proposals that have not been analyzed, marked up, and passed by the responsible committees. Because Members of Congress took an oath to support and defend the U.S. Constitution, they should pay special attention in the legislative process to any constitutional defects in pending legislation.
- Congress should not try to challenge the Supreme Court's rulings on the First Amendment when the object of such an effort would be to restrict or curtail the people's freedom to speak and participate effectively in elections and political debates. Congress also owes special deference to Supreme Court rulings when Members' self-interest in retaining their office conflicts with those rulings.
- Instead, Congress should consider legislation that would enhance political participation, improve transparency and public accountability, and reduce the threat of corruption. This could be done by eliminating the artificial contribution limits of past reforms that encourage circumvention of complex campaign finance laws and by enhancing reporting requirements to make the flow of campaign money more transparent to the public.

In sum, Congress should learn to appreciate the difference between enhancing accountability to the people and exercising control over them. Proposals that would restrict or curtail the involvement of individuals, political organizations, and political parties represent an attempt to exercise control over the people and tend to distort the electoral process. With few exceptions, they also would be unconstitutional. Proposals that are aimed at opening up the process, simplifying the campaign finance rules, and relying instead on complete and prompt disclosure would enhance politicians' political accountability to the people. Such proposals not only would be constitutional, but they also would reinforce the sovereignty of the people over elected officials and decrease the threat of corruption by making it more likely that perceived influence will be exposed.

OVERVIEW OF FIRST AMENDMENT PROTECTIONS OF CAMPAIGN ADVOCACY

It makes no sense for Congress to consider campaign finance proposals without a firm understanding of what proposals have been tried already and which of those measures have been struck down as unconstitutional. In the landmark decision of *Buckley* v. *Valeo,*[10] the Supreme Court struck down as unconstitutional many of FECA's key amendments. Because many of the proposals put forth by the "reformers" ignore or flout this ruling, their statements about what is constitutional should be suspect.[11]

The First Amendment provides that

> Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

10. 424 U.S. 1 (1976).

In its campaign finance decisions, the Supreme Court repeatedly has held that monetary contributions to candidates and political organizations are accorded First Amendment protections because they directly implicate the freedom of speech and association.[12] In part because the prohibition against laws abridging these freedoms is directed against Congress, the Supreme Court applies the most stringent and exacting test known in constitutional law to any legislation that infringes political speech or associational activity. Under this rigorous test, the government must show that any law it passes to restrict political speech or associational activity must be "narrowly tailored" to achieve "a compelling government interest."[13]

Very few proposals can or should pass both prongs of the test; indeed, very few have. In *Buckley* v. *Valeo,* a few of the campaign contribution limits (such as for political candidates themselves) were upheld because they were deemed to be narrowly tailored to the prevention of *quid pro quo* corruption and the appearance thereof. The Supreme Court struck down all limits on campaign spending in FECA (as opposed to reporting requirements). In doing so, it rejected every other government interest as insufficiently compelling to limit campaign spending.

Thus, individuals and organizations have the First Amendment right to spend an unlimited amount of money on issue advocacy. In addition, so long as individuals and organizations do not coordinate their activities with political candidates, they also have the right to spend an unlimited amount of money directly campaigning for the election or defeat of identifiable candidates. Since the *Buckley* decision, the Supreme Court and numerous other federal courts have reaffirmed these basic principles. Despite the wisdom of these decisions, many of the "reformers" today simply refuse to follow the text of the First Amendment.

THE CONSTITUTIONAL DISTINCTION BETWEEN EXPRESS ADVOCACY AND ISSUE ADVOCACY

In *Buckley,* the Supreme Court limited the range of political speech that may be regulated only to "express advocacy," that is, a communication explicitly advocates the election or defeat of clearly identifiable candidates. By contrast, "issue advocacy," which is the discussion of issues and/or candidates' positions on them, is not subject to congressional regulation—no matter what impact it has on an election. Several "reform" proposals attempt to alter or obliterate the distinction between these types of communication with new regulations or definitions. But because the distinctions drawn by the Supreme Court were dictated by the Constitution, no statutory language can alter them for constitutional purposes.

Express Advocacy

Express advocacy is a very narrow class of election-related speech that in "explicit words" or by "express terms advocates the election or defeat of a

11. With assistance from the leading congressional "reformers," the Brennan Center for Justice and other advocacy groups have waged a full-scale legal attack designed to nullify or overrule *Buckley* because they admit that many of the reform proposals they favor would not be upheld under that ruling. The Brennan Center, however, has lost every reported campaign finance case in which it participated that went to final judgment on the merits, which should raise doubts about the reliability of its constitutional views.

12. As the Court explained in *Buckley,*

> [a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number or issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Id. at 18–19. Thus, "[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.* at 19 n.18.

13. See Bopp, Constitutional Limits on Campaign Contribution Limits, *supra* at 240–245, discussing the applicable test.

clearly identified candidate."[14] A "finding of 'express advocacy' depend[s] upon the use of language such as 'vote for,' 'elect,' 'support,' etc."[15] As this paper will explain in greater detail, not all express advocacy is subject to regulation:

- A political candidate has the absolute First Amendment right to spend an unlimited amount of his own money expressly advocating his own election or the defeat of his opponent (unless that right is voluntarily waived, for example, when a candidate accepts matching funds). The Supreme Court in *Buckley* struck down an original provision of FECA that purported to limit a candidate's expenditure of his own money on express advocacy.

- An individual or organization also has the absolute First Amendment right to spend an unlimited amount of his/its own money expressly advocating the election or defeat of particular candidates so long as there is no actual coordination between the individual or organization and the political candidates at issue.

- The Supreme Court has held, however, that some limits may be placed on the amount of money given to candidates directly or spent on express advocacy that is coordinated with such candidates. This is said to be justified on the ground that such actual or in-kind contribution limits diminish the threat of *quid pro quo* corruption or the appearance thereof.

Issue Advocacy

Issue advocacy is the discussion of issues and candidates' positions on those issues *without* expressly advocating a candidate's election or defeat. The Supreme Court has recognized that issue advocacy sometimes does *influence* the election or defeat of particular candidates—but that does not convert it into express advocacy. Issue advocacy is absolutely protected by the First Amendment and can be subjected to no regulation—no matter the effect it has on an election.

In First Amendment decisions, the Supreme Court has required any regulation of speech to be narrowly tailored and clear—instead of overbroad or vague. An overbroad or vague regulation tends to chill protected speech unduly and, for that reason alone, it is unconstitutional. The Supreme Court's bright-line distinction between express advocacy and everything else is predicated on this constitutional rule. The Supreme Court's "overbreadth doctrine" and "void for vagueness" rule create insurmountable obstacles for legislators who try to blur this distinction.

Issue Advocacy's Absolute First Amendment Protection

Even though the First Amendment says that "Congress shall make no law abridging...the freedom of speech," the self-appointed reformers, beginning in the post-Watergate era, refuse to take "no" for an answer. The Supreme Court and the lower federal courts, however, consistently have enforced the First Amendment against all attempts to regulate issue advocacy.

The Supreme Court recognizes that the freedom of speech is both an inherent liberty and a necessary instrument for limited representative government.[16] Moreover, as the Supreme Court has observed,

> [i]n a republic where the people [not their legislators] are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those elected will inevitably shape the course that we follow as a nation.[17]

14. 424 U.S. at 43, 44, 80; see also *FEC* v. *Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 248–49 (1986) (*MCFL*).

15. *MCFL*, 479 U.S. at 249 (quoting *Buckley*, 424 U.S. at 44 n. 52)

16. *MCFL*, 479 U.S. at 257 n.10.

17. *Buckley,* 424 U.S. at 14-15.

Further,

> "[I]t can hardly be doubted that the constitutional guarantee [of the freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office."[18]

The seminal case is the 1976 decision of *Buckley* v. *Valeo,* in which the Supreme Court was faced with constitutional questions regarding Congress's post-Watergate amendments to FECA—by far the most comprehensive attempt to regulate election-related communications and spending to date. One of the more nettlesome problems with which the Supreme Court struggled was the question of what speech could be constitutionally subject to government regulation. The post-Watergate FECA was written broadly, subjecting any speech to regulation, which was made "relative to a clearly identified candidate,"[19] or "for the purpose of...influencing" the nomination or election of candidates for public office.[20]

In considering this question, the Supreme Court recognized that the difference between issue and candidate advocacy often dissipated in the real world:

> For the distinction between discussion of issues and candidates and advocacy of the election or defeat of candidates may often dissolve in 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.[21]

Thus, the Supreme Court was faced with a dilemma—whether to allow regulation of issue advocacy because it might influence an election or to protect issue advocacy because it is vital to the conduct of representative democracy, *even though it would influence elections.*

The Supreme Court resolved this dilemma decisively in favor of protection of issue advocacy. First, the Court recognized that

> a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs...of course includ[ing] discussions of candidates.[22]

This is because the Supreme Court considered the discussion of public issues and debate on the qualifications of candidates being integral elements of the constitutional system of government.[23] Thus, the Supreme Court observed that issue advocacy was constitutionally sacrosanct:

> [d]iscussion of *public issues and debate on the qualifications of candidates* are integral to the operation of the system of government established by our Constitution. The First Amendment affords the *broadest protection* to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[24]

Second, in order to provide this broad protection to issue advocacy, the Supreme Court adopted

18. *Id.* at 15 (citation omitted).

19. Section 608(e)(1) limits expenditures by individuals and groups "relative to a clearly identified candidate" to $1,000 per year.

20. Section 431(e) and (f) defines the terms *contribution* and *expenditure* for the purposes of FECA's disclosure requirements in then Section 434(e).

21. *Buckley,* 424 U.S. at 42–3.

22. *Id.* at 14 (citation omitted).

23. *Id.*

24. *Id.* at 14 (citation omitted) (emphasis added).

the bright-line "express advocacy" test, which limits government regulation to only those communications that, in "explicit words" or by "express terms, advocate the election or defeat of a clearly identified candidate."[25] In so doing, the Supreme Court narrowed the reach of FECA's disclosure provisions to cover only "express advocacy."[26] A decade later, the Supreme Court reaffirmed the express advocacy standard and applied it to the ban on corporate contributions and expenditures in connection with federal elections.[27]

Finally, not even the interest in preventing actual or apparent corruption of candidates, which was found sufficiently compelling to justify contribution limits directly to candidates, was deemed adequate to regulate issue advocacy. The Supreme Court rejected the government's interest in preventing corruption even though it recognized that issue advocacy had the potential to be abused to obtain improper benefits from candidates.[28]

What the Supreme Court did was draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues.[29]

In adopting a test that focuses on the words actually spoken by the speaker, the Supreme Court expressly rejected the argument that the test should focus on the *intent* of the speaker or whether the *effect* of the message would be to influence an election:

> [W]hether words intended and designed to fall short of invitation [to vote for or against a candidate] would miss the mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.[30]

In addition, some "reformers" claim the Supreme Court was not sufficiently farsighted to see the effect that issue advocacy eventually would have in influencing elections and, if they only brought this to its attention, then the Supreme Court would allow government regulation of issue

25. *Id.* at 43, 44. To ensure there would be no confusion about the meaning of "express advocacy," the Court gave examples of such "express terms"—"'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.

26. *Buckley,* 424 U.S. at 80; see also James Bopp, Jr., and Richard E. Coleson, *The First Amendment Is Not a Loophole: Protecting Free Expression in the Election Campaign Context,* 28 U.W.L.A. Law Rev. 1, 11–15 (1997).

27. *MCFL,* 479 U.S. at 249 ("We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition in § 441b."); see also *id.* ("finding of express advocacy depend[s] upon the use of language such as 'vote for,' 'elect,' 'support,' etc.") (citations omitted).

28. *Buckley,* 424 U.S. at 45.

29. *Maine Right to Life Comm., Inc.* v. *FEC,* 914 F. Supp. 8, 12 (D. Me. 1996), *aff'd,* 98 F.3d 1 (1st Cir. 1996) ("[W]e affirm for substantially the reasons set forth in the district court opinion.").

30. *Id.* at 43 (citation omitted). While "reformers" often espouse the view that the express advocacy test was intended only to fix the vagueness problem, which this passage addresses, they ignore the Court's confirmation that the express advocacy limitation was imposed on FECA as well "to avoid problems of overbreadth." *MCFL,* 479 U.S. at 248 (citing *Buckley,* 424 U.S. at 80).

advocacy. The Supreme Court made clear, however, that it was not so naïve:

> Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well as more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.[31]

Even so, the Supreme Court explicitly recognized that individuals and groups were at liberty to influence elections with issue advocacy:

> So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, *they are free to spend as much as they want to promote the candidate and his views.*[32]

Numerous federal courts, including the several courts of appeal that have been faced with restrictions on issue advocacy, have adhered faithfully to the "explicit" or "express" words of the advocacy test according to its plain terms.[33] There thus is almost no support in the federal courts for regulation of issue advocacy. Instead, the federal courts have been almost uniform in striking down as unconstitutional these attempts to evade the bright-line distinctions established in *Buckley.*

Current Attempts to Regulate Issue Advocacy

As mentioned above, many of the leading reform proposals attempt to alter or obliterate the constitutional distinction between express advocacy and issue advocacy by mere statutory definitions. Their aim is to expand the category of speech that they can regulate—speech that no longer would be free. Although Congress generally enjoys wide latitude to define most terms for *statutory* purposes (and can engage in Orwellian double-talk if it so wishes), it cannot convert a category of *constitutionally* protected speech into speech subject to regulation by creating artificial definitions.

31. *Buckley,* 424 U.S. at 43 n.50 (citation omitted).

32. *Id.* at 45 (emphasis added). Some argue that the "express advocacy" test was ill-considered by the Supreme Court. Even a cursory review of *Buckley* refutes this conclusion. The Court reiterated the "express advocacy" test in eight different passages throughout its opinion. 424 U.S. at 43, 44, 44 n.52, 45 (twice), 80 (thrice). Others contend that the "express advocacy" test is a "magic words" test—that so long as the words used in *Buckley*'s footnote 52 are avoided, political speakers avoid regulation. Footnote 52 belies this view: "This construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, *such as* 'vote for,'..." (emphasis added).

33. See *North Carolina Right to Life, Inc.* v. *Bartlett,* 168 F.3d 705 (4th Cir. 1999); *Virginia Soc'y for Human Life, Inc.* v. *Caldwell,* 152 F. 3d 268 (4th Cir. 1998); *Brownsburg Area Patrons Affecting Change* v. *Baldwin,* 137 F.3d 503 (7th Cir. 1998); *FEC* v. *Christian Action Network, Inc.,* 110 F.3d 1049 (4th Cir. 1997) (CAN II); *FEC* v. *Christian Action Network, Inc.,* 894 F. Supp. 946 (W.D. Va. 1995), *aff'd per curiam,* 92 F.3d 1178 (4th Cir. 1996) (*CAN I*); *Maine Right to Life Comm., Inc.* v. *FEC,* 914 F. Supp. 8 (D. Me. 1996), *aff'd per curiam,* 98 F.3d 1 (1st Cir. 1996) ("[W]e affirm for substantially the reasons set forth in the district court opinion."); *Faucher* v. *FEC,* 928 F.2d 468 (1st Cir. 1991); *FEC* v. *Central Long Island Tax Reform Immediately Comm.,* 616 F.2d 45 (2d Cir. 1980) (*en banc*); *Kansans for Life, Inc.* v. *Gaede,* 38 F. Supp.2d 928 (D. Kan. 1999); *Iowa Right to Life Comm., Inc.* v. *Williams,* No. 4–98–CV–10399 (S.D. Iowa Oct. 23, 1998); *Florida Right to Life, Inc.* v. *Mortham,* No. 98–770–CIV–ORL–19A (M.D. Fla. Sept. 29, 1998) (Order clarified Oct. 16, 1998); *Right to Life of Mich., Inc.* v. *Miller,* 23 F. Supp.2d 766 (W.D. Mich. 1998); *Planned Parenthood Affiliates of Mich., Inc.* v. *Miller,* 21 F. Supp.2d 740 (E.D. Mich. 1998); *Right to Life of Dutchess County, Inc.* v. *FEC,* 6 F. Supp.2d 248 (S.D. N.Y. 1998); *Clifton* v. *FEC,* 927 F. Supp. 493 (D. Me. 1996), *aff'd on other grounds,* 114 F.3d 1309 (1st Cir. 1997); *FEC* v. *Christian Action Network,* 894 F. Supp. 946 (W.D. Va. 1995), *aff'd per curiam,* 92 F.3d 1178 (4th Cir. 1996); *FEC* v. *Survival Educ. Fund, Inc.,* 1994 WL 9658 (S.D. N.Y. Jan. 12, 1994), *aff'd in part and rev'd in part on other grounds,* 65 F.3d 285 (2d Cir. 1995); *FEC* v. *Colorado Republican Fed. Campaign Comm.,* 839 F. Supp. 1448 (D. Colo. 1993), *rev'd* 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded on other grounds,* 116 S. Ct. 2309 (1996); *West Virginians for Life, Inc.* v. *Smith,* 919 F. Supp. 954 (S.D. W.Va. 1996); *FEC* v. *NOW,* 713 F. Supp. 428 (1989); *FEC* v. *AFSCME,* 471 F. Supp. 315, 317 (D. D.C. 1979).

The McCain–Feingold bill (S. 26) adopts two new terms: (1) "electioneering communications," which is defined as any television or radio broadcast that merely "refers to a clearly identified candidate for federal office" within 60 days of a general election or 30 days before a primary election, and is broadcast to an audience that includes the electorate for such election;[34] and (2) "federal election activity," which, similarly, is defined to include any "communication that refers to a clearly identified candidate...and is made for the purpose of influencing a Federal election (regardless of whether the communication is express advocacy)."

Under the McCain–Feingold bill's restrictions on "electioneering communications," the freedom Americans have enjoyed to engage in unregulated issue advocacy would be gone. Non-corporate and labor organizations that spent more than $10,000 in the aggregate on issue advocacy during the pre-election periods specified in the bill (which would be very easy to do) would become subject to strict reporting requirements.[35] Expenditures on issue advocacy during the pre-election periods that were deemed "coordinated" with a candidate (under a new expansive and unconstitutional definition, *infra*) would be regarded as contributions to candidates and thus become subject to FECA's contribution limits.[36] Corporations and labor unions alike would be banned from engaging in issue advocacy during the pre-election periods.[37]

With respect to "federal election activity," any person that expended more than $50,000 in the aggregate would become subject to the same reporting requirements now imposed on political action committees (PACs).[38] If these disbursements were made within 20 days of an election, they would have to be reported within 24 hours of making the expenditure on issue advocacy.[39]

The Shays–Meehan bill (H.R. 417) has similar objectives. It adopts three definitions of "express advocacy," only one of which would be constitutional. To say, however, as do the bill's sponsors, that Shays–Meehan "[s]trengthens" the definition of "express advocacy"[40] ignores the fact that the Supreme Court already has carefully defined the term "express advocacy" for constitutional purposes. Like medieval alchemists who attempted to turn lead into gold, Congress has no power to convert constitutionally protected speech into any other type.

The most egregious of the alternate definitions of "express advocacy" in Shays–Meehan provides for what is essentially a "no-advocacy" definition of "express advocacy," in which radio or television was the medium:

> The term "express advocacy" means a communication that advocates the election or defeat of a candidate by referring to one or more clearly identified candidates in a paid advertisement that is transmitted through radio or television within 60 calendar days of an election of the candidate and that appears in the State in which the election is occurring, except that with respect to a candidate for office of Vice President or President, the time period is within 60 calendar days preceding the date of a general election.[41]

34. Sec. 201.

35. Sec. 201.

36. Sec. 202.

37. Sec. 203.

38. Sec. 307.

39. *Id.*

40. The Shays–Meehan Bipartisan Campaign Finance Reform Act Short Summary, prepared by the Offices of Christopher Shays and Marty Meehan, January 1999.

41. Sec. 201.

This is even more encompassing than the ban on corporate "electioneering communications" in McCain–Feingold. Under current law, all individuals, political parties, businesses, and other organizations are free to refer to candidates and their records on issues without regulation by the federal government. Under Shays–Meehan, the mere reference to a candidate's name on radio or television during election campaign would convert issue advocacy into regulated express advocacy. This "no-advocacy" definition of "express advocacy" is the most indefensible attempt to suppress issue advocacy. As mentioned above, the federal courts already shot down a very similar approach.[42] Consequently, if passed, Shays–Meehan's "no-advocacy" definition of "express advocacy" would be dead on arrival in the federal courts.

Taken together, the Shays–Meehan bill's definitions are nothing less than an attempt to overrule the Supreme Court's express advocacy/issue advocacy distinctions. Under Shays–Meehan, the absolute protections afforded issue advocacy would vanish. Organizations that engaged in issue advocacy would become subject to extensive disclaimer[43] and reporting requirements.[44] Those organizations whose "major purpose" was issue advocacy and grassroots lobbying, but heretofore had not been considered PACs because they had engaged only in issue advocacy,[45] would have to comply with even "more extensive requirements" and "more stringent restrictions" by being required to register as PACs.[46] Business corporations would be banned from making expenditures on what previously was constitutionally protected issue advocacy.[47]

From Shays–Meehan's three definitions of "express advocacy," the Federal Election Commission (FEC) would determine whether a political speaker had (1) violated FECA's ban on business corporations' making independent expenditures;[48] (2) failed to register and report as a PAC (having spent at least $1,000 in the aggregate on independent expenditures);[49] or, (3) if not a PAC, failed to file reports with the FEC (having spent at least $250 in the aggregate on independent expenditures).[50]

Each of these measures would fly in the face of the First Amendment's broad protection of issue advocacy. Campaign finance statutes regulating more than explicit words of advocacy of the election or defeat of clearly identified candidates are "impermissibly broad"[51] under the First Amendment. The McCain–Feingold and Shays–Meehan definitions described above all would be unconstitutional.

An "Implied Advocacy" Definition of "Express Advocacy" Is Unconstitutional

Implicitly acknowledging that only "express advocacy" can be regulated, some "reformers" wish to redefine "express advocacy" in contradictory terms. For example, Shays–Meehan would adopt,

42. *Right to Life of Michigan, Inc.* v. *Miller,* 23 F. Supp.2d 766 (W.D. Mich. 1998); *Planned Parenthood Affiliates of Michigan, Inc.* v. *Miller,* 21 F. Supp.2d 740 (E.D. Mich. 1998).

43. See 2 U.S.C. § 441d(a)(3).

44. See 2 U.S.C. § 434(c).

45. *Buckley,* 424 U.S. at 79; MCFL, 479 U.S. at 252 n.6.

46. *MCFL,* 479 U.S. at 254; see also 2 U.S.C. § 432-34(a)(b).

47. 2 U.S.C. § 441b(a); see also *MCFL,* 479 U.S. at 256 ff. (voluntary political corporations not subject to corporate ban on independent express advocacy expenditures).

48. 2 U.S.C. § 441b(a).

49. 2 U.S.C. § 431(4), 433–34(a)(b).

50. 2 U.S.C. § 434(c).

51. *Buckley,* 424 U.S. at 80.

as one of its alternate definitions of "express advocacy," an "implied advocacy" test:

> The term "express advocacy" means a communication 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.[52]

The only possible support for this definition is the Ninth Circuit's decision in *FEC* v. *Furgatch,* on which this test is partly based.[53] *Furgatch* involved an enforcement action against an individual for publishing a newspaper ad critical of President Jimmy Carter and urging the readers "Don't let him do it."[54] The FEC sued, claiming a violation of FECA for the failure to report this expenditure to the FEC and to place a disclaimer on it. The Ninth Circuit agreed with the FEC that these violations had occurred:

> We conclude that speech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of *no other reasonable interpretation* but as an exhortation to vote for or against a specific candidate. This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message *is unmistakable and unambiguous, suggestive of only one plausible meaning.*[55]

The problem with the reliance of the "reformers" on only this much of *Furgatch* is that they failed to acknowledge its second and third components:

> Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by [FECA]. Finally, it must be clear what action is advocated.[56]

Such *clarity of advocacy* converts implied advocacy into express advocacy. In addition, the language from *Furgatch,* which allows one to take account of "external events," is at best dictum—an informal and non-binding aside in a judicial opinion—because the communication at issue was express advocacy.[57] Otherwise, the reference is a direct assault on *Buckley.* The most reasonable reading of this case was articulated by the Fourth Circuit, which simply saw reference to external events as permissible only in those cases in which a political communication's explicit directive is ambiguous:

> [T]he simple holding of *Furgatch* was that, in those instances where political communications do include an explicit directive to voters to take some course of action, but that course of action is unclear, "context"—including the timing of the events of the day—may be considered in

52. Sec. 201.

53. 807 F.2d 857 (9th Cir. 1987). Shays–Meehan adopts the first part of *Furgatch*'s gloss on the express advocacy test: "speech is 'express' for present purposes if its message is unmistakable and unambiguous, suggestive of only one meaning." *Id.* at 864. Shays–Meehan ignores *Furgatch*'s other requirements that the speech "present a clear plea for action" and that "it must be clear what action is advocated." *Id.*

54. *Id.* at 858.

55. *Id.* at 864 (emphasis added).

56. *Id.*

57. The advertisement in question mentioned President Carter by name, the fact that he was running for re-election, that "[i]f he succeeds," more bad things would happen, and the plea to action: "DON'T LET HIM DO IT." *Id.* at 858. This is similar to the express advocacy found in *MCFL,* in which nothing but the four corners of the communication were considered.

> determining whether the action urged is the election or defeat of a particular candidate for public office.[58]

Seen in this light, it is a very narrow holding applicable to few, if any, political communications, and it certainly does not support the vague language of the proposed amendment. The FEC, as well as several states, adopted various forms of Shays–Meehan's "implied advocacy" test, and the courts consistently struck down these efforts.[59]

Voting Records/Guides as "Exceptions" to the Definition of Express Advocacy

As if to ameliorate some of the constitutional damage caused by its expansive definitions of express advocacy, Shays–Meehan offers a "Voting Record and Voting Guide Exception" to its definition of express advocacy. Actually, the provision is just more of the same conflation of the express advocacy/issue advocacy distinction, but in a more unbelievable context.

The essence of a voting record or voter guide is that they detail the official voting record or positions of candidates and elected officials.[60] So what is at stake is nothing less than the fundamental freedom of citizens to publicize and discuss how elected officials have performed in office or what their public positions have been. It is not surprising that many career politicians and elected officials are uncomfortable when citizens expose their actual voting records or statements (it may interfere with their attempt to paint a contrary image), but it is truly audacious for public officials to think they can sell restrictions on publishing such voting records or guides as a progressive reform.

Shays–Meehan would allow a voting record or guide

> in printed form or posted on the Internet that (i) presents information *solely* about the voting record or position on a campaign issue of one or more candidates (including any statement by the sponsor of the voting record or voting guide of its agreement or disagreement with the record or position of a candidate).... [emphasis added]

But it would include an additional implied advocacy qualifier, which voting records/voter guides would have to meet, that swallows the "exception":

> ...so long as the voting record or voting guide when taken as a whole does not express unmistakable and unambiguous support for or opposition to one or more clearly identified candidates.

Thus, what the voting record/voter guide exception in Shays–Meehan would give it also would take away in the same sentence.

58. *CAN II,* 110 F. 3d at 1054.

59. See *Maine Right to Life Comm., Inc.* v. *FEC,* 914 F. Supp. 8 (D. Me. 1996), *aff'd per curiam,* 98 F.3d 1 (1st Cir. 1996); *FEC* v. *Christian Action Network,* 110 F.3d 1049 (4th Cir. 1997); *Kansans for Life, Inc.* v. *Gaede,* 38 F. Supp.2d 928 (D. Kan. 1999); *Iowa Right to Life Comm., Inc.* v. *Williams,* No. 4–98–CV–10399 (S.D. Iowa October 23, 1998); *Right to Life of Dutchess County* v. *FEC,* 6 F. Supp.2d. 248 (1998). Of course, reliance is invariably placed on *Furgatch* for the "implied advocacy" test and it is rejected just as often.

60. Sec. 201(b). By tradition, voting records and voter guides have been the method to publish the voting practices of incumbents in office and to contrast the positions of opposing candidates on issues of concern to the sponsor of the guide or record. The term "voting record" usually refers to a report of the specific votes taken on legislation by incumbent officeholders. A "voter guide" describes the stated positions of competing candidates in response to questions submitted to them by, or discussed orally with, the sponsor of the record/guide. If a candidate refuses to answer the questions submitted, the voter guide often says so and provides the probable response of the candidate based on his or her previous public statements or voting record. The sponsor of the voting record or voter guide typically also will let the reader know its preferred responses. The voting record or voter guide also may tabulate the agreement/disagreement of the incumbents or candidates with the sponsor by percentage, and may indicate whether an incumbent has been a leader in support of, or in opposition to, the positions of the sponsor.

In any race in which the candidates take different positions on the issues selected for the voting record/voter guide and the sponsor provides its position, the voting record/voter guide expresses unmistakable and unambiguous support for the views of some candidates and not others. For most, if not all, publishers of voting guides, this is the whole point of a voting guide: to express unambiguous support for certain positions and the candidates who agree with them on the issues they deem important. The freedom to speak hardly would be worth much if it extended only to statements that were unclear, ambiguous, or ineffective in communicating a message about an important public issue. Moreover, the federal courts have held that merely expressing support for a candidate's views is not enough to convert it into an explicit endorsement unless the message also presents a clear plea for action and that it is clear what action is advocated.[61]

From the point of view of readers who share the views of the sponsors, the voting record/voter guide might provide an implicit message to vote for the candidates whose positions on the presented issues are consistent with the sponsor's. But the fact that it may have this effect does not make the voting record or voter guide express advocacy. The ultimate purpose of the First Amendment is to promote and protect the communication of such vital information and provoke such a reaction.

Yet, under Shays–Meehan, the FEC would be empowered to regulate the messenger. All voting records/voter guides would be viewed as expressing "unmistakable and unambiguous support" for or against the candidates identified. At best, the new "exception" is vague and leaves the sponsors of voting records/voter guides with uncertainty as to whether their communications would fall under it. This ambiguity by itself would be constitutionally fatal.[62]

As if this were not bad enough, Shays–Meehan provides another qualifier for its "exception" that, in most cases, would swallow it: The voting record or voter guide must not be "coordinated" with any candidate as that term is expansively defined:

> [the voting record/voter guide] *is not coordinated activity* or is not made in coordination with a candidate, political party, or agent of the candidate or party, or a candidate's agent or a person who is coordinating with a candidate or a candidate's agent, except that nothing in this clause may be construed to prevent the sponsor of the voting guide from directing questions *in writing* to a candidate about the candidate's position on issues for purposes of preparing a voter guide or to prevent the candidate from responding in writing to such questions....

To understand this qualifier, reference must be made to Shays–Meehan's new definition of "coordinated activity,"[63] which this paper elaborates in greater detail below. It is obvious that voting records/voter guides would be viewed as "coordinated activity" under this definition.

The Shays–Meehan bill provides 10 different scenarios that would constitute "coordination." The scenarios encompass the type of communication that invariably is involved between the sponsor of voter guides and the candidates mentioned in them. It often is impossible to prepare a voter guide without at least a general, if not a particular, understanding with the candidates being ques-

61. See, e.g., *Furgatch,* 807 F.2d at 864.

62. See, e.g., *Buckley,* 424 U.S. at 43 (citation omitted):

> No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.

63. Sec. 206(a).

tioned that their answers are being compiled for purposes of a voter guide that will be published during an upcoming election season. Without an understanding along these lines, the sponsor faces a risk of receiving no response at all from the candidates.

But this "coordination" qualifier that would allow only written questions to the candidates and, thus, prohibit the sponsor from having any oral communication with the candidates so as to ascertain the positions of candidates on issues, already was struck down as unconstitutional in the federal courts. In *Clifton* v. *FEC,*[64] the First Circuit Court of Appeals struck down the FEC's voter guide regulations that prohibited any oral communications with candidates in preparation of voter guides.[65] The court held that this rule is "patently offensive to the First Amendment" and that it is

> beyond reasonable belief that, to prevent corruption or illicit coordination, the government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues.[66]

Consequently, Shays–Meehan's exception for voting records/voter guides is a sham, which only highlights the unconstitutional nature of the expansive express advocacy definitions.

Direct Bans on Pre-Election Issue Advocacy

Other proposed reforms have the same objective with respect to issue advocacy as does Shays–Meehan, but without redefining express advocacy. As mentioned above, McCain–Feingold's new term of "electioneering communications" would ban corporations and labor unions from engaging in issue advocacy 60 days before a general election and 30 days before a primary election in cases in which radio or television is the medium.[67]

Once again, this approach already was tried and appropriately shot down by the federal courts. In Michigan, the Secretary of State promulgated a rule that banned corporate and labor union communications made within 45 days of an election that contained merely the "name or likeness of a candidate." Two traditional adversaries, Right to Life of Michigan and Planned Parenthood, challenged the rule in separate federal courts, and it was declared unconstitutional.[68] In striking down this rule, the district court held that even if

> "express advocacy" is to be measured strictly by the words used or by a more lenient contextual analysis as suggested in *Furgatch*...[the rule] does not even pass muster under *Furgatch.*"[69]

Consequently, if passed, this ban, along with the disclosure requirements imposed on non-corporate "electioneering communications," is dead on arrival in the federal courts.

64. 114 F.3d 1309 (1st Cir. 1997).

65. 11 CFR § 114.4(c)(5).

66. *Clifton,* 114 F.3d at 1314.

67. Like the drafters of the voting record/voter guide exemption in Shays–Meehan, McCain–Feingold also makes a failed attempt to diminish its squelching of political speech by excluding Section 501(c)(4) tax-exempt corporations from its prohibition. But because such corporations cannot make any "electioneering communications" with money donated to them by businesses or labor unions, or with funds derived from a trade or business, this measure would provide little solace. Because Section 501(c)(4) corporations rely—in some cases quite heavily—on moneys donated to them by for-profit businesses and from the sale of goods, the exclusion from the corporate ban on issue advocacy does not mitigate this serious suppression of First Amendment rights.

68. *Right to Life of Michigan, Inc.* v. *Miller,* 23 F. Supp.2d 766 (W.D. Mich. 1998); *Planned Parenthood Affiliates of Michigan, Inc.* v. *Miller,* 21 F. Supp.2d 740 (E.D. Mich. 1998).

69. *Right to Life of Michigan,* 23 F. Supp.2d at 768.

The weight of authority is heavy because the express advocacy test means exactly what it says, and issue advocacy is protected from regulation. Campaign finance statutes attempting to regulate or ban more than explicit words that advocate the election or defeat of clearly identified candidates are "impermissibly broad"[70] and invalid under the First Amendment.

RE-DEFINING COORDINATION WITH LABELS, NOT FACTS

Under FECA, an express advocacy expenditure that is made

> in cooperation, consultation, or concert, with, or at the request or suggestion of a candidate...shall be considered to be a contribution to such candidate.[71]

If it is coordinated with the candidate, an explicit endorsement to vote for a particular candidate by an otherwise independent group is arguably tantamount to a contribution to the candidate because it implicates the same potential for *quid pro quo* corruption. This type of pre-arrangement with a candidate is referred to in short hand as a "coordinated" expenditure. An ad or expenditure that is not coordinated with a candidate is termed an "independent expenditure" and constitutionally cannot be limited at all.[72]

As mentioned above, however, such proposals as McCain–Feingold and Shays–Meehan provide for a sweeping and unconstitutional definition of "coordination" that by mere label drastically would limit true independent expenditures. It would do this by presuming, without proving, the existence of coordination under certain factual scenarios in which it did not necessarily exist.

Under the leading House and Senate bills, in which an organization's independent expenditures were deemed to be "coordinated" with a candidate, a corporation would be prohibited from making them and individuals would be limited to spending $1,000 on them because the communication would be subject to the $1,000 contribution limit to candidates.[73] This, of course, would be a violation of the First Amendment in which the expenditure was actually an independent one. If the Constitution forbids Congress from limiting independent expenditures, Congress certainly cannot limit these disbursements by simply attaching a new label to them.

Presumed Coordination

Both bills provide 10 different factual instances in which "coordination" is presumed.[74] For example, if during an election cycle a person making an independent expenditure and a candidate employ a common vendor, coordination would be presumed. Indeed, unilateral action by the vendor, that is, providing services to a candidate after an independent expenditure had been made on behalf of the same, could convert the independent expenditure into a "contribution."

Another instance of presumed coordination would occur if the person making the independent expenditure, in the same election cycle, merely discussed strategy or policy with the candidate concerning his decision to seek elective office, or

70. *Buckley*, 424 U.S. at 80.

71. 2 U.S.C. § 441a(7)(B)(i).

72. *Colorado Republican Federal Campaign Comm.* v. *FEC,* 116 S. Ct. 2309, 2316 (1996) (Breyer, J., plurality opinion); *id.* at 2321 (Kennedy, J., Rehnquist, C.J., Scalia, J., concurring in the judgment); *id.* at 2330 (Thomas, J., Rehnquist, C.J., Scalia, J., concurring in the judgment); see also *FEC* v. *National Conservative Political Action Comm.,* 470 U.S. 480, 497 (1985); *Buckley,* 424 U.S. at 47, 51; *New Hampshire Right to Life Political Action Comm.* v. *Gardner,* 99 F.3d 8, 18–19 (1st Cir. 1996); *Georgia Right to Life, Inc.* v. *Reid,* No. 1:94–CV–2744–RLV (N.D. Ga. Jan. 22, 1996); *Common Cause* v. *Schmitt,* 512 F. Supp. 489 (D. D.C. 1980).

73. 2 U.S.C. § 441a(a)(1)(A),(7)(B)(i), 441b(a). A coordinated expenditure is considered an in-kind contribution to a candidate subject to FECA's contribution limits.

74. *Id.*

discussed any matter related to the candidate's campaign with the candidate. The same is true for the person making an independent expenditure if he also helped to raise funds for the candidate who benefited from the expenditure.

These presumptions would be invalid because the Supreme Court has held that coordination must be actually proved. In *Colorado Republican Federal Campaign Comm.* v. *FEC,* the FEC took the position that party expenditures were presumed to be coordinated with their candidates as a matter of law. The Supreme Court rejected this view:

> An agency's simply calling an independent expenditure a "coordinated expenditure" cannot (for constitutional purposes) make it one.... [T]he government cannot foreclose the exercise of constitutional rights by mere labels.[75]

The Supreme Court held that there must be "actual coordination as a matter of fact."[76] Congress, therefore, cannot recite merely some factual scenarios in which it might be possible, or even probable, that coordination with candidates takes place, and then presume as a matter of law that it has occurred in such instances. To do so would allow the government to curtail—drastically—independent expenditures and issue advocacy by mere labels, which, as mentioned above, constitutionally could not be limited.

Attempts to Eliminate the Express Advocacy Requirement for Coordination

Beyond the effort to eliminate many real independent expenditures on express advocacy, the definition of "coordinated activity" in the leading campaign finance "reform" bills suffers from another fatal flaw of attempting to eliminate the requirement that only express advocacy can be deemed coordinated with a candidate. As explained above, the Supreme Court has declared that only expenditures on express advocacy can be regulated; that is, communication that in "explicit words" or by "express terms advocates the election or defeat of a clearly identified candidate."[77] Conversely, fully protected issue advocacy is the discussion of issues and candidates' positions on them *without* expressly advocating their election or defeat. Some "reforms" aim to eliminate this distinction in the area of "coordinated activity" in addition to other areas of law.

The Shays–Meehan and McCain–Feingold bills, for example, explicitly would eliminate the express advocacy component of "coordinated" expenditures:

> "Coordinated activity" means anything of value provided by a person in coordination with a candidate...for the purpose of influencing a federal election (*regardless of whether the value being provided is a communication that is express advocacy*)....[78]

Under this definition, the publication of any voting records or voter guides would be deemed an in-kind contribution to a candidate if "coordinated" as newly defined. Indeed, under this expansive definition, one would need not even mention a candidate. Merely making an expenditure that weighed in on a public policy debate that was also a campaign issue could be considered something "of value for the purpose of influencing a federal election." But attempts to limit such valuable speech would be unconstitutional.

BANNING "SOFT MONEY" FOR POLITICAL PARTIES

Soft money is a term used to describe contributions and expenditures that are not subject to regulation under the Constitution or a particular jurisdiction's election statutes (FECA, in this case).

75. 116 S. Ct. 2309, 2319 (1996) (Breyer, J., plurality opinion).

76. *Id.* at 2317.

77. 424 U.S. at 43, 44, 80; see also *MCFL,* 479 U.S. at 248-49.

78. Sec. 206 (Shays–Meehan); Sec. 215 (McCain–Feingold) (emphasis added).

Soft money thus includes the types of expenditures that the Supreme Court has said are absolutely protected by the First Amendment and not subject to any government regulations, such as contributions for, and expenditures on, issue advocacy and on truly independent expenditures for express advocacy.

Conversely, *hard money* refers to contributions and expenditures subject to regulation, such as contributions for express advocacy that is coordinated with the candidate. Some "reformers" believe that the ability of political parties to spend an unlimited amount of money on issue advocacy affecting the parties' own candidates is a gaping loophole that must be closed. (This loophole mentality of the "reformers" follows from their failure to accept that the First Amendment was intended to provide broad protection to the people to engage in political speech; the Supreme Court recognized only one small exception in *Buckley.*)

Activities and communications that the McCain–Feingold and Shays–Meehan bills effectively would regulate, limit, or even prohibit with respect to individuals, organizations, and some corporations would be banned outright with regard to political parties, which, like any other entity, at the present time may receive and spend an unlimited amount of soft money:

> A national committee of a political party...shall not solicit, *receive,* or direct to another person a contribution, donation, transfer of funds, or *spend any funds,* that are not subject to the limitations, prohibitions, and reporting requirements of this Act.[79]

This same prohibition would be imposed on state political parties with respect to "[f]ederal election activity," which, as mentioned above, explicitly encompasses communications that merely

> refers to a clearly identified candidate...and is made for the purpose of influencing a Federal election (regardless of whether the communication is express advocacy.[80]

The net result is that issue advocacy would become the exclusive domain of individuals and interest groups void of the tempering effect of political parties. This attempt to limit the free speech rights of political parties also would be unconstitutional.

Political Parties' Right to Publish Issue Advocacy

If individuals and narrow interest groups, such as corporations, unions, and banks, enjoy the basic First Amendment freedom to discuss issues and candidates in the context of electoral politics, why should political parties, which have wider bases of interests that are necessarily tempered and diffused, be deprived of the right to engage in unfettered issue advocacy? American political parties exist to advance a broad array of issues.

Proponents of the idea that issue advertising by political parties should be funded entirely or in part with hard money argue that this restriction is simply a "contribution limit."[81] The fallacy of that argument, of course, is that the Supreme Court has justified contribution limits only on the grounds that large contributions create the reality or appearance of *quid pro quo* corruption, which, as discussed above, cannot justify a limit on issue advocacy.[82]

More important, the proposed ban on soft money contributions to political parties cannot be

79. Sec. 101 (both bills) (emphasis added).

80. Sec. 101 (both bills).

81. Brief of Amici Curiae United States Senators Carl Levin, John D. McCain and Russell D. Feingold, *ODP/RNC* v. *FEC* in the United States Court of Appeals for the District of Columbia, 9 (August 18, 1998).

82. *Buckley,* 424 U.S. at 45; see also James Bopp, Jr., *Constitutional Limits on Campaign Contribution Limits,* 11 Regent U. L. Rev. 235 (1998–99).

justified on the theory that political parties corrupt federal candidates. The Supreme Court already has rejected this notion. In *Colorado Republican Federal Campaign Comm.* v. *FEC,* the FEC took the position that independent, uncoordinated expenditures by political parties should be treated as contributions to the benefited candidate.[83] Such treatment would have resulted in allowing individuals, candidates, and political action committees to spend unlimited amounts of money on independent expenditures to advocate the election of a candidate while limiting the amount a political party could spend for the same purpose.

The Supreme Court disagreed with the FEC, noting that "[w]e are not aware of any special dangers of corruption associated with political parties." After observing that individuals could contribute more money to political parties ($20,000) than to candidates ($1,000) and PACs ($5,000), and that "FECA permits unregulated 'soft money' contributions to a party for certain activities," the Supreme Court concluded that the "opportunity for corruption posed by these greater opportunities for contributions is, at best, attenuated."[84] The Supreme Court continued in this vein with respect to the FEC's proposed ban on party independent expenditures, which has direct application to a ban on soft money contributions:

> We therefore believe that this Court's prior case law controls the outcome here. We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties.[85]

The concurring justices also found little, if any, opportunity for party corruption of candidates because of the parties' very nature and structure.[86]

The Supreme Court echoed the same theme with respect to the independent expenditures of political action committees:

> The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.[87]

If this is true of PACs, then it is even more true that there can be no corruption or appearance of corruption resulting from issue advocacy by political parties.

In addition, the Supreme Court in *FEC* v. *Massachusetts Citizens for Life, Inc. (MCFL)*[88] provided further guidance on whether there is a threat of corruption posed by such an organization as a political party. The Supreme Court considered the ban on independent expenditures by corporations under 2 U.S.C. § 441b. It evaluated whether there was any risk of corruption with regard to an MCFL-type organization that would justify such a ban on its political speech. Although *MCFL* addressed whether an ideological corporation was sufficiently like a business corporation to justify the ban on using corporate dollars for independent expenditures, there are several transferable concepts to evaluating the threat of corruption posed by a political party.

The concern raised by the FEC in *MCFL* was that § 441b served to prevent corruption by "pre-

83. 116 S. Ct. at 2317.

84. *Id.* at 2316.

85. *Id.* at 2317.

86. *Id.* at 2321 (Kennedy, J., Rehnquist, C.J., Scalia, J., concurring in the judgment); see also *id.* at 2331 (Thomas, J., Rehnquist, C.J., Scalia, J., concurring in the judgment).

87. *FEC* v. *National Conservative Political Action Comm.,* 470 U.S. 480, 498 (1985).

88. 479 U.S. 238, 248–49 (1986).

vent[ing] an organization from using an individual's money for purposes that the individual may not support."[89] The Supreme Court found that "[t]his rationale for regulation is not compelling with respect" to MCFL-type organizations because

> [i]ndividuals who contribute to [an MCFL-type organization] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes.[90]
>
> [I]ndividuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction.[91]
>
> Finally, a contributor dissatisfied with how funds are used can simply stop contributing.[92]

Political parties similarly pose no risk of *quid pro quo* corruption because a political party cannot return a governmental favor; people give money to parties precisely because they support what the party stands for. A contribution to a party is for the purpose of enhancing advocacy of the issues the party represents. Any individual unhappy with the use of the money simply may quit contributing and leave the party. In sum, the threat of corruption cannot justify a limit on issue advocacy and, even if it could, political parties would pose no threat of *quid pro quo* corruption.

Although today's campaign finance "reformers" wish for comprehensive changes to FECA in order that their "reforms" could work more effectively, some Members of Congress may be tempted to adopt a piecemeal approach. This approach, however, would be circumvented just as a raging river dammed up will find another course. For example, a ban on soft money contributions to, and expenditures by, political parties would be avoided by direct issue advocacy expenditures by corporations, labor unions, and other groups. The converse also would be true. Banning corporate and labor union issue advocacy would result in increased donations to, and resulting issue advocacy expenditures by, political parties. In short, only far-reaching obliteration of constitutional rights would achieve what the reformers seek—federal control of issue advocacy.

CONSTITUTIONAL APPROACHES TO CAMPAIGN FINANCE REFORM

Certainly, some reforms are needed to correct the problems associated with past reform efforts. What some would-be reformers see as a terrible circumvention of the current campaign finance laws is really the natural but inefficient diversion of the public's desire to have a say in who their elected leaders are and what policies those leaders will pursue. Instead of attempting to restrict citizens' political freedoms further and make campaign finance laws even more complicated, Congress should work to correct those laws that cause the distortion in the first place.[93]

Besides the infringement on personal freedom and the distortion in the funding of political campaigns, the current laws create three other problems:

1. Political candidates must spend an increasing amount of time raising campaign funds in small increments that grow smaller in terms of real dollars each year as inflation takes its toll. Elected officials are increasingly distracted

89. *MCFL*, 479 U.S. at 260.

90. *Id.* at 260–61.

91. *Id.* at 261.

92. *Id.*; see also *Day* v. *Hollahan,* 34 F.3d 1356, 1363–65 (8th Cir. 1994).

93. See James Bopp, Jr., and Richard E. Coleson, *The First Amendment Is Not a Loophole: Protecting Free Expression in the Election Campaign Context,* 28 U. West L.A. L.R. 1, 72–78 (1997) (also discussing other measures not mentioned here that could be taken to reform campaign finances truly).

from their public duties by the constant need to raise funds, and some public officials have resigned as a result of the constant fundraising pressure.[94]

2. Campaign finance laws already are so complex that few, if any, candidates can avoid at least some technical violation. FEC investigations run for years after each election cycle, and record fines are assessed sometimes for inadvertent errors or disagreements over the interpretation of law. Whatever the value of the current laws—and their positive value is questionable—there surely is a high cost of uncertainty and wasted legal resources that must be deducted from it.

3. Public accountability is hampered by the current system because it causes a shift of funds from more transparent contributions and expenditures to less transparent contributions and expenditures. If combating the threat of corruption is the most important goal, then Congress should simplify the laws, allow contributions to go directly to their intended beneficiaries, and let the people see more clearly where the money is flowing. Prompt reporting requirements would be the only needed government reform. Any other approach would treat citizens as children and replace true accountability with an overreaching regulatory bureaucracy.

To enhance political participation and improve transparency and accountability in the process, Congress should:

- **Raise the contribution limits.** At a minimum, contribution limits must be raised substantially if they are to keep pace with inflation. The $1,000 limit on individual contributions to candidates that was imposed a quarter-century ago should be raised to at least $2,500 and indexed for inflation. In constant dollars, a $1,000 contribution in 1974 would be worth at least $2,500 today.[95] (In addition, the aggregate individual contribution limit also should be raised from $25,000[96] to $100,000 and indexed for inflation.) Permitting individuals to make larger and more contributions would enable more citizens to run for office, allow public officials to concentrate on their jobs, and remove some of the incentives for interest groups to make independent and issue advocacy expenditures.

The individual and multicandidate PAC contribution limits to political parties should be increased, too, from $20,000[97] and $15,000,[98] respectively, at least to $50,000 and indexed for inflation. The current limitations diminish the relative force of political parties and encourage them to seek soft money. Strengthening the clout of parties in the election process would serve to reduce the relative weight of narrow interests and the likelihood of corruption. Political parties are one of the mediating institutions in the political process that should be permitted to fulfill their legitimate political role.

94. See *Concerning Limits to Candidates in Federal Elections: Hearings before the Senate Committee on Rules and Administration,* 106th Cong., 1st Sess., May 24, 1999 (testimony of former Senator Dan Coats and Exhibit 6, quoting Senators John Kerry (D–MA), Frank Lautenberg (D–NJ), Wendell Ford (D–TN), and Dennis DeConcini (D–AZ) and former Senator Paul Simon (D–IL), most announcing their intention to retire but all expressing dismay at the inordinate amount of time necessarily devoted to raising campaign contributions).

95. *Russell* v. *Burris,* 146 F.3d 563, 570 (8th Cir. 1998). Those who take issue with the validity of the consumer price index (CPI) as an annual measure to increase the contribution limits are reminded that the CPI is used annually to increase the amount that presidential candidates eligible for matching funds may expend, as well as the amounts that may be expended by national and state parties on federal candidates. See 2 U.S.C. § 441a(c)(1). True reformers are open to alternatives.

96. 2 U.S.C. § 441a(a)(3).

97. 2 U.S.C. § 441a(a)(1)(B).

98. 2 U.S.C. § 441a(2)(B).

- **Remove the limits on coordinated expenditures by political parties.** Congress should consider the merits of ending the limits placed on the amount of expenditures political parties may coordinate with their candidates.[99] The Supreme Court all but struck the limits down in *Colorado Republican:*

> [T]his Court's opinions suggest that Congress wrote the Party Expenditure provision not so much because of a special concern about the potentially "corrupting" effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful spending.[100]

The Supreme Court chose not to reach the facial challenge to the party expenditure limit itself, but to remand the case for further proceedings. The four concurring justices, nevertheless, were quite prepared to strike it down.[101] On remand, the district court observed that Congress enacted the party expenditure limits for constitutionally inadequate reasons, and the court declared it unconstitutional.[102]

Congress should repeal the coordinated expenditure limits for political parties for sound policy reasons as well. As stated above, political parties cannot corrupt their own candidates. "There is an identity cultivated by the law and borne out in fact between a political party and a candidate who represents that he or she is of that party."[103]

> While the various interest groups (and their PACs) usually have one specific goal or concern, political parties represent an amalgam or coalition of interests and goals.... The party can't afford to get in a situation that is corrupt or corrupting because the party has to be held accountable, and the party is held accountable through the ballot.[104]

These reforms would encourage direct citizen participation in political campaigns, thereby reducing the incentive for indirect involvement through independent expenditures and issue advocacy. The revisions also would ameliorate the disincentives facing potential challengers to incumbents.

Comprehensive Campaign Finance Reform

If Congress really were serious about campaign finance reform, however, it would consider instead the provisions in one of the true comprehensive reform bills introduced. For example, Representatives John Doolittle (R–CA) and Tom DeLay (R–TX) introduced a genuine reform bill that also would be constitutional.[105] It would (1) repeal the limits on individual and PAC contributions to candidates and parties as well as party contributions to candidates; (2) terminate taxpayer financing of presidential election campaigns; (3) require parties to distinguish between federal and non-federal funds, and require each state party to file with the FEC a copy of the same disclosure form as it files with the state; (4) require electronic filing of campaign reports, and require them to be filed every

99. 2 U.S.C. § 441a(d).

100.116 S. Ct. at 2317.

101.See *id.* at 2321 (Kennedy, J., Rehnquist, C.J., Scalia, J., concurring in the judgment); *id.* at 2323 (Thomas, J., Rehnquist, C.J., Scalia, J., concurring in the judgment).

102.*FEC* v. *Colorado Republican Federal Campaign Comm.,* 41 F. Supp.2d 1197, 1999 WL 86840, at *10 and *11 ff. (D. Colo. Feb. 18, 1999).

103.*Id.* at *13.

104.*Id.*

105.H.R. 1922.

24 hours during the three months preceding an election; (5) require the FEC to post campaign reports on the Internet; and (6) bar acceptance of contributions unless specific disclosure requirements were met.

Considering the built-in advantages enjoyed by incumbents, repealing contribution limits would tend, of course, to level the playing field between challengers and incumbents. Although improving the fairness of elections could decrease the likelihood that current officials will support them, these reforms also would address the three problems with the current system identified above. They would reduce the need for candidates and public officials to engage in constant fundraising and lessen the influence of such outside fundraisers as Johnny Chung and Charlie Trie. They would simplify the overly complex regulatory regime and lessen intrusive FEC investigations that stretch on for years. And they would improve the transparency and political accountability of the election process. Most important, such true reforms also would be consistent with First Amendment freedoms.

CONCLUSION

Issue advocacy in the context of electoral politics enjoys absolute First Amendment protection. The Supreme Court defined only a narrow scope of non-issue advocacy that can be regulated—express or explicit words of advocacy of the election or defeat of a clearly identified candidate in which such clear directives as "vote for" are employed. Congress cannot eviscerate this bright-line test with "implied" or "no-advocacy" standards without running afoul of the First Amendment. Further, political parties are not exempt from the enjoyment of this protection and, therefore, the Constitution prevents Congress from forbidding them from receiving and expending soft money. There is no need to do so, either. Because of their nature, parties are incapable of *quid pro quo* corruption.

Even express advocacy cannot be limited if it involves the candidate's own money or truly independent expenditures that are not coordinated with a candidate. Congress cannot take away the constitutional right to engage in unfettered issue advocacy and unlimited independent express advocacy simply by presuming that coordination with candidates exists. Legislatively created labels cannot obviate the freedom of speech. Many of the current "reform" proposals before Congress, therefore, would fail the court-ordered test.

There are constitutional solutions, however, to some of the real problems caused by the current laws. Congress should increase substantially or scrap the contribution limits on individuals and PACs to candidates while strengthening disclosure requirements, and eliminate the limits on political party coordinated expenditures on behalf their own candidates. This would open the political process to more challengers and enable parties to fulfill their mediating and tempering role in federal elections.

—James Bopp, Jr., is an attorney with Bopp, Coleson & Bostrom in Terre Haute, Indiana. He serves as Of Counsel with Webster, Chamberlain & Bean in Washington, D.C.; General Counsel for the James Madison Center for Free Speech; and Chairman of the Election Law Subcommittee, Free Speech and Election Law Practice Group of The Federalist Society.