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Recasting the Issue Ad: The Failure of the Court's Issue Advocacy Standards

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RECASTING THE ISSUE AD: THE FAILURE OF THE COURT'S ISSUE ADVOCACY STANDARDS

David A. Pepper*

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I. INTRODUCTION

In the fall of 1993, as the debate over President Clinton's health care reform bill heated up, the Health Insurance Association of America (HIAA) launched a series of advertisements featuring the infamous "Harry and Louise." In one ad, the young couple, seated around a breakfast table, denigrated the White House's health care reform plan, stating "there's got to be a better way."¹ Unrelated to a specific election or candidate, and instead focused on a single policy dispute, the \$6.5 million campaign marked a new trend in political advertising: the use of an "issue ad" to sway policy decisions. The ads sparked a national debate, as Democrats publicly lambasted the advertisement as misleading, the Democratic National Committee (DNC) launched its own ad attacking the anti-reform position,² as did an advocacy group which supported the reform effort.³ In the end, the opposing sides reached a truce, but the reform effort failed.⁴

Despite complaints about their accuracy and their uncertain role in the ultimate demise of Clinton's health care legislation,⁵ the health care ad campaigns

¹ *Health Care Reform Debate Squeezed into TV Ads*, THE ATLANTA J. & CONST., Oct. 23, 1993, at A11. See also Elizabeth Kolbert, *The Ad Campaign: Playing on Uncertainties About the Health Plan*, N.Y. TIMES, Oct. 21, 1993, at A20; Elizabeth Kolbert, *New Arena for Campaign Ads: Health Care*, N.Y. TIMES, Oct. 21, 1993, at A1.

² See Catherine S. Manegold, *Reform Ads Rule Airwaves*, SUN. GAZETTE MAIL, July 17, 1994, at 11A; *Insurers Ask Clinton to Help Stop Ads*, ASSOCIATED PRESS, N.Y. TIMES, March 11, 1994, at A20.

³ See Mary Jane Fisher, *Administration, HIAA Stake Out Common Ground*, NAT'L UNDERWRITER, PROP. & CASUALTY/RISK & BENEFITS MGMT. ED., Mar. 21, 1994, at 1.

⁴ The reform plan died a slow death. See, e.g., Adam Clymer, *Congressional Compromise: Clinton's Health Plan: Not as Dead as it Looks*, N.Y. TIMES, March 27, 1994, at § 4, 3; Robin Toner, *Strain Shows in Committees on Health Bill*, N.Y. TIMES, June 16, 1994, at A24; Monica Borkowski, *The Health Care Debate: Chronology; High Fever to No Pulse*, N.Y. TIMES, Sept. 27, 1994, at B10.

⁵ A telephone poll taken in September and October of 1993 found a mixed reaction to the ads. Seventy-five percent of respondents had no definitive reaction to the ads; twenty-one percent said the advertisements made them more likely to believe major changes were necessary, while two percent said

illustrated how issue advocacy can enrich the discussion over important policy questions by bringing that discussion into the public eye. First, the focus on issues provided a positive contrast to the personal snipes and vacuous rhetoric of many political debates or advertisements. Moreover, the public discussion of contradictory views provided the American people with a more exposed airing of issues at stake than is afforded by the usual beltway monopoly over policy questions. And rather than backroom handshakes between interest group and politician, the campaign brought the lobbying process into the public forum, effecting political change at a level far closer to the grass roots than the customary form of influence: direct financial contributions to political candidates. In short, at the very least, communications like the health care reform ads comprise important forms of expression under either the “marketplace of ideas”⁶ or self-governance⁷ rationales for the First Amendment. Practically, such ads may serve as a healthy supplemental forum in which to air important policy debates from NATO expansion to trade policy.

As the 1996 Presidential and Congressional campaigns unfolded, a different type of “issue advertisement” hit the American airwaves. This Article will show that rather than addressing a specific policy debate, these ads possessed all the attributes of a candidate’s campaign advertisements. They expressly identified and criticized vulnerable candidates in tightly contested districts or states and only shallowly discussed issues, if at all. In some cases these ads were designed by candidates and campaign staffs themselves, and often they were organized by national or state political parties that had worked closely with candidates. Others were aired by independent groups which were intimate with particular candidates and had publicly vowed to influence the upcoming election. Despite their apparent dissimilarity from the HIAA ads of 1994, these ads were cast under the same definition and restrictionless status provided by current campaign finance law.

Although the Supreme Court and lawmakers have in the past attempted to establish standards distinguishing between the two types of advertisements described above, this Article will argue that those standards are ineffective because

they were less likely to believe major change was needed. ROPER CTR. AT THE UNIV. OF CONN., PUB. OPINION ONLINE, (March 18, 1994), *available in* LEXIS, Market Library, RPOLL File.

⁶ See generally *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”); JOHN STUART MILL, *ON LIBERTY* (1859) (arguing that freedom of expression bolsters the search for truth).

⁷ See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (arguing that the central purpose of the First Amendment is to further the process of self-governance by providing for unrestricted discussion of public issues).

they fail to take into account the realities of political advertising and campaigning. While the Court and lawmakers have correctly identified the potential benefits of true issue advocacy, campaign finance laws as they are now applied and interpreted do not frame issue advocacy in a way that safeguards those benefits while avoiding its potential dangers. The inadequacy of the current distinguishing standards introduces numerous problems into the campaign finance system and defies the Court's own careful measures upholding many aspects of campaign finance regulation.

Part II of this Article traces the current legal standards defining issue advocacy, analyzing the few cases in which the Court has addressed issue advocacy and specifically examining the two prongs used to set issue advocacy apart from campaign expenditures which can be regulated: express advocacy and coordination. Part III describes the development of issue ads in politics, focusing on the 1996 elections. More specifically, this discussion shows how and explains why the current prongs fail to encompass ads that are clear campaign ads. Part IV describes how these flaws introduce a gaping loophole around current campaign finance laws and will explain the threats to the system that this loophole creates. Part V recommends and justifies new standards for issue ads that account for the realities of political campaigning, and, in doing so, preserve issue ads' positive role while eliminating the negative consequences they can render. Similar standards have been proffered recently by the Federal Election Commission (FEC), as well as by the judicial and Congressional branches, but have yet to gain hold in the law. If Congress and the Court are to avoid the very dangers to the campaign system that the Court itself has deemed compelling in recent decades, then both branches must promulgate and support some version of these new standards in the near future.

II. ISSUE ADVOCACY: THE RATIONALE AND THE STANDARDS

A. *Protecting Independent Issue Advocacy: The Court's Rationale*

In *Buckley v. Valeo*⁸ and *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL)*,⁹ the Court permitted regulation of campaign-related communications and expenditures involving "express advocacy," while granting independent issue advocacy full freedom from government regulation. In doing so, the Court provided both Constitutional and practical justifications why independent

⁸ 424 U.S. 1 (1976).

⁹ 479 U.S. 238 (1986).

issue advocacy merits protected status while other forms of political expression may be regulated.

In *Buckley*, the Court declared that all regulations impinging political expression – whether general policy discussion or advocacy for a particular political result – burden “core First Amendment rights of political expression,” and therefore require the most rigid scrutiny.¹⁰ Only regulations that are narrowly tailored to serve a compelling government interest can withstand such scrutiny.¹¹ Having set forth this fundamental principle, the Court made two moves whose result was the full protection of independent issue advocacy from campaign finance regulation.

First, while the Court recognized the prevention of real or apparent corruption as a compelling interest justifying limits on campaign contributions,¹² it found that independent expenditures could not be regulated in this way because they pose little danger of corruption.¹³ Next, citing several compelling interests, the

¹⁰ *Buckley*, 424 U.S. at 45-46, 79. The Court elaborated on the importance of protecting political expression. “[T]he First Amendment right to ‘speak one’s mind . . . on all public institutions’ includes the right to engage in ‘vigorous advocacy no less than abstract discussion.’” *Id.* at 48 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964)). *Buckley* stated that this right was especially sacred with regard to political campaigns. *Id.* at 14-15. “[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.” (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). This strong protection of political expression squared with earlier Court precedent. *See, e.g., Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates . . .”).

¹¹ *See Buckley*, 424 U.S. at 44-46, 79. This analysis is the same as that used by the Court to assess other political speech restrictions. *See, e.g., Boos v. Barry*, 485 U.S. 312, 334 (1988); *Board of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). For an overview and critique of the compelling interest-narrowly tailored test for content-based restrictions, see Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996).

¹² *See Buckley*, 424 U.S. at 26. At the same time, *Buckley* explicitly rejected as “wholly foreign to the First Amendment” the argument that the government possessed an important interest in “equalizing the relative ability of individuals and groups to influence the outcome of elections.” *Id.* at 48-49. In a later case, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Court would find a compelling interest in removing the corrosive and distortive effects of large corporate wealth on elections. *See discussion, infra notes 160-165 and accompanying text.*

¹³ *See id.* at 46. The Court proffered two reasons for this conclusion. First, independent expenditures by definition can not be coordinated with a campaign, and thus will provide “little assistance to the candidate’s campaign and indeed may prove counterproductive.” *Id.* at 45-47. Second, the lack of coordination and the unpredictability of independent advocacy undermines the danger of a “quid pro quo for improper commitments from the candidate.” *Id.* The Court has repeated this

Court went on to approve modest regulation of campaign-related independent expenditures in the form of reporting and disclosure requirements.¹⁴ The Court, however, once again erected the “core” First Amendment status of “issue discussion and advocacy of a political result” to withhold independent issue advocacy from those requirements.¹⁵

In essence, the Court established a three-tiered structure of regulation of campaign expenditures – coordinated contributions (strict limits), independent expenditures (disclosure and reporting requirements), and independent issue advocacy (no regulation). In doing so, the Court faced a new challenge: distinguishing among the three tiers. The Court recognized that setting apart the latter two categories – discerning between “discussions of issues and candidates from more pointed exhortations to vote for particular persons”¹⁶ – would be a complex task: “[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.”¹⁷ To make this distinction, the Court established a line of analysis looking for “express advocacy.”¹⁸ To distinguish independent issue advocacy from coordinated contributions, the Court’s task appeared less difficult. It simply defined issue advocacy as inherently independent, encompassing those communications undertaken in an uncoordinated fashion by an “individual other than a candidate or a group other than a political committee.”¹⁹ Thus, coordination analysis would

rationale in later cases. *See, e.g.,* Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm’n, 116 S. Ct. 2309, 2315-16 (1996) (“[L]imitations on independent expenditures are less directly related to preventing corruption [than those on contributions limits.]”); Federal Election Comm’n v. National Conservative Political Action Comm., 470 U.S. 480, 498 (1985) (“[T]he absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”).

¹⁴ *See Buckley*, 424 U.S. at 67-68.

¹⁵ *Id.* at 79.

¹⁶ Federal Election Comm’n v. MCFL, 479 U.S. 238, 249 (1986) .

¹⁷ *Buckley*, 424 U.S. at 42.

¹⁸ *Id.* at 47.

¹⁹ *Id.* at 79-80.

segregate issue advocacy expenditures from contributions. Confident in these two analytical safeguards, the Court granted issue advocacy its fully protected status.

B. Express Advocacy: The “Magic Words” Standard

The “express advocacy” standard first emerged in *Buckley*, which struck down aspects of the Federal Election Campaign Act of 1971 (FECA)²⁰ that limited campaign and independent expenditures but upheld contribution and Political Action Committee (PAC) limits and a public financing scheme for the Presidential election.²¹ Specifically, the “express advocacy” prong emerged as the Court examined the \$1,000 limit on independent expenditures. The Court expressed concern that in targeting “any expenditure relative to a clearly identified candidate,”²² FECA’s language was unconstitutionally vague and would chill core First Amendment expression.²³ In order to “save” the statute, the Court held that that portion of the Act should “apply only to expenditures for communications that in *express terms advocate the election or defeat of a clearly identified candidate* for federal office.”²⁴ In a footnote, the Court further defined this phrase to include “communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ and ‘reject.’”²⁵ Even with this added clarity, the Court ultimately rejected the independent expenditure limit,²⁶ but it incorporated its “express

²⁰ Fed. Election Campaign Act of 1971, 2 U.S.C. §§ 431–55 (1994).

²¹ See *Buckley*, 424 U.S. 1 (1976).

²² 18 U.S.C. § 608(e)(1) (Supp. IV, 1970) (repealed 1976).

²³ While the Court noted that FECA had defined the terms “expenditure,” “candidate,” and “clearly identified,” it held that the “use of so indefinite a phrase as ‘relative to’ a candidate fails to clearly mark the boundary between permissible and impermissible speech.” *Buckley*, 424 U.S. at 41. Even in the context of the later clarification – “*advocating the election or defeat of such candidate*” – the Court found the definition lacking. *Id.* at 42 (quoting 18 U.S.C. 608 (e)(1) (Supp. IV, 1970) (repealed 1976)).

²⁴ *Id.* at 44 (emphasis added).

²⁵ *Id.* at 44 n.52.

²⁶ See *supra* note 13 and accompanying text. Interestingly, in striking down the provision, the Court argued in part that a narrow express advocacy standard would not comprise an effective “loophole-closing” standard. “[U]nscrupulous persons and organizations” could “skirt[] the restriction on express advocacy of election or defeat but nevertheless benefit[] the candidate’s campaign.” *Buckley*, 424 U.S. at 45.

advocacy” analysis into FECA’s reporting and disclosure requirements²⁷ for independent expenditures, which the Court upheld.²⁸ Thus, when individuals and groups “make expenditures for communications that *expressly advocate* the election or defeat of a clearly identified candidate,” they are subject to FECA’s reporting and disclosure requirements.²⁹ This “magic words” definition of “express advocacy” was shortly cemented into place. Congress directly placed that standard within its campaign finance legislation,³⁰ and in the following decade, lower courts applied a rigid “magic words” test in examining “express advocacy.”³¹

The Court has revisited the “express advocacy” prong only once. Ten years after *Buckley*, a pre-election flyer by a “pro-life” nonprofit corporation forced the Court to re-examine its “magic words” standard. In a newsletter, the Massachusetts Citizens for Life (MCFL) declared that “[n]o pro-life candidate can win in November without your vote in September,” and printed “Vote Pro-Life” on the back page of the newsletter.³² In addition to these exhortations, the flyer listed the

²⁷ See 42 U.S.C. § 434(e) (1994).

²⁸ See *Buckley*, 424 U.S. at 84. For detailed discussion, see *infra* notes 136-141 and accompanying text.

²⁹ *Id.* at 80 (emphasis added). The Court did not repeat the infirmities of a narrow “express advocacy” standard that it had observed earlier. See *supra* note 26.

³⁰ See 2 U.S.C. §§ 431(17), 441d (1994); H.R. Rep. No. 94-1057, at 38 (1976), *reprinted in* 1976 U.S.C.C.A.N. 929. The legislation defines “independent expenditure” as “an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.” 2 U.S.C. § 431(17) (1994).

³¹ See, e.g., *Fed. Election Comm’n v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 52 (2d Cir. 1980) (rejecting the FEC’s context-based analysis of the committee’s anti-tax bulletin); *Civil Liberties Union v. New Jersey Election Law Enforcement Comm’n* 509 F. Supp. 1123, 1131 (D.N.J. 1981) (striking down a New Jersey law requiring regulation and disclosure by organizations providing “political information concerning any candidate or candidates for public office”) (quoting N.J. STAT. ANN. §19:44A-3(g) (West 1989) (effective date April 24, 1973) (deleted by amendment 1983)); *Federal Election Comm’n v. American Federation of State, County and Municipal Employees*, 471 F. Supp. 315 (D.D.C. 1979) (granting a motion to dismiss the FEC’s claim that a “Nixon-Ford” poster was express advocacy). *Cf. Orloski v. Federal Election Comm’n*, 795 F.2d 15, 167 (D.C. Cir. 1986) (using a narrow express advocacy analysis to hold that although the purpose of a candidate picnic was largely to “muster support” for an upcoming election, the picnic was not a “political event”).

³² *Fed. Election Comm’n v. MCFL*, 479 U.S. 238, 243 (1986). The flyer displayed a ‘y’ next to candidates who supported the MCFL position on a particular issue, and an ‘n’ next to candidates opposed to the MCFL position. Asterisks were placed next to candidates who had a “100% pro-life

candidates for every state and federal office in Massachusetts along with each candidate's record on three abortion-related issues. The flyer also displayed pictures of thirteen candidates whom MCFL considered the strongest supporters of its "pro-life" position.³³ The back page of the flyer included a disclaimer that the flyer "does not represent an endorsement of any particular candidate."³⁴

The Court – calling upon its "magic words" test but seeming to relax the standard in the process – found MCFL's flyer to constitute "express advocacy." The Court held that the exhortation to "vote for 'pro-life' candidates," combined with the identification and photographs of candidates "fitting that description," "provides in effect an explicit directive: vote for these (named) candidates."³⁵ Thus, although the words themselves did not meet the definition of the "magic words" outlined in *Buckley*, the Court found express advocacy by looking at the broader context of the message: although the message was "marginally less direct than, 'Vote for Smith'," the flyer "goes beyond issue discussion to express electoral advocacy."³⁶

The *MCFL* Court's apparent loosening of the *Buckley* "magic words" standard has had little impact on issue advocacy decisions in the lower courts. Although the Ninth Circuit³⁷ and the FEC³⁸ have since outlined a more flexible

voting record." *Id.*

³³ *See id.*

³⁴ *Id.*

³⁵ *Id.* at 249.

³⁶ *Id.* The *MCFL* Court made several other important conclusions concerning FECA. First, it construed the language of 2 U.S.C. § 441b, which made it unlawful for corporations and labor organizations to make contributions or expenditures "in connection" with federal election, to mean that a corporate or union expenditure need only constitute "express advocacy" to be prohibited under the provision. *Id.* at 249. This marked a reading far broader than that contended by MCFL, which argued that the words "of value" of § 441b(b)(2) implied a narrow definition of "in connection." *See id.* at 245. Moreover, although the Court held that the prohibition of § 441b was unconstitutional as applied to MCFL – a corporation without shareholders, which neither was established by a business corporation or labor union nor accepted contributions from such institutions, and which was "formed for the express purpose of promoting political ideas" and "cannot engage in business activities," *id.* at 264 – it predicted that the "class of organizations" like MCFL that avoid the requirements of § 441 "will be small." *Id.* at 264.

³⁷ *See Fed. Election Comm'n v. Furgatch*, 807 F.2d 857, 861 (9th Cir. 1987). Analyzing an advertisement lambasting Jimmy Carter in his bid for re-election, the Ninth Circuit adopted a broader, context-based definition of "express advocacy." Specifically, the Court held 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

approach to identify express advocacy, other courts continue to adopt a more rigid “magic words” framework, as demonstrated by the First Circuit approach.³⁹ In fact, the FEC’s revised approach was struck down by the First Circuit.⁴⁰ In short, the “magic words” test remains firmly in place.

C. *Defining Coordination*

Beginning with *Buckley* and continuing through *Colorado Republican Campaign Committee v. Federal Election Commission*,⁴¹ the Court, following FECA, has framed the definition of independent issue advocacy as implicitly requiring that such advocacy not be coordinated with a candidate or her campaign. In *Buckley*, the Court explicitly set aside the threat that independent issue advocacy

interpretation but as an exhortation to vote for or against a specific candidate.” *Id.* at 864. A District of Columbia district court applied the standard set forth in *Furgatch* to find three National Organization for Women letters to comprise issue advocacy. *Federal Election Comm’n v. National Org. for Women*, 713 F. Supp. 428, 434-35 (D.D.C. 1989).

³⁸ See *infra* notes 191-194 and accompanying text.

³⁹ In contrast to *Furgatch*, the First Circuit applied and defended a rigid “magic words” test in striking down and FEC regulation of voter guides. 11 C.F.R. § 114.4(b)(5)(1). See *Faucher v. Federal Election Comm’n*, 928 F.2d 468 (1st Cir. 1991). The court defended the “bright-line” standard established in *Buckley* as a certain way to avoid government or court examination of the intent and meaning of speech that lacked “magic words.” Such an effort to distinguish between “discussion, laudation, general advocacy, and solicitation” places the political speaker “wholly at the mercy of the varied understanding of his hearers and consequently of whatever inferences may be drawn to his intent and meaning. Such a distinction offers no security for free discussion.” *Id.* at 471–72 (quoting *Buckley*, 424 U.S. 1, 43 (1976) (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945))). Other courts have been equally rigid in looking for “magic words.” See *Fed. Election Comm’n v. Christian Action Network*, 894 F. Supp. 946, 948 (W.D.Va. 1995) (ruling that advertisement criticizing Presidential support for “radical” gay issues was issue advocacy because it did not use “explicit words” calling for “electoral action”), *summarily aff’d per curiam*, 92 F.3d 1178 (4th Cir. 1996); *Fed. Election Comm’n v. Survival Educ. Fund Inc.*, 89 Civ. 0347, 1994 WL 9658 (S.D.N.Y., Jan. 12, 1994), *aff’d in part, rev’d in part*, 65 F.3d 285, 289 (2d Cir. 1995) (holding that mailing claiming that Ronald Reagan’s “anti-people policies *must* be stopped” was not express advocacy) (quoting letter from Benjamin Spock M.D., to the general public (July 23-27, 1984)).

⁴⁰ See *Maine Right to Life Comm. v. Fed. Election Comm’n*, 914 F. Supp. 8, 12-13 (D. Me. 1996) (holding that “magic words” allow candidates to “know from the outset exactly what is permitted and what is prohibited,” and that the FEC standard “chills” political expression), *summarily aff’d per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 66 U.S.L.W. 3254 (BNA Oct. 7, 1997).

⁴¹ 116 S. Ct. 2309 (1996) (upholding as “independent expenditures” ads run by the Colorado Republican Party).

expenditures could be coordinated with a campaign by simply calling upon the logic of the statute: any “controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act” and are subject to FECA’s contribution ceilings.⁴² In other words, issue advocacy is inherently uncoordinated. Summarily making this point, the Court did not attempt to fine-tune the phrase “controlled or coordinated”⁴³ in great detail. Rather, looking at the legislative history and the “purpose of [FECA],” the Court established the coordination standard by concluding that “all expenditures *placed in cooperation with or without the consent of a candidate, his agents, or an authorized committee of the candidate*” would be deemed contributions, rather than independent expenditures.⁴⁴

Neither the Court nor Congress has wavered from, nor elaborated upon, this standard. Congress imported *Buckley’s* language into its definitions of independent expenditures and contributions, but with little additional detail.⁴⁵ Moreover, most major independent advocacy cases since *Buckley* have involved messages whose “independence” was not contested; the coordination prong was neither litigated nor fine-tuned. For example, there was no contention that MCFL’s newsletter or the Michigan Chamber of Commerce’s intended advertisement in *Austin v. Michigan State Chamber of Commerce*⁴⁶ was coordinated with political campaigns, and the Court ruled along other lines. In those cases where the Court has analyzed at greater length the presence of coordination and its importance as a prong

⁴² *Buckley*, 424 U.S. at 46. The Court elaborated in a footnote that FECA provided that expenditures made “on behalf of a candidate” – those “expenditures ‘authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate’” – were to be treated as “contributions by the person or group making the expenditure.” *Id.* at 45 n.53 (citing 18 U.S.C. § 608(c)(2)(B) (repealed 1976)).

⁴³ FECA itself did not use the words “coordination” or “control,” but “on behalf of a candidate.” See 18 U.S.C. § 608(c)(2)(B) (repealed 1976).

⁴⁴ *Buckley*, 424 U.S. at 46 n.53 (emphasis added).

⁴⁵ The statutory language includes in its definition of contribution any expenditure “made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized committees, or their agents . . .” 2 U.S.C. § 441a(a)(7) (1994). See also 2 U.S.C. § 431(17) (1994) (defining independent expenditures as expenditures “advocating the election or defeat of a clearly identified candidate which [are] made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate”).

⁴⁶ 494 U.S. 652 (1990) (upholding Michigan state ban on independent expenditures by corporations).

distinguishing tiers of speech protection, it has elaborated only slightly on the standard.

In *Federal Election Commission v. National Conservative Political Action Committee*,⁴⁷ even though the Court described at length the virtues of independent expenditures relative to contributions,⁴⁸ the Court provided scant analysis in defining coordination; in looking at the activities of two political action committees at bar, it simply concluded: “these expenditures were ‘independent’ in that they were not made at the request of or in coordination with the official Reagan election committee or any of its agents.”⁴⁹ Likewise, the Court’s 1996 decision in *Colorado Republican* left the coordination standard equally unspecified. Although the case involved a battle over whether party expenditures are implicitly coordinated, and despite dozens of references to the term “coordinated,” the decision provided little additional precision to that term. Instead, in finding the Colorado Republican Party not to have coordinated with a candidate,⁵⁰ the Court merely pointed to “the uncontroverted direct evidence that this advertising campaign was developed . . . independently and not pursuant to any general or particular understanding with a candidate.”⁵¹ Without more detailed standards along which to assess the presence of coordination, lower courts have hesitated to conclude that questionable relations between advocacy groups, political committees and candidates comprise coordination.⁵² In a recent case striking down new FEC regulations of voter guides, in fact, the most the First Circuit could say about the Court’s coordination standard

⁴⁷ 470 U.S. 480 (1985) (striking down a FECA provision making it a criminal offense for an independent political committee to expend more than \$1,000 to further the election of a presidential candidate who receives public funding).

⁴⁸ See *supra* note 13.

⁴⁹ *NCPAC*, 470 U.S. at 490.

⁵⁰ The party ran an advertisement criticizing the Democratic candidate before a Republican candidate had been selected. See *Colorado Republican Federal Campaign Comm’n*, 116 S. Ct. 2309, 2315 (1996).

⁵¹ *Id.*

⁵² See, e.g., *Democratic Senatorial Campaign Comm. v. Federal Election Comm’n*, 745 F. Supp. 742, 745-46 (D.D.C. 1988) (denying plaintiff’s suit to compel an FEC investigation of the use of common consultants as prohibited coordination); *Stark v. Federal Election Comm’n*, 683 F. Supp. 836, 839-40 (D.D.C. 1988) (denying plaintiff’s suit to compel an FEC investigation of coordination between political opponent and several political action committees and associations). Cf. *Clifton v. Federal Election Comm’n*, 114 F.3d 1309, 1315 (1st Cir. 1997) (striking down an FEC voter guide provision which regulated contact between groups distributing voter guides and political candidates).

is that it “imply[s] some measure of collaboration beyond a mere inquiry as to the position taken by a candidate on an issue.”⁵³

To summarize, the Court and current legislation rely on the twin prongs of “express advocacy” and coordination to distinguish the independent discussion of issues from messages which can be regulated under campaign finance law. Despite this important role, these prongs developed within a rather limited stream of cases, and with scant analysis and little refinement over time. Unfortunately, 1996 would show that the Court and the current law do not define either prong in a way that allows them to serve their purpose. Moreover, 1996 would also show that the express advocacy standard has overshadowed the equally critical need to focus on coordination, eliminating that element from today’s political understanding of issue advocacy.

III. ISSUE ADVOCACY IN ACTION: THE FAILURE OF THE STANDARDS

A. 1996: *The Political Fault-Line*

The broad use of “issue advertising” and the FEC-created loophole of “soft-money”⁵⁴ leveled an overwhelming one-two punch in the 1996 federal elections. The estimated price tag of the election cycle was \$2.7 billion, shattering the cost total of any past election year.⁵⁵ This total included more than \$250 million raised in “soft-money” by the Democratic and Republican parties,⁵⁶ and more than \$70 million spent by interest groups.⁵⁷ Issue advertising comprised a primary target of these unparalleled dollar amounts.

The first wave of the issue advertisement “airwar” began more than one year before the election. Smarting from the 1994 Republican Congressional sweep,

⁵³ *Clifton*, 114 F.3d at 1311.

⁵⁴ “Soft money” is money that is ostensibly given for non-campaign, “party building” activity, such as “get out the vote” drives. As such, it falls outside campaign finance regulations, as opposed to “hard money,” which is regulated. For a more detailed discussion of “soft money,” see *infra* notes 150-153 and accompanying text.

⁵⁵ See Ruth Marcus & Charles R. Babcock, *The System Cracks Under the Weight of Cash; Candidates Parties and Outside*, THE WASHINGTON POST, Feb. 9, 1997, at A1 [hereinafter *The System Cracks*].

⁵⁶ See Deb Reichmann, *The Associated Press, Parties Raised \$263.5M in Soft Money Over 2 Years*, THE RECORD, N. N.J., Feb. 17, 1997, at A17.

⁵⁷ See *The System Cracks*, *supra* note 55.

armed with a substantial war chest, and comforted by the lack of a primary opponent, President Clinton agreed in late 1995 to launch an early advertising blitz costing several million dollars per week.⁵⁸ After several test advertisements featured the President as “tough on crime,” the first wave comprised a series of advertisements attacking the Republicans on their proposed \$270 billion Medicare cut. These advertisements contrasted a stately Clinton standing next to an American flag in full color with gray head shots of Bob Dole and Newt Gingrich. While the ad described Clinton as “right to protect Medicare, [and] right to defend our decision as a nation,” it stated that the Republican leaders were “wrong to cut Medicare benefits” by \$270 billion, and in one ad, followed their images with a flat-lining heart monitor.⁵⁹ Similar ads ran continuously until the November election, reaching more than 125 million people.⁶⁰ These advertisements were dubbed and bankrolled by campaign officials as “issue advertisements,” as they lacked the necessary “magic words.”

Emerging from the primaries in the spring of 1996, the Dole campaign, short of cash and stung by the early Democratic onslaught, mirrored its opponent’s strategy. The campaign kicked off with a sixty-second ad titled “The Story” which devoted fifty-six seconds to a biography of candidate Dole. Justifying this ad with the statement that Dole’s “bio” comprised an “important issue,” the Republican National Committee (RNC) spent \$18 million airing it, out of a total of an estimated \$35 million spent on issue advertising.⁶¹ Other ads, while touching upon crime, drugs, taxes, welfare reform, and the balanced budget, primarily comprised attacks of Clinton.⁶² Closer to the election, the Republican Party donated millions of dollars to partisan special-interest organizations — including Americans for Anti-Tax

⁵⁸ See BOB WOODWARD, *THE CHOICE* 233–39 (1996); John Kifner, *Clinton Advertising Plan Led to Asian-American Donors*, N.Y. TIMES, April 14, 1997, at B7 [hereinafter *Advertising Plan*]; *The System Cracks*, *supra* note 55.

⁵⁹ WOODWARD, *supra* note 58, at 237–39; James E. Barnes, *Big Issues, Big Money, Big Stakes*, 27 NAT’L J. 2188 (1995).

⁶⁰ See *The System Cracks*, *supra* note 55.

⁶¹ Charles R. Babcock & Ruth Marcus, *A Hard-Charging Flood of ‘Soft Money’*, THE WASHINGTON POST, Oct. 24, 1996, at A1; *The System Cracks*, *supra* note 55.

⁶² See Martha T. Moore & Richard Wolf, *Republicans Roll Out Their Ads*, USA TODAY, May 17, 1996, at 4A.

Reform (\$4.6 million) and the National Right to Life Committee (\$650,000) – which then ran their own ad campaigns.⁶³

In addition to the higher profile presidential campaigns, issue ads permeated campaigns in two other ways. First, both parties lavished millions of dollars upon House and Senate races. Most spending went to a combination of issue ads and direct attack ads.⁶⁴ Second, special interest groups exuberantly entered the issue advocacy fray. Following successful televised attacks of the “Contract with America” as well as Republicans opposed to a minimum wage increase,⁶⁵ the American Federation of Labor-Congress of Industrial Organization (AFL-CIO) spent \$35 million in a series of ads targeting individual Republican House candidates on issues ranging from Medicare, taxes, education, and pensions.⁶⁶ Although AFL-CIO President John Sweeney stated his purpose was to “take back the Congress and take back our country,” and union officials worked closely with candidates and political parties, the entire ad campaign was labeled issue advocacy.⁶⁷ Groups of all sorts followed suit, vying on all sides of the Congressional and Presidential races. Prominent players included: the Sierra Club; the National Education Association; the Christian Action Network; the National Rifle Association; the United States Chamber of Commerce; Citizen Action; and numerous other national and local groups.⁶⁸

⁶³ See Charles R. Babcock, *Anti-Tax Group Got Big Boost from RNC as Election Nearing*, WASH. POST, Dec. 10, 1996, at A4 [hereinafter *Anti-Tax*]; Charles R. Babcock & Ruth Marcus, *RNC Gave \$2 Million to Tax-Reform Group*, WASH. POST, Oct. 29, 1996, at A9 [hereinafter *RNC*].

⁶⁴ See Eliza Newlin Carney, *Party Time*, 28 NAT'L J. 2214 (1996); Ruth Marcus, *Reinterpreting the Rules, 'Independent Expenditures' Alter Senate Races*, WASH. POST, Oct. 26, 1996, at A1; Bill Paxon, *NRCC Unveils Ad Campaign to Promote Republican Congress*, Press Release, July 23, 1996.

⁶⁵ See *The System Cracks*, *supra* note 55.

⁶⁶ See Gil Klein, *Aggrieved Republicans Finding Labor's Medicare Ads a Bitter Pill*, THE RICHMOND TIMES DISPATCH, July 7, 1996, at A6; Ruth Marcus, *Taking 'Voter Guides' to the TV Audience; AFL-CIO Tries New Approach in 28 Districts*, WASH. POST, Oct. 17, 1996, at A16.

⁶⁷ Julian Gruenwald & Robert Marshall Wells, *At Odds with Some Workers, AFL-CIO Takes Aim at GOP*, 54 CONG. Q. WKLY. REP. 993, 994 (1996).

⁶⁸ See *The System Cracks*, *supra* note 55. Individual campaigns often totalled in the millions of dollars. Citizen Action, for example, spent seven million dollars criticizing Republicans on Medicare, the environment, and education. The Sierra Club aired \$3.5 million in ads. See *id.*

B. *Express Advocacy and Coordination Running Rampant*

“Issue ads” of two sorts dominated the 1996 campaign: (1) those which clearly made “pointed exhortations to vote”⁶⁹ for a given candidate, and (2) those which were directly planned by or coordinated with a candidate’s campaign. Instead of falling within either of those Court prongs, triggering FECA regulation, such advertisements ran as pure issue ads in 1996. This allowed candidates, their parties and their supporters to skirt campaign finance regulations and introduce the very problems which those regulations, backed by the Court’s authority, had sought to avoid.

1. Express Advocacy Without “Magic Words”

a. The 1996 Record

The 1996 elections showed that advertisements which lack the Court’s “magic words” can still be designed and utilized primarily “for the purpose of influencing [an] election.”⁷⁰ In other words, they showed that a rigid “magic words” test fails to effectively detect most cases of potentially corrupting “express advocacy.”

Eyed by their timing, the districts in which they ran, and the depth with which they addressed issues, the DNC and RNC presidential advertisements were unmistakable salvos in a campaign about candidates. Some lacked any issue component whatsoever; others used issues as weapons to denigrate an opponent, but did not discuss them in even the barest detail. Examples are plentiful. As discussed above, the RNC’s most important nationwide advertisement – the Dole biography – used just the final four seconds to address issues.⁷¹ Negative RNC ads were equally candidate-focused; one solely discussed Clinton’s attempts to avoid a sexual harassment suit.⁷² DNC ads mirrored the Republicans’ ads. Only listing issues in a rapid-fire display of words – “America’s values,” “economic growth,” “welfare,”

⁶⁹ Federal Election Comm’n v. MCFL, 479 U.S. 238, 249 (1986).

⁷⁰ 42 U.S.C. § 431(8)(a)(i) (1994).

⁷¹ See Babcock & Marcus, *A Hard-Charging Flood of ‘Soft Money’*, *supra* note 61; *The System Cracks*; *supra* note 55.

⁷² See Letter from Ann McBride, President, Common Cause, to Janet Reno, Attorney General 36 Oct. 9, 1996 [hereinafter Common Cause] (on file with author). For other candidate-centered Dole ads, see The Associated Press, *Dole Ad Attacks on Drug Issue*, NEWSDAY, Sept. 21, 1996, at A6; Judy Keen, *Dole Ad Doubles Up: Drugs, Character*, USA TODAY, Aug. 27, 1996, at 10A.

“education,” and “Medicare” – with scant elaboration, many such ads’ central effect was to demonize Dole and House Speaker Newt Gingrich while praising Clinton.⁷³ Finally, although most issue ads did not explicitly seek votes through “magic words,” many ended with direct calls to action: “Tell President Clinton you won’t be fooled again,” or “It’s time to say yes to the Clinton plans – yes, to America’s families.”⁷⁴

Numerous party ads for House and Senate races and interest group ads were equally campaign-centered, dealing with issues only shallowly and calling for action by voters without directly stating “magic words.” An RNC ad aimed at the House elections showed a crystal ball and asked “What would happen if the Democrats controlled Congress and the White House? [I]f we give the special interests a blank check in Congress, who’s going to represent us?”⁷⁵ This ad aired in fifty of the most closely contested districts.⁷⁶ Other ads directly denounced rival candidates. In a Rhode Island Senate campaign, for example, an RNC ad lambasted Democratic candidate Jack Reed’s position on welfare, stating: “It’s outrageous. . . . That’s liberal. That’s Jack Reed. That’s wrong.” Despite this virulence, the ad avoided “magic words” by closing with a plea for voters to “Call liberal Jack Reed. Tell him his record on welfare is just too liberal.”⁷⁷ From the AFL-CIO⁷⁸ to Americans

⁷³ Common Cause, *supra* note 72, at 24–26. See also Howard Kurtz, *Democrats’ Ad Blitz Echoes Bush Theme of Change a ‘Risk’*, WASH. POST, Sept. 12, 1996, at A1.

⁷⁴ Common Cause, *supra* note 72, at 25, 34–38. See also Ruth Marcus, *Political Ads Test the Limits: ‘Issues Advocacy’ Growing Despite Partisanship Concerns*, WASH. POST, April 8, 1996, at A1 [hereinafter *Political Ads*].

⁷⁵ Martha T. Moore, *GOP Ad: Don’t Return to Past Warns Against Shift in Congress*, USA TODAY, Oct. 29, 1996, at 10A.

⁷⁶ See *id.*

⁷⁷ Carney, *Party Time*, *supra* note 64, at 2216. Positive ads also urged voters to take action. A GOP ad in Michigan’s Eighth District race stated: “Dick Chrysler voted to reform Congress. . . . Tell him to keep fighting for commonsense change.” *Id.*

⁷⁸ Labor ads ran the gamut of issues, fiercely criticizing Republican Congressional candidates by name but never mentioning “magic words,” although they usually ended with a call to action. One AFL-CIO ad warned that “[Congressman] wants to cut Medicaid and Medicare for our parents, cut education and college loans, all to give a huge tax break to big business and the rich. . . . Let’s tell [Congressman] to stop the political games and stand up for working families for a change.” *Political Ads*, *supra* note 74. An International Brotherhood of Teamsters ad against Congressman Nathan Deal (R-GA) urged “Next year, let’s say: ‘No Deal.’ Because nobody needs a Congressman like Nathan Deal.” Robert Marshall Wells & Juliana Gruenwald, *Labor Ads Target GOP Newcomers*, 54 CONG. Q. WKLY. REP. 998 (1996).

for Limited Terms⁷⁹ to the Sierra Club,⁸⁰ ads by independent groups mirrored the party ads in their clear focus on specific elections and campaigns, despite some discussion of issues. The AFL-CIO, Christian Action Network, and Sierra Club also issued television “voter guides” in highly contested races.⁸¹

b. Analysis: “Magic Words” Fails Political Advertising 101

That 1996 campaign advertisements did not use “magic words” but still constituted a clear form of “express advocacy” is unsurprising given the nature of political campaigns in the United States. Even at the time the Court set up the “magic words” doctrine, it was common political wisdom that direct pleas for votes were not necessary, and indeed could be ineffective, in campaign advertising. At the same time, strict issue discussions also carry little appeal among viewers. Instead of these two alternatives, a more sophisticated mixture of candidate-centered advocacy peppered with ambiguous issue references has long proved the most effective advertising strategy.⁸² The 1996 elections merely repeated this

⁷⁹ On a political flyer broadly distributed in the Illinois Senate race, Americans for Limited Terms proclaimed: “Don’t let career politicians play the old shell game on you!” The flyer then featured a critique of the Democratic candidate’s position alongside a grainy photograph, and praise for the Republican candidate, alongside a clear, crisp headshot. *Political Ads*, *supra* note 74.

⁸⁰ Targeting individual Congressmen for their votes on environmental issues, Sierra Club ads urged voters to “keep Congress from doing any more damage.” Eliza Newlin Carney, *Air Strikes*, 28 NAT’L J. 1313, 1316 (1996).

⁸¹ The Christian Coalition presented to its members “scorecards,” giving to “American Christian voters the facts they will need to distinguish between good and misguided Congressmen,” and rating members of Congress on a 1 to 100 scale. Leslie Wayne, *Political Issue Ads Worry FEC*, THE SUNDAY GAZETTE MAIL, Sept. 29, 1996, at 16A. *See also* Carney, *Air Strikes*, *supra* note 80, at 1317.

⁸² Beginning with William Henry Harrison’s use of the “log cabin” and “Tippecanoe” in the first full-fledged presidential campaign in 1840, presidential and other political candidates have more often than not turned to speechless metaphors and images as primary weapons in eliciting voter support. *See* KATHLEEN HALL JAMIESON, PACKAGING THE PRESIDENCY 9–11 (1992). From the image of a rail (Lincoln) and the teddy bear (Roosevelt), to the use of the newsreel to air image-laden attack ads, to modern day images of “candidates reading to their children, fishing in a rushing stream, or pausing to inspect peanuts in a warehouse bin,” candidates have never had to rely on express calls to vote to win over an electorate. *Id.* at 12.

Long before the “magic words” test placed a disincentive on such words, modern television campaigns often eschewed such express “soap-selling” exhortations as “vote for Smith.” In 1952, Eisenhower ran ads calling on voters to remember the Korean war: “[t]ake another look at your boy. Think about him when you vote on Tuesday.” *Id.* at 47. Adlai Stevenson countered with ads that also avoided “magic words” by asking Americans: “[I]sn’t it a better ‘hope for peace’ to keep the military subordinate to a civilian president?” *Id.* at 50. Fourteen years later, the infamous “Daisy” portraying

pattern, illuminating the inadequacy of a legal standard that seeks “magic words” when advertisers in most cases would not utilize “magic words” anyway.

A combination of factors explains this trend. First, the lack of appeal of detailed issue discussions became apparent as early as the 1940s and ‘50s.⁸³ Instead of issue or party-centered campaigns, campaigns which focus on candidates and images have become the norm, “where candidates seek office as individuals and where voters rely upon the personal characteristics of candidates.”⁸⁴ This trend reflects voter behavior studies showing that candidate image is the most important short-term driver of how voters select candidates and parties.⁸⁵

Although candidate image is the engine of campaign success, campaign staffs face a remaining challenge: a direct “hard sell” of a candidate is often ineffective. As outlined in detailed strategy memos by the Nixon campaign staff in 1972, while the campaign’s focus was to present the President as an “activist” with “courage, decisiveness, and dedication,” the question remained: how to present these images without demeaning his “presidential” stature through direct appeals.⁸⁶ Nixon’s staffers discovered the answer – indirectly and subtly. As one memo recommended: “The President’s personal qualities of compassion, humor and informality should never be the subject of a commercial. But *by careful selection of footage, and careful wording of a commercial message*, we can emphasize these

Barry Goldwater’s hawkish nuclear position in a particularly macabre fashion was not the only one which did not use or need “magic words” to make a strong political point; one Johnson ad focused on Goldwater’s plans for social security, urging voters “vote for keeping Social Security”; another described the goal of Johnson’s “war on poverty,” and then urged: “Help win it.” *Id.* at 191, 198, 219. Nixon’s 1968 ads focused on the angst of 1968 America, ending with the question, “[A]s we see and hear things, millions of Americans cry out in anguish. Did we come all this way for this?” *Id.* at 247. In 1972, George McGovern aired ads describing the killing of children in Vietnam: “[A]s we vote November 7th, let us think of . . . all the other defenseless children of the world.” *Id.* at 317.

⁸³ Both Roosevelt and Truman benefitted from radio ads and newsreels that displayed flattering “presidential” images, while their Republican counterparts’ efforts to “talk facts” floundered. *See id.* at 27, 31–33. Adlai Stevenson was the last candidate to stubbornly cling to issue-talk, losing badly while running clips of past speeches in 30-minute telecasts. *See id.* at 61.

⁸⁴ E.D. DOVER, *PRESIDENTIAL ELECTION IN THE TELEVISION AGE: 1960-1992* 6 (1994). *See also* RICHARD JOSLYN, *MASS MEDIA AND ELECTIONS* 45 (1984).

⁸⁵ *See, e.g.*, DAN NIMMO & ROBERT L. SAVAGE, *CANDIDATES AND THEIR IMAGES* 190-91 (1976). Research has shown that although they may make judgments about candidates’ images from ads, voters “learn” very little about policy and issue positions from political advertisements; ads are “not likely to assist the public in forming attitudes about future policy alternatives or the policy preferences of candidates.” JOSLYN, *supra* note 84, at 198, 203.

⁸⁶ JAMIESON, *supra* note 82, at 295–98.

characteristics in a *subtle yet effective way*.⁸⁷ The same memo recommended: “Use an announcer’s voice-over and show film of the President in action. This technique allows us to show the President as an activist, use excerpts from his speeches, and yet have an announcer tell the basic story. . . . [T]he effect is of a commercial that is *for* the President, not *by* the President.”⁸⁸

Apart from showing images of a candidate “in action,” perhaps the most effective technique campaign staffs use to effect a desired candidate image without directly discussing that image has been to strategically employ references. A 1972 study of voter reaction to election advertisements concluded that advertisements which discussed issues in general terms proved more effective than direct image and character ads:

While the image beliefs of many voters emerge from what is seen on television, the candidate cannot easily and directly control these beliefs. Perhaps it seems paradoxical, but we think *a candidate can develop a more favorable image through issue spots that convince voters he can handle difficult problems*, than through image spots that try to create directly a favorable belief about his personal qualities.⁸⁹

A more recent survey of political advertisements showed that politicians heed this wisdom, as most issue appeals are vague, and are usually tied intimately to candidate qualities. The study concluded that “public policy *positions* are less important to campaigners than are the impressions of candidates that policy discussions leave with the voters. . . . [They] are used to communicate something about the candidate as a person.”⁹⁰ The 1996 political combatants used this very strategy.⁹¹

⁸⁷ *Id.* at 300 (emphasis added).

⁸⁸ *Id.* at 299.

⁸⁹ THOMAS E. PATTERSON & ROBERT D. MCCLURE, POLITICAL ADVERTISING: VOTER REACTION TO TELEVISED POLITICAL COMMERCIALS, Citizens Research Foundation 38 (date not available) (emphasis added).

⁹⁰ JOSLYN, *supra* note 84, at 44. These appeals are made in such a way that voters are unlikely to form “attitudes” about future policy alternatives or policy preferences, but rather will only “reassure the public that the policy viewpoints of candidates are acceptable.” *Id.* at 47.

⁹¹ A Clinton aide’s language describing his tactics mirrors that of the Nixon team: in order to win over voters who disliked Clinton, “[t]he key was to advertise on election issues only, not to promote Clinton’s candidacy.” DICK MORRIS, BEHIND THE OVAL OFFICE 140 (1997).

Two other factors demonstrate why “magic words” are often absent from effective vote-inducing advertising. First, because television advertisements are a component of a broader campaign which includes a bevy of communications,⁹² “express advocacy” in advertisements is unnecessary. Candidates can make such explicit exhortations at stump speeches, conventions, and other appearances, while delivering a more subtle “sell” through advertising. Second, the evolution of television has enhanced candidates’ abilities to shape strong messages through visual imagery as opposed to spoken or written words. Just as technology has eclipsed the old corporate advertisement strategy of verbally describing a product’s cost and function, so too has it enhanced the ability of visual associations to differentiate between candidates.⁹³ From Nixon’s juxtaposition of a smiling Hubert Humphrey with grisly scenes from the Vietnam war, to the infamous Willie Horton ads of 1988, images pack the most powerful political punch.⁹⁴ The court’s “magic words” test thus misses the fundamental point that such explicit words are simply unnecessary to modern campaign advertising. Looking for and relying upon such words to distinguish issue advocacy from candidate advocacy is therefore a fruitless task.

2. Cooperation and Coordination

a. The 1996 Record

In addition to pervasive candidate advocacy under the guise of issue advocacy, the campaigns of 1996 saw direct and continuous cooperation between the organizations designing and funding issue advertisements and the candidates who benefited from such ads. Indeed, the term “coordination” understates much of the reality of 1996 because it implies that separate entities planned and undertook given activities. In the Presidential campaigns of 1996, a single entity ran the advertising show – the campaign committee itself.⁹⁵

⁹² See JAMIESON, *supra* note 82, at 486-87.

⁹³ See *id.* at 488.

⁹⁴ See *id.* at 488–89.

⁹⁵ For a summary of the extent of cooperation, see Common Cause, *supra* note 72.

Essentially, the Clinton campaign directed and implemented the 1995 and 1996 issue ad machine, with the DNC serving as the campaign's financial conduit.⁹⁶ Clinton himself was "heavily involved in the day-to-day presentation of his campaign through television advertising."⁹⁷ He was the "day-to-day operational director of our TV ad campaign. . . . Every ad was *his* ad."⁹⁸ In addition to direct meetings between Clinton, Gore and top DNC officials discussing the strategy and content of the ads,⁹⁹ Clinton's top campaign advisers managed all facets of the ad campaign and strategy.¹⁰⁰ Moreover, the trail of money to pay for the advertisements as well as these consultants' fees belied the distinction between "hard" campaign money and "soft" party money.¹⁰¹ Ads of a similar genre and created by the same staff were paid for at one moment by the campaign, at the next by the DNC.¹⁰² Finally, the White House itself, with Clinton at the helm and Vice President Gore, among others, directly soliciting funds, led the fund-raising drive to pay for these advertisements.¹⁰³

⁹⁶ For detailed accounts of the intimate DNC-Clinton campaign connection, see *The System Cracks*, *supra* note 55 ("For all intents and purposes, the DNC became an extension of the Clinton-Gore campaign. . . . [Clinton's] operation and the party's had been welded into one money machine."); Stuart Taylor Jr., *Scandal Hidden in Plain View*, LEGAL TIMES, March 17, 1997, at 27 (stating that the DNC and RNC operated as "totally controlled cash conduits to finance unprecedentedly costly television advertising promoting Bob Dole and Bill Clinton").

⁹⁷ WOODWARD, *supra* note 58, at 353.

⁹⁸ MORRIS, *supra* note 91, at 144.

⁹⁹ See WOODWARD, *supra* note 58, at 236, 345, 354, 416; Kifner, *Advertising Plan*, *supra* note 58; Bob Woodward, *Clinton Called Shots for Party Ad Blitz; DNC Effort, While Pro-President Wasn't Bound by Campaign Finance Curbs*, THE WASHINGTON POST, June 25, 1996, at A1.

¹⁰⁰ See MORRIS, *supra* note 91, at 138-46. See also *The System Cracks*, *supra* note 55; Taylor, *supra* note 96, at 28.

¹⁰¹ That difference "existed only in the minds of the bookkeepers and legal fine-print readers." WOODWARD, *supra* note 58, at 236.

¹⁰² See Kifner, *Advertising Plan*, *supra* note 58 (describing how Clinton's campaign committee paid for the first wave of test-ads (\$2.4 million) on crime, but that the DNC paid for the second wave of early ads (\$800,000) regarding health care). The fees of those organizing Clinton's advertising were paid by both the campaign and the DNC, as well as state parties through whom the DNC passed funds. See Bob Hohler & Walter V. Robinson, *Clinton Paid Top Strategists \$15M; Big Ad Campaigns Drove Fund-Raising*, THE BOSTON GLOBE, Oct. 19, 1996, at A1.

¹⁰³ See MORRIS, *supra* note 91, at 150-51; WOODWARD, *supra* note 58, at 236.

The RNC likewise worked hand-in-hand with the Dole campaign throughout 1996. Although the party waited for Dole to emerge from the primaries, the campaign's early financial straits compelled Dole to depend on the party.¹⁰⁴ Party-candidate coordination in planning and implementing advertising was thus not surprising, nor hidden. The campaign's chief media strategist produced and directed the RNC ad campaign of 1996, and the company he incorporated to manage the RNC advertising resided within Dole campaign headquarters.¹⁰⁵ Unsurprisingly, the RNC ads reflected the specific themes and presented the same language that Dole voiced on the campaign trail.¹⁰⁶ Other top campaign officials, including both pollsters and fund-raisers, also performed dual campaign and party roles.¹⁰⁷

Unlike the narrow and peculiar facts of *Colorado Republican*, where ads were run by a state party before either a Republican or Democratic Senate candidate had been selected, the national parties' support of House and Senate candidates occurred well into campaigns between Democratic and Republican primary winners. As one official of the Democratic Senate Campaign Committee (DSCC) acknowledged, parties "knew exactly what these campaigns are attempting to do in developing their message, how much money they have, where they're strong, where they're weak."¹⁰⁸ Partisan accusations about alleged cooperation between parties and candidates during 1996 therefore came as no surprise, and essentially stated the obvious.¹⁰⁹

Finally, independent interest groups coordinated much of their advertising spending and strategy with leaders of parties and campaigns. First, groups who were running ads in support of a given candidate at the same time were working

¹⁰⁴ See Stephen Labaton, *Limited Cash Likely to Restrict Dole's Campaign Message*, N.Y. TIMES, May 16, 1996, at B11. Until it received general election funds in August, the Dole Committee did not pay for a single television commercial. See James Bennet, *Dole, Kemp and Their Tax Plan Make First Commercial Foray*, N.Y. TIMES, Aug. 21, 1996, at A15.

¹⁰⁵ See Common Cause, *supra* note 72, at 31.

¹⁰⁶ See *id.* at 30-38.

¹⁰⁷ See *id.* at 30-31 (describing shift of leading Dole "soft money" fund-raiser Joanne Coe from "hard money" to "soft money" duties once Dole campaign hit its "hard money" limits).

¹⁰⁸ Carney, *Party Time*, *supra* note 64, at 2217.

¹⁰⁹ See, e.g., Kathy Kiely, *GOP Complaints Say Anti-Hutchinson Ads Violate Federal Law*, ARK. DEMOCRAT-GAZETTE, Oct. 17, 1996, at 1B (describing the Republicans' accusation that DNC-funded ads were "produced in direct coordination" with the campaign of Senate candidate Winston Bryant).

directly with those candidates' staffs at the grass roots level.¹¹⁰ Second, themes of the candidates' and parties' campaigns and those of the independent advertising campaigns often mirrored one another almost exactly. For instance, the AFL-CIO's emphasis on proposed Medicare cuts and welfare were nearly indistinguishable from the DNC's ads on the topic.¹¹¹ On the other side, business group ads attacking "union bosses" used nearly identical language to National Republican Campaign Committee (NRCC) ads run in the same districts, and both the independent ads and the NRCC's ads often were launched simultaneously.¹¹² Third, such ads aired in districts that were politically vulnerable to one party or another, comprising exactly those areas where parties had chosen to focus their monies.¹¹³

Looking at such factors, each side loudly protested incidents of clear coordination. In North Carolina's Second Congressional District, Republicans discovered that the AFL-CIO and a Democratic candidate had hired "the same individual, at the same media firm, in the same town, to place similar advertisements, on the same television station, airing to the same market, in the same weeks, and often at the same time."¹¹⁴ Democrats could point to similar evidence of collusion. In Montana, Democratic Senator Max Baucus was besieged by four separate advertising campaigns by three interest groups and the NRSC, all launched in the same week. None of the ads ran on the same stations and between them they covered every major radio market in the state.¹¹⁵ Moreover, the RNC's generous donations to independent groups who in turn launched pro-Republican advertising campaigns also constituted undeniable cooperation.¹¹⁶

¹¹⁰ The AFL-CIO's "Project 95" and "Project 96" spent hundreds of thousands of dollars directly helping Democratic candidates through grass-roots lobbying that included both professional organizers and flocks of volunteers planning and staging political events, making phone calls, and other activities. See Linda Killian, *Alienated Labor*, THE NEW REPUBLIC, Dec. 2, 1996, at 16.

¹¹¹ See *supra* notes 66, 73, 74 & 78 and accompanying text.

¹¹² See Benjamin Sheffner, *NRCC Set To Spend \$10 Million on Vulnerable Seats*, ROLL CALL, July 25, 1996, available in LEXIS, News Library, Curmews File.

¹¹³ See Carney, *Air Strikes*, *supra* note 80, at 1316; Gruenwald & Wells, *supra* note 67, at 993.

¹¹⁴ Mario Cino, Press Release, Oct. 10, 1996.

¹¹⁵ See Carney, *Air Strikes*, *supra* note 80, at 1315-16.

¹¹⁶ RNC leaders denied knowledge of how the money would be spent. See Babcock, *Anti-Tax*, *supra* note 63, at A4; Babcock & Marcus, *RNC*, *supra* note 63, at A9. These "mystery" groups were often formed and led by operatives with close ties to a political party. See Charles Babcock & Ruth Marcus, *For Their Targets, Mystery Groups' Ads Hit Like Attack from Nowhere*, WASH. POST, Mar. 9, 1997, at A6; Jonathan Riskind, *High Dollar Campaigning*, THE COLUMBUS DISPATCH, March 9,

b. Analysis

The 1996 elections thus illuminated the problems that emerge from a vaguely defined coordination standard. As discussed above, the relevant Court cases have mouthed the coordination standard, but none has precisely defined it.¹¹⁷ The Court's words are essentially repeated in the FECA language,¹¹⁸ which presents only alliterative synonyms for coordination – “cooperation,” “consultation,” and in “concert with” – and only one specific example of such coordination: expenditures made “at the request or suggestion of” a candidate.¹¹⁹ This weak standard creates two significant problems.

First, the law's frailty has obfuscated the coordination prong in the minds of campaigners and politicians. The accounts of campaign organizers, and the outright brashness of their actions, show that most campaigns either misunderstood or ignored outright the requirement that issue advertisements cannot be coordinated by or with campaign committees or candidates. Instead, the assumption within campaigns in 1996 was that if an advertisement lacked “magic words,” it was not an issue ad – regardless of whether coordination had occurred.¹²⁰ Even the nation's highest legal official misstated the law when she claimed that “the proper characterization of a particular expenditure depends not on the degree of coordination, but rather on the content of the message.”¹²¹

1997, at 4D [hereinafter *High Dollar*]; Jonathan Riskind, *Strickland Says Ad Twists Lucasville Riot Remarks*, THE COLUMBUS DISPATCH, Oct. 30, 1996, at 4B [hereinafter *Lucasville Riot*].

¹¹⁷ See *supra*, notes 41-53 and accompanying text.

¹¹⁸ See *supra*, note 45 and accompanying text.

¹¹⁹ 2 U.S.C. § 441(a)(7) (1994).

¹²⁰ See, e.g., Carney, *Air Strikes*, *supra* note 80, at 1315 (quoting an RNC spokesman, who stated “there are no limits to the party, or really any other entity, running advertising or doing other communication efforts that are aimed at a discussion of the issues.”); Ruth Marcus, *Political Ads*, *supra* note 74 (quoting a DNC press secretary, who stated that ads were “not saying ‘vote for, vote against’ so they’re not campaign ads”). The common but mistaken Washington interpretation that *Colorado Republican* opened an even wider door for issue ads and independent expenditures by parties added to this fundamental misunderstanding of the law. For a discussion highlighting the confusion about the law among politicians, campaign officials, and lawyers, see Jill Abramson, *Tape Shows Clinton Involvement in Party-Paid Ads; Legal Line is Unclear*, N.Y. TIMES, Oct. 21, 1997, at A20.

¹²¹ Letter from Janet Reno, United States Attorney General, to Sen. Orrin. G. Hatch 6-7 (Apr. 14, 1997) (on file with author).

An ill-defined coordination prong also fails to capture the reality of political campaigns: that even without direct and open coordination, parties and independent groups are still able to undertake more subtle coordination with campaigns, accruing all the benefits of more direct cooperation. The *Buckley* holding and Justices Kennedy's concurrence in *Colorado Republican* correctly point out that the very nature of political parties leads to continuous and pervasive coordination with candidates seeking office.¹²² A similar situation exists for many independent groups. Meeting often and working closely with party members or individual politicians on other campaign issues such as PAC disbursements, wedded naturally and openly to one party or another due to ideological similarities, and armed with much of the same information, resources, and campaign tactics as party and campaign staffs, many groups can muster ad campaigns that mesh nicely with the goals of a candidate they support. Such activity will likely provide the same political pay-off as outright coordination or direct financial support. The AFL-CIO campaign exemplifies this type of virtual coordination: the union knew the vulnerable Republican districts, placed political operatives in those districts to work with the Democrats, coordinated with the Democrats over how to allocate its PAC money, and ran ads quite similar in style and substance to the DNC ads running in the same districts.¹²³ On the Republican side, coalitions of business groups and conservative nonprofit groups who had worked closely with Republicans throughout the 1995-1996 legislative session stood as party analogs in the 1996 elections; they undertook all the forms of planning, advertising, direct mail, fundraising and grass-roots work that the Republican party itself undertakes, and as continuously met and strategized

¹²² The Court in *Buckley* stated that parties' "major purpose . . . is the nomination or election of a candidate" and their expenditures "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Buckley*, 424 U.S. 1, 79 (1996). Justice Kennedy correctly observed in *Colorado Republican* that, as the purpose of parties is the "selecting and supporting [of] candidates," a party's spending will "in most cases" be made in cooperation with local candidates. *Colorado Republican*, 116 S. Ct. 2309, 2322 (1996) (Kennedy, J., concurring). To elaborate on Kennedy's point, parties spend years before a race grooming top local politicians to run for open or vulnerable seats; they also cooperate and actively communicate before election seasons begin, as well as during elections themselves when discussing the direct party support permitted.

¹²³ See ELIZABETH DREW, *WHATEVER IT TAKES* 76-79 (1997). In Pennsylvania's 21st District, in addition to running issue ads attacking the Republican candidate, the AFL-CIO spent more than \$150,000 to pay for the "95 Project" and the "96 Project." This involved a full-time professional organizer conducting grass-roots lobbying in the district, and AFL-CIO members working as the Democratic candidate's volunteers. See Guy Gugliotta & Ira Chinoy, *Money Machine: The Fund-Raising Frenzy of Campaign '96; Outsider Made Erie Ballot a National Battle* (pt. 2), WASH. POST, Feb. 10, 1997, at A1.

with party officials.¹²⁴ Like a rigid “magic words” test, a coordination prong which does not target these forms of coordination fails to distinguish between true issue advocacy and campaign expenditures that can be regulated. With this failure, the Court’s confidence that the threat of corruption from independent expenditures “remains a hypothetical possibility and nothing more”¹²⁵ proves unfounded.

IV. THE RESULT: UNDERMINING THE ENTIRE SYSTEM

A. “Loophole” Around Campaign Finance Laws

As they existed under the law in 1996, many issue ads clearly called for voters to choose one candidate over another, and were after direct or indirect coordination. While court decisions and FEC rulings will trickle in in forthcoming years about 1996’s issue ads,¹²⁶ if they remain consistent with current doctrine, they will presumably find almost all such ads to be issue ads on the ground that they lack “magic words.” That likelihood, combined with a breadth and depth of manipulation and misunderstanding of issue advocacy that no court could begin to remedy, illustrates that both prongs of the Court’s test have failed. That failing opens a sizeable loophole around numerous other aspects of campaign finance legislation put into place in previous decades, as 1996 demonstrated.

First, the fact that unlimited and undisclosed amounts of money can be spent by or in coordination with a candidate for advertisements that “expressly advocate” allows that candidate and her donors to sidestep the limits on individual

¹²⁴ For a comprehensive look at how conservative non-profit groups coordinated activity among themselves and with Republican Congressional campaign officials, see DREW, *supra* note 123, at 18-19, 28, 42, 170-71, 207. See also Major Garrett, *How to Behave Like a Majority Party*, THE WKLY. STANDARD, May 5, 1997, at 20.

¹²⁵ *NCPAC*, 470 U.S. 480, 498 (1985).

¹²⁶ At this time, the FEC has not ruled on any complaints about specific advertisements from 1996. Neither have courts rendered decisions on alleged violations of campaign finance law from the 1996 federal campaigns. Telephone interview with Liz Kurland, Information Department, Federal Election Commission (Jan. 2, 1998). In fact, it was only just prior to the 1996 elections that courts ruled on questionable issue advertisements from the 1992. See *Federal Election Comm’n v. Christian Action Network*, 894 F. Supp. 946, 948 (W.D. Va. 1995), *summarily aff’d per curiam*, 92 F.3d 1178 (4th Cir. 1996). According to campaign finance reform advocates, the slow pace of FEC decisionmaking, and consequent court rulings, is in large part due to the flawed structure and lack of sufficient financial support for the FEC. See, e.g., Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1148-49 (1994).

and PAC contributions that were first upheld in *Buckley*.¹²⁷ Rather than adhere to these limits, individuals can give unlimited “soft money” donations to a party, perhaps at the insistence of campaign officials themselves, and that money can directly support a given campaign through coordinated or campaign-related advertisements. In 1996, gifts leading to Presidential coffees and Lincoln bedroom stays were merely the most prominent of such individual contributions.¹²⁸ Moreover, interest groups, in addition to or in lieu of their allowable PAC spending,¹²⁹ can now rain far more money upon elections through unlimited issue advertisements.

Second, issue ads in their current form have brought corporate and union money back into elections in the very fashion that has been barred for most of this century¹³⁰ and that the Court has deemed corrupting.¹³¹ Whether through soft money donations to national or state parties, through contributions to groups that run issue ads, or through their own issue ads, corporations and unions can now directly impact individual campaigns in an unregulated way which far surpasses their PAC donations.¹³² Major corporations, labor unions, and business and labor-related interest groups took advantage of this opportunity in 1996.¹³³

¹²⁷ Individual contributions to candidates, political parties and other political committees are limited to \$1000 (per election), \$20,000 (per calendar year) and \$5000 (per calendar year). See 2 U.S.C. § 441a(a)(1)A, B, C (1994). Individuals are also limited to \$25,000 in total contributions in any given year. See 2 U.S.C. § 441a (3) (1994).

¹²⁸ For individual soft money donations at all levels, see, for example, Babcock & Marcus, *RNC, supra* note 63 (describing \$1 million donation by Rupert Murdoch to the California Republican Party, which Democrats said had occurred due to the work of House Speaker Gingrich).

¹²⁹ PAC contributions are limited to \$5,000 per candidate (per election cycle), \$15,000 for parties (per year) and \$5,000 for other political committees (per year). See 2 U.S.C. § 441a(a)(2) (1994).

¹³⁰ Corporate money given “in connection” with federal elections has been banned since 1907; union contributions were disallowed in 1943. BROOKS JACKSON, *BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED* 41 (1990). See 2 U.S.C. § 441b(a) (1994) (banning corporate and labor organization contributions “in connection with any election to any political office”).

¹³¹ See *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 655 (1990) (upholding Michigan state ban on independent expenditures by corporations).

¹³² With its \$35 million campaign spread out among about 75 districts, the AFL-CIO was able to inject an additional \$500,000 into each individual race. See Gruenwald & Wells, *supra* note 67, at 993.

¹³³ Top soft money corporate givers to the Republican parties included Philip Morris (\$2,508,118); RJR Nabisco (\$1,148,175); American Financial Group (\$794,000); Atlantic Richfield (\$766,506); Union Pacific/Southern Pacific (\$692,460); and Brown & Williamson (\$635,000). Top

Third, issue ads completely stymied the presidential campaign finance system. Using issue ads, Clinton and Dole were able to shatter with impunity the voluntary spending limits that both had agreed to in exchange for federal funding.¹³⁴ In fact, the very day in late 1996 that Clinton formally agreed to primary spending limits, he hosted a coffee for major donors that was part of the broader effort that so dramatically fractured that limit. At the same time, he was already well into an ad campaign that was costing millions of dollars per week.¹³⁵

Fourth, issue ads allow national and state parties to transgress the limitations on their allowable coordinated support of presidential or other federal candidates.¹³⁶ For 1996, that limit was \$12 million for the presidential campaigns,¹³⁷ but as parties became the primary organizations bankrolling issue ads designed by the campaigns themselves, that limit was clearly violated. Moreover, the national parties shuttled money to state parties, or directed donors – particularly politically unappealing ones – to give directly to state parties,¹³⁸ who then purchased advertising time for issue ads the national parties had designed.¹³⁹ Doing so allowed the national parties to avoid FEC disclosure requirements¹⁴⁰ and also saved those

corporate givers to the Democrats included: Communication Workers of America (\$1,108,425); Walt Disney (\$997,050); Joseph Seagram & Sons (\$945,700); United Food & Commercial Workers (\$707,550); Revlon Group (\$648,250); Lazard Freres (\$617,000); Loral (\$600,500). See Amy Borrus & Mary Beth Regan, *The Backlash Against Soft Money: Business is Fed Up, and It May Spur Campaign-Finance Reform*, BUSINESSWEEK, March 31, 1997, at 34, 35.

¹³⁴ In 1996, the presidential public funding system allowed for \$37 million for primary spending, to be paid for by contributions and public matching funds, and for \$62 million in the general election, all to be paid for by public funding. See 26 U.S.C. §§ 9001–9006 (1994).

¹³⁵ See *The System Cracks*, *supra* note 55.

¹³⁶ The limit is determined by a formula. See 2 U.S.C. § 441a(d)(2)-(3) (1994).

¹³⁷ See Chris Conway, 'Issue Ads' Allow Unlimited Political Pitches, CHARLESTON GAZETTE AND DAILY MAIL, Sept. 15, 1996, at 19A.

¹³⁸ See Charles R. Babcock, *DNC Diverted Controversial Donations; FEC Reports Don't Show Tobacco, Gambling Checks Sent to State Parties*, WASH. POST, April 13, 1997, at A1; Paula Dwyer, "A Second Set of Books" for the Democrats?: *The DNC Directed Unreported Donations to Key States*, BUSINESSWEEK, April 21, 1997, at 34.

¹³⁹ See Jill Abramson & Leslie Wayne, *Democrats Used the State Parties to Bypass Limits*, N.Y. TIMES, October 2, 1997, at A1; Ruth Marcus, *DNC Finds Easy Way to Save 'Hard Money'; Democrats Defend Channeling Dollars for Advertising Purchases Through State Parties*, WASH. POST, July 1, 1996, at A4.

¹⁴⁰ See 11 C.F.R. § 104.8(c) (1993).

parties precious hard money, because their state counterparts can generally allocate a larger ratio of “soft money” toward advertisements.¹⁴¹

Fifth, issue ads as they currently exist provide an easy route around FECA’s reporting and disclosure requirements, which comprise the primary device for monitoring campaign-related expenditures and enforcing campaign laws. As the Court stated in *Buckley*, disclosure requirements serve three important goals: informing the electorate of the source of campaign money, deterring corruption by exposing contributions and expenditures to publicity, and allowing the record-keeping necessary to enforce contribution limits.¹⁴² Rigorous registration and reporting requirements for contributions by individuals, contributions by PACs, and for party and candidate expenditures, are equally vital to enforcing campaign laws, particularly in maintaining control over corporate and union dollars.¹⁴³ Issue ads allow organizations to evade such requirements and permit millions of dollars to flow freely into campaigns when they would otherwise require disclosure and reporting. All three purposes of disclosure outlined in *Buckley* are thus eviscerated.

B. *Re-introducing Corruption, the Perception of Corruption, and Distortion*

By providing a loophole around current campaign finance laws, the issue ad as it exists today re-introduces the potential for corruption, and the perception of corruption, which FECA and Court decisions beginning with *Buckley* have sought to prevent. In upholding contribution limits, the Court in *Buckley* adumbrated two constitutionally compelling threats. First, “[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.”¹⁴⁴ Equally destructive, the Court stated, “is the impact of the *appearance* of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”¹⁴⁵ Issue ads, in allowing unchecked donations from previously illegal sources to play a direct role in campaign politics, have introduced both of these threats into the system.

¹⁴¹ See 11 C.F.R. § 106.5 (a), (b), and (d) (1997) (setting out allocation ratios for hard and soft money expenditures by national and state parties); Abramson & Wayne, *supra* note 139.

¹⁴² See *Buckley*, 424 U.S. 1, 66–68 (1976).

¹⁴³ See 2 U.S.C. §§ 431–437 (1994) (§§ 435–436 repealed in 1980) (discussing the required disclosures of federal campaign funds).

¹⁴⁴ *Buckley*, 424 U.S. at 26–27.

¹⁴⁵ *Id.* at 27 (emphasis added).

1. Primary Cost Driver of Elections

The first clear danger from the proliferation of issue ads has been the sheer amount of money they bring into the system. In the Presidential primary and general elections, television advertisements comprised the largest expense item – more than sixty percent of each candidate's spending from August to election day.¹⁴⁶ At least \$70 million of these costs came from the “issue ads” run by the Democratic and Republican parties.¹⁴⁷ Additionally, the millions of dollars of party-designed and independent issue ads showered upon Congressional and Senate races nationwide created a spiral effect, increasing the pressure on all entities and individual candidates to raise and spend additional funds to counter such attacks.¹⁴⁸ If an increased amount of money in the system contributes to the degeneration of the political system through, among other effects, the increased potential for corruption and perception of corruption, a growing lack of inequality in the system between those with access to money and those without, and providing an added advantage to incumbents, then issue advertisements are a hazard for their cost-impact alone.¹⁴⁹

Beyond the large sums of money involved, however, these ads arouse even greater concern because they are paid for with “soft money.”¹⁵⁰ While outside the scope of this Article, the dangers of corruption and the perception of corruption that soft money poses are perhaps the largest campaign finance concern in Washington

¹⁴⁶ See Ira Chinoy, *In Presidential Race, TV Ads Were Biggest '96 Cost by Far*, WASH. POST, March 31, 1997, at A19.

¹⁴⁷ See *id.*

¹⁴⁸ See Gugliotta & Chinoy, *supra* note 123, at A1 (describing how issue ads from the DCCC and other groups increased a candidate's campaign cost to almost twice his original estimate).

¹⁴⁹ For a discussion of the negative consequences of the high cost of campaigns, see, for example, Fred Wertheimer & Susan Weiss Manes, *supra* note 126, at 1131-36.

¹⁵⁰ The increased use of issue ads was directly linked to the frenzied quest for soft money. The Clinton decision in 1995 to launch an aggressive “issue ad” campaign came hand in hand with two other key decisions: (1) to have the Democratic National Committee pay for the campaign with soft money rather than precious “hard money,” and (2) to launch a “soft money” fundraising blitz to allow the DNC, which was chronically short of funds, to avoid going into debt. It was these decisions which initiated the “fierce pressure for money that overwhelmed the Democratic National Committee.” Alison Mitchell, *Building a Bulging War Chest: How Clinton Financed His Run*, N.Y. TIMES, Dec. 27, 1996, at A1.

today.¹⁵¹ Ostensibly designated for non-campaign, “party building” activity, soft money is unrestricted, is donated in amounts as high as \$50,000 and \$100,000, and comes primarily through corporate, union and individual donations that would not otherwise be allowed in the system.¹⁵² The 1996 campaigns not only saw candidates raise and spend three times as much soft money as in the last presidential election – from \$89 million in 1991-1992 to \$263 million¹⁵³ – but the election also made clear that this money supports purposes beyond “party building” and poses a high risk of corruption.¹⁵⁴

2. Added Threat of Quid Pro Quo

Carrying millions of dollars of soft money into the system, issue ads have clearly added to the threat of *quid pro quo*-style political corruption. Many organizers of issue ads and donors of soft money that bankrolled issue ads appear to have secured much more than coffees and White House stays. Examples abound of suspicious, seemingly *quid pro quo* situations from 1996. The battle over the minimum wage bill pitted some of the largest organizers of issue ads and donors of soft money; while labor gained a \$.90 increase, business groups who had given to Republicans through PACs and soft money garnered more than \$21 billion in tax breaks that accompanied the bill.¹⁵⁵ After the election, labor’s issue ad investment seemingly paid off in other ways.¹⁵⁶ And individual donors, such as Chiquita-owner

¹⁵¹ For detailed discussion of soft money and its problems, see, for example, JACKSON, *supra* note 130, at 41-46; Wertheimer & Manes, *supra* note 126, at 1144-48; Fred Wertheimer, *Stop Soft Money Now*, N.Y. TIMES MAGAZINE, Dec. 22, 1996, at 38-39 [hereinafter Wertheimer, *Stop Soft Money*].

¹⁵² See Wertheimer & Manes, *supra* note 126, at 1144-48.

¹⁵³ *The System Cracks*, *supra* note 55.

¹⁵⁴ See, e.g., Wertheimer, *Stop Soft Money Now*, *supra* note 151.

¹⁵⁵ See Eric Pianin, *Money Machine: The Fund Raising Frenzy of Campaign '96; How Business Found Benefits in Wage Bill* (pt. 3), WASH. POST, Feb. 11, 1997, at A1. Provisions such as “a tax credit for restaurants and pizza delivery companies, . . . a phase-out of the luxury tax on cars, . . . and the elimination of a tax on overseas earning of corporations,” came after strong soft money support from corporate interests on these issues. See John Jacobs, *Funding Practices for Political Access Becoming Obscene*, THE FRESNO BEE, Jan. 31, 1997, at B7.

¹⁵⁶ In a course of three weeks in the spring of 1997, Clinton came down strongly in favor of labor positions on controversial issues: barring private corporations from providing social services and requiring minimum wage for workfare plans under the new welfare legislation. The latter was “widely interpreted as an effort to repay the union leaders who have supported the Democratic Party.” Jason DeParle, *White House Calls for Minimum Wage in Workfare Plan*, N.Y. TIMES, May 16, 1997, at A1.

Carl Lindner, who funneled more than \$500,000 to state parties at the DNC's behest, were rewarded for their generosity.¹⁵⁷ Other examples of soft money donors gaining access to the President or senior government officials and then reaping rewards from this access include broadcast companies,¹⁵⁸ banking interests,¹⁵⁹ pro-gambling organizations,¹⁶⁰ and donors gaining access to Department of Commerce trade missions.¹⁶¹

These specific instances have also led to the second problem the Court identified in *Buckley*: the perception of corruption. Surveys show a widespread lack of faith regarding the current campaign system, a lack of faith driven by cynicism over the role of money in the electoral process. According to an expansive *Washington Post* survey, a substantial majority of the public feels the system suffers

¹⁵⁷ Lindner's complaint against a restrictive trade practice of the European Union was the first promoted by the U.S. before the World Trade Organization; Lindner then prevailed in a preliminary ruling. See Brook Larmer & Michael Isikoff, *Brawl Over Bananas*, NEWSWEEK, Apr. 28, 1997, at 43; Michael Weisskopf, *The Busy Back-Door Men*, TIME, Mar. 31, 1997, at 40; *WTO Sides with Chiquita in Euro-Banana Dispute*, EUROWATCH, Apr. 4, 1997. The United States decided to promote Lindner's case despite the fact that only 6,000 of Chiquita's 45,000 employees work in North America, and nearly all of Chiquita's banana crop comes from South and Central America or Europe. See John Maggs, *Bananas Split U.S., Europe in WTO Spat*, J. COM., Mar. 18, 1997, at 1A.

¹⁵⁸ In early 1997, Congress decided to lend to television broadcasters, free of charge, airwaves for high definition digital television transmissions valued from \$7 billion to \$15 billion, making broadcast television the only industry not required to pay for previously vacant airwaves. What many decried as "corporate welfare" succeeded \$3.5 billion in soft money donations to the national parties by broadcasters in the 1995-1996 election cycle. See Leslie Wayne, *Broadcast Lobby Excels at the Washington Power Game*, N.Y. TIMES, May 5, 1997, at D2.

¹⁵⁹ See, e.g., Maureen Dowd, *Bubba Don't Preach*, N.Y. TIMES, Feb. 9, 1997, § 4, at 5 (attacking Clinton for the DNC arrangement of meetings between banking regulators and bankers who had donated soft money); Douglas R. Harbrecht, *Congress and Financial Deregulation: A Gravy Train*, BUSINESSWEEK ONLINE, May 27, 1997 (describing the yearly debate over financial deregulation, driven largely by campaign contributions by banking interests).

¹⁶⁰ Millions of dollars in political donations to Republicans and Democrats seemed to pay off for Steve Wynn, chief executive of Mirage Resorts, and other gambling interests, when three of the nine persons selected to be on the National Gambling and Policy Commission were strong players in the pro-gambling lobby, including the head of MGM Grand Casino and the head of the Nevada Gaming Control Board. See William Safire, *The Gambler's Bid*, N.Y. TIMES, May 14, 1997, at A21.

¹⁶¹ Critics charged the Department of Commerce with handing out placements on its influential trade missions to large donors. Under Secretary Ron Brown, for instance, the Office of Business Liaison – led by a former top DNC fund-raiser – made those selection decisions. One watchdog group found that more than one quarter of the companies on such trips were major Democratic Party supporters, having given more than \$10 million since 1990. See Bill Montague, *The Trade-Politics Connection: Critics Question Power-Peddling in Global Market*, USA TODAY, Nov. 1, 1996, at 1B.

numerous dilemmas, all of which center on the dominant role of money. More than eighty percent polled stated that the system needs to be overhauled, and almost seventy percent of the general public said the primary reason people donate to political parties through soft money is to gain “more access and influence” over candidates.¹⁶² At 48.8 percent, 1996's voter turnout was the lowest in the nation's history, possibly reflecting this falling confidence in the system.¹⁶³

3. Distorting Congressional Races

A final result of uncontrolled issued ads is one which the Court has decried in the past: the distortive effect on political campaigns of corporate and union dollars. As the Court explained in *MCFL*, *Austin* and *National Right to Work Committee*,¹⁶⁴ corporate funds “amassed in the economic marketplace”¹⁶⁵ carry a potentially corrosive impact in the political arena. Such funds accrue to enormous sums due to “the unique state-conferred corporate structure that facilitates the amassing of large treasuries.”¹⁶⁶ Thrown into the campaign system, this money “can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions.”¹⁶⁷ According to the courts, this distortive effect takes place in two ways. First, corporate money can so benefit a candidate's campaign that it buys his support on

¹⁶² Richard Morin & Mario Brassard, *Those Who Give and Those Who Watch Want a New Direction*, WASH. POST, Feb. 9, 1997, at A1. Other complaints included the following: that campaign contributors have excessive influence on elected officials; that big contributors and special interests dominate campaigns; that contributions by companies that conduct business with the government are prevalent; that money has too decisive a role in election results; and that the distance between voters and political leaders is widening. *See id.* Almost 80% said they believed contributions to political parties should be limited. *See id.*

¹⁶³ *See DREW*, *supra* note 123, at 253; Burt Neuborne, *Court's Decision Has Been Disastrous for Democracy*, ST. LOUIS POST-DISPATCH, Feb. 18, 1997, at 7B.

¹⁶⁴ 459 U.S. 197, 207 (1982) (“[S]ubstantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political ‘war chests’ which could be used to incur political debts from legislators who are aided by the contributions.”).

¹⁶⁵ *MCFL*, 479 U.S. 243, 257 (1986).

¹⁶⁶ *Austin*, 494 U.S. 652, 660 (1990).

¹⁶⁷ *Id.* *See also MCFL*, 479 U.S. at 256 (“This concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas.”).

political issues.¹⁶⁸ Second, the level of advertising that corporate wealth engenders misleads the public by exaggerating the support for a corporation's political ideas.¹⁶⁹

As the Court foretold, these distortive effects brought havoc to many local races in 1996, as issue ads run by parties, labor unions and other organizations flooded the airwaves and overwhelmed local campaigns in a number of specific ways. First, the message and image candidates tried to portray were often drowned out by issue ads;¹⁷⁰ even the supposed beneficiaries of issue ads were sometimes bruised by those ads.¹⁷¹ Candidates facing FECA limitations on "hard money" sources struggled to respond to such attacks. They either were unable to counter, relied on issue ads on their behalf, or undertook frenzied drives for additional money to respond directly.¹⁷² Second, attacks from out-of-region and national parties changed the local nature of debates, drawing attention away from hometown issues in favor of less relevant concerns of the party or issue group.¹⁷³ Third, issue ads carried a greater likelihood of inaccuracy and negativity due to less accountability by outside groups and to the failure of blanket national ad campaigns

¹⁶⁸ See *Austin*, 494 U.S. at 660.

¹⁶⁹ See *id.*; *MCFL*, 479 U.S. at 258 ("The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.").

¹⁷⁰ In Michigan's Eighth Congressional District, the efforts of Republican Rep. Dick Chrysler and Democratic candidate Debbie Stabenow were dwarfed by those of outside organizations. The AFL-CIO spent \$504,000 attacking Chrysler, the DNC spent \$1 million criticizing the Republican Congress, while the national Republican party, working largely through the state party, and an independent business coalition responded with several hundred thousand dollars in retaliatory ads. See Carney, *Party Time*, *supra* note 64, at 2217-18.

¹⁷¹ In a Rhode Island Senate race, fierce advertising by the RNC and NRSC hurt the Republican candidate; its tone was too harsh, and the controversy surrounding the ads detracted from the candidate and her issues. See *id.* at 2216.

¹⁷² After being the target of a state-wide flurry of negative issue ads from the National Republican Senatorial Committee and four independent pro-business groups, Senator Max Baucus had to spend \$90,000 simply to respond to the attacks. See Carney, *Air Strikes*, *supra* note 80, at 1315; Doug Obey, *Baucus' Slim Lead Worries Dems*, THE HILL, June 12, 1996, at 13.

¹⁷³ In Rhode Island, the Democratic candidate complained bitterly about \$743,810 in RNC ads and \$100,000 in NRSC ads: "It's been an outrageous and blatant attempt by a national party to literally buy a Senate seat. . . . A small state like Rhode Island, with small media markets, is particularly vulnerable to this type of campaign waged by unaccountable money." Carney, *Party Time*, *supra* note 64, at 2216.

to detect the nuances of local races.¹⁷⁴ Fourth, many ads were aired without disclosure, often by unfamiliar or new groups, sowing confusion within the electorate about the sources of the messages they were seeing.¹⁷⁵

A case study of a Congressional campaign best illustrates these distorting effects.¹⁷⁶ The race in Pennsylvania's 21st Congressional District, centered in Erie, pitted a Republican freshman, Phil English, against Ron DiNicola, a Democratic attorney who ran for the seat and lost in 1994. A DCCC ad in early 1995 "morphing" English's face into that of Newt Gingrich began an onslaught of outside issue ads – mostly coming from Washington – which dominated the Erie airwaves. In the following year, the NRCC, the Pennsylvania Democratic and Republican parties (with national party money), the United States Chamber of Commerce, the AFL-CIO, Citizen Action, the Republic Education Fund, Public Citizen, the International Brotherhood of Teamsters, the National Right to Life PAC, and other groups poured in at least \$1.4 million, mostly in issue ads, into the race.¹⁷⁷ In one twenty-hour stretch in November, more than 500 campaign ads aired on Erie television stations. And on election eve, an unknown independent group which did not disclose its funding sources – Citizens for Republic Education Fund – aired more ads in Erie than either candidate.¹⁷⁸

Overall, outside advertising spending approximately equaled the total spending of both candidates (\$1.6 million). The sum represented almost twice the

¹⁷⁴ In Ohio's Sixth Congressional District, a late issue ad run by a mysterious group – Citizens for the Republic Education Fund – attacked the Democratic candidate over comments made regarding a prison riot several years before. The attack came despite the fact that both the Republican Governor and former Lieutenant Governor had praised the candidate for his "responsible remarks" during the crisis. Riskind, *High Dollar*, *supra* note 116; Riskind, *Lucasville Riot*, *supra* note 116, at 4B. In Illinois, a \$120,000 issue ad mailing campaign against Senate candidate Bob Kustra by Americans for Limited Terms attacked him for not signing a term limits pledge. Kustra, however, had signed a 12-year limit pledge with another advocacy group. See Carney, *Air Strikes*, *supra* note 80, at 1317; *Political Ads*, *supra* note 74.

¹⁷⁵ In the closing weeks of many campaigns, unknown groups such as Citizens for Reform, the Republic Education Fund and the Coalition for our Children's Future spent heavily on highly partisan, pro-GOP advertising, without any disclosure. See Charles R. Babcock & Ruth Marcus, *For Their Targets, Mystery Groups' Ads Hit Like Attacks from Nowhere*, WASH. POST, Mar. 9, 1997, at A6. Some of these groups were led by people with close ties to or actual positions with a national or state political party. See Gerald F. Seib, *Shadow Boxing: Issue Ads Leave Voters in the Dark*, WALL STREET J., Feb. 5, 1997, at A20.

¹⁷⁶ See Gugliotta & Chinoy, *supra* note 123 for the full description of the following case study.

¹⁷⁷ Because issue advertising spending does not require disclosure, that amount was probably substantially higher. See *id.*

¹⁷⁸ See *id.*

amount both candidates had spent on television and radio advertising (\$833,000). Moreover, the outside spending prompted the candidates to increase drastically their own fund-raising and spending. English, who spent \$417,000 in his 1994 victory, had estimated that the 1996 election would cost him \$600,000. After seeing the initial DCCC and AFL-CIO attacks, he increased that estimate to \$800,000, and then to \$1 million. Ultimately, he spent \$1.2 million. At the same time, his spending strategy changed dramatically. Rather than attacking DiNicola at a time when he was most vulnerable in early 1996, English hesitated, fearful of future issue advertisements to which he would have to respond. DiNicola, not fond of fundraising, proved unable to secure the funds he needed to penetrate the issue ad clamor.¹⁷⁹

Nor did this outside spending address the candidates' own campaign messages, or issues particularly tailored to the region. English himself criticized a Republican party ad ostensibly in his favor that portrayed a cigar-smoking "union boss" as buying out Congress and DiNicola; the district was a strong pro-union, heavy industry and steel region, so such attacks only hurt English. He was also baffled by ads touting his Medicare record. He commented about the issue ad attack: "it was disorienting, like having a debate with an air-raid siren in the background."¹⁸⁰ Local commentators were offended by the dominance of Washington interests over those of the communities within the district; charges of carpetbagging and beltway influence permeated the campaign. In the end, English won by a narrow margin, but the increased "issue advocacy" failed to spark additional interest among the voters – ten thousand fewer people voted than in 1992.¹⁸¹

C. *Lessons from 1996*

Thus, the 1996 campaigns showed that the current prongs of express advocacy and coordination are inadequately framed, causing an utter breakdown in the campaign finance system. A rigid express advocacy standard that requires "magic words" proved ineffective as it faced the realities of effective campaign advertising. An ill-defined coordination standard collapsed for two reasons: its lack of clarity led it to be ignored outright by campaigns and lawmakers, and its vagueness failed to identify adequately the subtle and indirect coordination which occurs in real-world campaigns. Failing at both ends, issue ads, combined with the

¹⁷⁹ *See id.*

¹⁸⁰ *Id.*

¹⁸¹ *See id.*

soft money that feeds them, opened an immense loophole around current campaign finance regulations, and incurred wide damage in doing so. Overall spending skyrocketed. Corruption and the perception of corruption entered the system like no time in recent history. And outside funds overwhelmed candidates and their attempts to proffer locally-tailored messages in local elections. The same threats to the electoral system that the Court has recognized in justifying past campaign finance regulations have thus resurfaced through its own loose standards for issue advocacy.

V. CHANGING THE STANDARDS

A number of proposals are on the table in Washington and bandied around the newspapers and law reviews to solve current campaign finance problems. These proposals include free or subsidized television advertising, a public financing system for all campaigns combined with voluntary spending limits, an outright ban on soft money, the imposition of spending limits, full and mandatory disclosure for all campaign-related expenditures, the reversal of *Buckley*, an overhaul of the FEC, and others.¹⁸² Other proposals proffer ways to increase the “quality” of political advertisements.¹⁸³ The feasibility and constitutionality of these solutions, many of

¹⁸² See Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. (1997) (hereinafter Campaign Reform Act). See also, e.g., Bruce A. Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, AM. PROSPECT, Spring 1993, at 71 (proposing a voucher system to replace private financial support); Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470 (1997) (proposing mandatory public financing of electoral campaigns and criticizing *Buckley*); Richard Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996) (proposing a mandatory voucher system to replace the current system of campaign finance); Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160 (1994) (proposing complete public financing of Congressional campaigns); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1411-12 (1994) (proposing the use of incentives to replace private support with public funding); Wertheimer & Manes, *supra* note 126, 1149-59; David R. Lagasse, Note, *Undue Influence: Corporate Political Speech, Power and the Initiative Process*, 61 BROOK. L. REV. 1347, 1367 (1996) (arguing that the Court should repudiate its key campaign finance holdings because its “free speech marketplace” model is bankrupt); Max Frankel, *It's the Demand Stupid*, N.Y. TIMES MAG., Feb. 2, 1997, at 24 (proposing abolishing television ads and providing free television in its place); *How to Cut the Cost of Politics*, THE ECONOMIST, Feb. 8, 1997, at 17-18 (proposing spending limits). For critiques of current and proposed campaign finance regulation, see Lillian Bevier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258 (1994); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049 (1996).

¹⁸³ See, e.g., Rebecca Arbogast, *Political Advertising and the First Amendment: A Structural-Functional Analysis of Proposed Reform*, 23 AKRON L. REV. 209, 223 (1989) (proposing that political commercials be at least 90 seconds in length); Jack Winsbro, *Misrepresentation in Political*

which would impact but not resolve the issue ad question,¹⁸⁴ are complicated, and are beyond the scope of this Article. Instead, this part will focus specifically on redefining the standards framing issue advocacy to satisfy the Court's careful balancing of two competing interests: permitting wide political expression, and maintaining a legitimate, uncorrupted political campaign system.

A. *Using Context to Judge Express Advocacy*

1. Employing the "Reasonable Person" Standard

Replacing the "magic words" test with a context-based "reasonable person" standard for "express advocacy" would allow the "express advocacy" prong to distinguish properly between candidate advocacy and true issue advocacy. The approach could take various forms, but at its heart would *find an ad to be express advocacy when a reasonable person, viewing the full advertisement in its context, would judge the central message of the ad to be calling upon him or her to vote for or against a particular candidate in an upcoming election*. Only those contextual factors a reasonable viewer would likely be aware of – such as the timing of an advertisement, the use of commonly known campaign language or messages within an advertisement, or an unusually public and partisan discussion about campaigns by the group airing the advertisement that would strongly impact the advertisement's perceived message – could be considered in judging the advertisements themselves. Such an approach has been advocated and justified by a handful of authorities.

Advertising: The Role of Legal Sanctions, Comment, 36 EMORY LAW J. 853, 895–915 (1987) (proposing several means – including the use of defamation law, statutory requirements, and format restrictions – to improve the quality of political advertising); Peter F. May, Note, *State Regulation of Political Broadcast Advertising: Stemming the Tide of Deceptive Negative Attacks*, 72 B.U. L. REV. 179, 206 (1992) (proposing a state legislative framework to decrease negative advertising); Fred Wertheimer, *TV AD Wars: How to Reduce the Financial and Social Costs of Television Advertising in Our Political Campaigns* (date unknown) (unpublished manuscript, on file with the author) (proposing several specific requirements, including free air time and a requirement that candidates appear at the end of each ad).

¹⁸⁴ Unless the definitional problems of issue advocacy are addressed directly, other attempts at reform – even broad ones – will in fact simply push more money through the "issue ad" loophole. For instance, if the giving of "soft money" were banned entirely, corporations, unions and other large givers could replace "soft money" donations to parties with large donations to non-profit groups running campaign-related advertisements, or run such advertisements themselves. Although less direct support of a candidate, the political payoff would be approximately the same, as would the level of dollars being donated. Distortion, especially at the local level, could very well increase.

In *Furgatch*, the Ninth Circuit outlined a clear and workable context-based approach. Rather than looking for “magic words” as the only indication of express advocacy, the court found that an ad can also be deemed express advocacy if “when read as a whole, and with limited reference to external events, [it is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.”¹⁸⁵ The court suggested three components that would together prove “express advocacy.” First, an ad must convey a message that is “unmistakable and unambiguous, suggestive of only one plausible meaning.”¹⁸⁶ Second, an ad must present a “clear plea for action,” and not be “merely informative.”¹⁸⁷ Third, “it must be clear what action is advocated.”¹⁸⁸ The court emphasized that if “reasonable minds could differ” in interpreting speech in question, then a court could not deem a message express advocacy.¹⁸⁹ In determining that “don’t let him do it” advocated a clear, unambiguous action to vote against President Carter,¹⁹⁰ the court not only examined the message itself,¹⁹¹ but looked at the timing of the ad, which, a week prior to the election, left little doubt to the “reasonable” viewer what the suggested command was.¹⁹²

After prevailing in *Furgatch*, the FEC altered its rules for “express advocacy” to reflect the standards expounded upon in the decision. First, it listed a set of phrases and examples of “express advocacy,” expanding the specific “magic words” standard outlined in *Buckley*.¹⁹³ Some of these specific examples reflect the

¹⁸⁵ *Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Furgatch*, 807 F.2d at 864.

¹⁹¹ The court found that the ad failed to address any specific issue, and instead assaulted Carter on personal issues. *See id.* at 865.

¹⁹² *See id.*

¹⁹³ The FEC standard deemed ads to be express advocacy when they use words such as “vote for the President,” “re-elect your Congressman,” “support the Democratic nominee,” “cast your ballot for the Republican challenger for U.S. Senate in Georgia,” “Smith for Congress,” when “Vote Pro-Life” or “Vote Pro-Choice” accompanies “a listing of clearly identified candidates described as Pro-life or Pro-Choice, . . . ‘defeat’ accompanied by a picture of one or more candidate(s), . . . or communications . . . which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers,

MCFL context-based interpretation.¹⁹⁴ Second, the FEC explicitly restated the *Furgatch* holding. Express advocacy would include any communication that “when taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s). . . .”¹⁹⁵ Two factors would lead to such a conclusion. First, “the electoral portion of the communication [must be] unmistakable, unambiguous, and suggestive of only one meaning,” and second, “reasonable minds [can] not differ as to whether [an ad] encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.”¹⁹⁶

Finally, the “express advocacy” element of the most prominent campaign finance reform bill before Congress in 1997 and 1998 – the Bipartisan Campaign Reform Act of 1997 (better known as the McCain-Feingold Bill)¹⁹⁷ – called for a “reasonable person” standard, but added several variables. First, the bill labeled as “express advocacy” any communication which met a variant of the FEC’s broader “magic words” test, including if, in context, the ad would “have no reasonable meaning other than to advocate the election or defeat of [one] or more clearly identified candidates.”¹⁹⁸ Alternatively, “express advocacy” would exist if

advertisement, etc. which say ‘Nixon’s the One,’ ‘Carter ‘76’ ‘Reagan/Bush’ or ‘Mondale!’” 11 C.F.R. § 100.22(a) (1997).

¹⁹⁴ See 11 C.F.R. § 100.22(b) (1997).

¹⁹⁵ 11 C.F.R. § 100.22(b)(1) (1997).

¹⁹⁶ *Id.* The FEC defined “clearly identified” as those communications where a communication identifies the candidate by “name, nickname, photograph or drawing,” or an “unambiguous reference” to his or her status, such as “the President” or “the incumbent.” 11 C.F.R. §100.17 (1997). For a comprehensive defense of the FEC’s standard, see Michael D. Leffeb, 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 (1996).

¹⁹⁷ Campaign Reform Act, *supra* note 182. In October, 1997, after a flurry of legislative activity, a revised McCain-Feingold bill, already substantially narrowed from earlier versions, failed to reach a floor vote in the Senate. See Eric Schmitt, *Campaign Finance Measure Blocked in Two Senate Votes; Main Foe Says Bill is ‘Dead,’* N.Y. TIMES, Oct. 8, 1997, at A1; Eric Schmitt, *Overhaul Bill Stalled Again in Senate in Same Ploys,* N.Y. TIMES, Oct. 10, 1997, at A21. It again failed to reach the Senate floor in February, 1998. See Helen Dewar, *Campaign Finance Bill Dies in Senate,* WASH. POST, Feb. 27, 1998 at A1.

¹⁹⁸ Campaign Reform Act, *supra* note 182, at § 201(b)(20)(A)(i). Specifically, the bill provided that communications comprised “express advocacy” if they “contain[ed] a phrase such as ‘vote for,’ ‘re-elect,’ ‘support,’ ‘cast your ballot for,’ ‘(name of candidate) for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject,’ or a campaign slogan or words that in context can have no reasonable meaning other than to

a communication referred to one or more clearly identified candidates in a radio or television advertisement within sixty days before a general election.¹⁹⁹ Finally, the bill would find “express advocacy” if any communication expressed “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.”²⁰⁰

2. Effectively Distinguishing Between Issue and Candidate Advocacy

All three “reasonable person” standards discussed allow an analysis of an advertisement’s true impact by looking at an advertisement’s broader context and at specific relevant factors in addition to “magic words.” This approach reflects the reality that campaign advertisements need not possess “magic words” to be effective vote-generating tools, and, more broadly, that “the meaning of words . . . depends heavily on context as well as the shared assumptions of speaker and listener.”²⁰¹ At the same time, these standards establish a relatively high threshold for an ad to be deemed campaign-centered, allowing true issue ads to continue unaffected. The

advocate the election or defeat of 1 or more clearly identified candidates.” *Id.*

¹⁹⁹ See *id.* at § 201(b)(20)(A)(ii). In treating differently television and radio ads that precede an election by sixty days or less, McCain-Feingold’s time buffer sets too rigid a framework that may in practice hamper the central aim of distinguishing issue advocacy from express advocacy, and needlessly complicates the doctrine. Others have called for time buffers of different lengths. See Allison Rittenhouse Hayward, *Stalking the Elusive Express Advocacy Standard*, 10 J.L. & POL. 51, 86–94 (1993) (proposing a five-day time buffer within which all ads mentioning candidates would be regarded as express advocacy). Rather than a firm cut-off date, the more effective approach remains to adhere to those taken in *Furgatch* and by the FEC – looking at the timing of an advertisement as a critical factor to be weighed in the contextual analysis. Perhaps more importantly, a rigid sixty-day cutoff may be constitutionally infirm because it is not “narrowly tailored” to eliminate corruption. See *infra* note 218 and accompanying text. For instance, ads within McCain-Feingold’s sixty-day buffer that pose little threat because they are indeed issue ads would be regulated, and perhaps prohibited. Hayward’s approach, on the other hand, would fail to end the threat of corruption posed by the millions of dollars of ads airing in the months prior to her five-day buffer.

²⁰⁰ See Campaign Reform Act, *supra* note 182, at §201(b)(20)(A)(iii). McCain-Feingold exempts ads that provide information “in an educational manner” about two or more candidates’ voting records. See *id.* at § 201 (b)(20)(B)(i).

²⁰¹ *Maine Right to Life Comm. v. Federal Election Comm’n*, 914 F. Supp. 8, 11 (D. Me. 1996), *aff’d*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S. Ct. 52 (1997). Although striking down the FEC standards in that case, the court conceded: “One does not need to use the explicit words ‘vote for’ or their equivalent to communicate clearly the message that a particular candidate is to be elected.” *Id.* at 11.

requirement that a reasonable viewer interpret an ad's central message as a clear and unambiguous exhortation to vote for or against a certain candidate will exclude even those ads that provide substantial and influential information about candidates and elections for the central purpose of discussing an issue or policy.

Applying a "reasonable person" standard to 1996, many of that year's campaign "issue ads" would in fact constitute "express advocacy." Given the very explicit way in which it targeted individual candidates, most of the AFL-CIO's 1996 campaign would fall under a "reasonable person" standard of express advocacy, as would countless other independently-run issue ads whose election-oriented appeals were unmistakable.²⁰² So too would most of the DNC and RNC ads, which glossed over issues in order to articulate forceful pronouncements about candidates. Those ads falling more closely to the date of a primary or an election, even if they did not expressly urge a vote, would likely be read by a "reasonable person" to be directing such a vote.

What messages remain as protected issue ads? Ads which provide information to voters about voting records without calling for any specific action would continue as issue advocacy. Ads which take place months before an election, discuss an issue on the Congressional agenda and a respective Congressman's position, and urge voters to make their local Congressman aware of their feelings on the issue, would also comprise issue advocacy.²⁰³ The health care ads of 1994 would still pass muster, as would some of the AFL-CIO's early ads regarding the Contract with America.²⁰⁴ Legitimate issue ads might also include an environmental advocacy group running ads describing the environmental records of lawmakers and its own environmental view, or a pro-life group publicizing voting records while espousing its pro-life view. Ads which primarily discuss issues, but refer to

²⁰² Because of their issue focus and their distance from the elections, the AFL-CIO's 1995 ads addressing the Contract with America provisions being considered in Congress could pass muster as issue advocacy.

²⁰³ Although it explicitly rejected the FEC's context-based analysis, the Second Circuit's analysis in *Federal Election Comm'n v. Central Long Island Tax Reform Immediately*, 616 F.2d 45 (2d Cir. 1980), actually illustrates the appropriate consideration of relevant factors under such an analysis. The court in that case found a leaflet to comprise issue advocacy, noting that although the leaflet criticized the voting record of a local Congressman on the group's tax reform issues, "[t]here is no reference anywhere in the [leaflet] to the Congressman's party, to whether he is running for re-election, to the existence of an election or the act of voting in any election; nor is there . . . an unambiguous statement in favor or against the election of [the Congressman]." *Id.* at 53. The court concluded that without any reference to the candidate's opponent or his views, "a reader of the pamphlet could not find any indication, express or implied, of how [the group] would have him or her vote." *Id.*

²⁰⁴ See *supra*, notes 1-3 & 65 and accompanying text.

elections and candidates in an ambiguous way, and therefore carry less influence on voters, would likely comprise issue advocacy, but would border express advocacy. A court or the FEC might render a decision either way depending on the specific circumstances and the perceived degree of ambiguity.²⁰⁵

3. Satisfying the Court's First Amendment Analysis

As *Furgatch* argues, a context-based “reasonable person” test is consistent with the Court’s purposes in establishing the “express advocacy” prong in *Buckley*, and with its approach in *MCFL*. Although it is debatable whether the *Buckley* Court’s list of “magic words” was meant to be exhaustive or simply exemplary,²⁰⁶ the Court’s approach in *MCFL* favored the latter interpretation. The Court suggested a less literal approach by looking at the broader purpose and message of the advertisement itself to conclude that although “marginally less direct than ‘Vote for Smith,’ . . . [the flyer] goes beyond issue discussion to express electoral advocacy.”²⁰⁷ *MCFL* thus seemed to recognize, as the *Furgatch* court noted, that *Buckley*’s “magic words” do “not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate.”²⁰⁸

Moreover, applying a reasonable person standard accomplishes the same goal that *Buckley* was seeking in originally creating the “magic words” standard: avoiding unconstitutional vagueness in construing the phrase “expenditure relative to a clearly identified candidate.”²⁰⁹ In fact, the Court commonly utilizes context-based reasonableness approaches to distinguish protected from unprotected expression. Obscenity is judged in part by “whether ‘the average person, applying contemporary community standards,’ would find that the work, taken as a whole,

²⁰⁵ A District of Columbia District Court’s weighing of different factors regarding member solicitation letters by the National Organization for Women (NOW) illustrates the appropriate process. Finding that the central message of the letters was to expand NOW membership, that the numerous appeals made in the letters – to “join NOW,” to wear a button, to write a check and to put pressure on various politicians – suggest “several plausible meanings,” and that the letters made only a “few passing references” to opponents of abortion (and that only two were seeking election in the year the letters were distributed), the court found the letters to comprise issue advocacy under the *Furgatch* test. *Federal Election Comm’n v. National Org. for Women*, 713 F. Supp. 428, 434-35 (D.D.C. 1989).

²⁰⁶ The use of the words “such as” suggests the words listed were not as “magic” as has been later held. *Buckley*, 424 U.S. 1, 44 (1976).

²⁰⁷ *MCFL*, 479 U.S. 243, 249 (1986).

²⁰⁸ *Furgatch*, 807 F.2d 857, 863 (9th Cir. 1987).

²⁰⁹ *Buckley*, 424 U.S. at 41-42.

appeals to the prurient interest.”²¹⁰ Courts also judge “fighting words” by context,²¹¹ as they do when considering obscenity over public airwaves.²¹² A “reasonable person” test for issue ads as spelled out above, which would render ads to be “express advocacy” only when campaign messages are unambiguous in their advocacy for or against a candidate, is thus no less constitutionally infirm than context-based standards used to distinguish other areas of protected speech.²¹³

Finally, the “reasonable person” test for express advocacy passes the broader strict scrutiny analysis – one which balances the fundamental right of political expression with compelling government interests justifying regulation of that expression – which the Court has applied from *Buckley* through *Austin*.²¹⁴ First,

²¹⁰ *Miller v. California*, 413 U.S. 15, 24 (1973) (citation omitted). *See also* *Roth v. United States*, 354 U.S. 476, 489 (1957) (stating that the “community standards” test is “adequate to withstand the charge of constitutional infirmity”); *Furgatch*, 807 F.2d at 863. *Miller* also required two other prongs to be met for speech to be deemed obscene, *see Miller*, 413 U.S. at 24, which the Court has proclaimed to be an important factor saving the obscenity standard from unconstitutional vagueness. *See Reno v. American Civil Liberties Union*, 117 S.Ct. 2329, 2332 (1997) (striking down provisions of the Communications Decency Act). The standards proposed in *Furgatch* and by the FEC should withstand even the *Reno v. ACLU* analysis, since – like *Miller* – they introduce additional criteria beyond a simple “reasonable person” analysis.

²¹¹ *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (stating that the test for “fighting words” using an interpretive standard of “men of common intelligence” is “narrowly drawn and limited to define and punish specific conduct” and does not “contravene[] the Constitutional right of free expression”). *See generally* Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U.L.Q. 531, 536 (1980); Leffeb, *supra* note 196, at 715-16 (discussing the “context-sensitive approach” used to analyze fighting words under the First Amendment).

²¹² *See United States v. Pacifica Foundation*, 438 U.S. 726, 744 (1978) (“[B]oth the content and the context of speech are critical elements of First Amendment analysis.”) (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

²¹³ For a more detailed discussion of context-based standards in First Amendment law, *see* Leffeb, *supra* note 196, at 709 (discussing standards applied to other areas of First Amendment speech).

²¹⁴ *See Colorado Republican*, 116 S. Ct. 2309, 2313 (1996) (“In [past FECA] cases, the Court essentially weighed the First Amendment interest in permitting candidates (and their supporters) to spend money to advance their political views, against a ‘compelling’ governmental interest in assuring the electoral system’s legitimacy, protecting it from the appearance and reality of corruption.”); *Austin*, 494 U.S. 652, 660 (1990) (holding that the distortion wrought by corporate independent expenditures comprises “a sufficiently compelling rationale to support its restriction”); *MCFL*, 479 U.S. at 256 (“When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest.”); *Buckley*, 424 U.S. at 66 (“[T]here are governmental interests sufficiently important to outweigh the possibility of infringement [of First Amendment rights], particularly when the ‘free functioning of our national institutions’ is involved.”) (citation omitted); *Federal Election Comm’n v. National Org. for Women*, 713 F. Supp. 428 (D. D.C. 1989) (“The Supreme Court has upheld the

the standard advances the compelling interests expounded in *Buckley*: eliminating the opportunity for corruption and the perception of corruption that the “magic words” standard has allowed.²¹⁵ Second, the standard serves the interest put forth in *Austin* and *MCFL*: keeping corporate and union money from distorting elections.²¹⁶ Third, by compelling disclosure and reporting of advertisements that are undoubtedly campaign related, the “reasonable person” standard would serve the three compelling interests the *Buckley* Court found to justify disclosure and reporting requirements.²¹⁷

In addition to meeting these compelling interests, the standard is “narrowly tailored” to pinpoint that speech which can be regulated under *Buckley* and later doctrine. Because the new standard will “supply necessary premises that are unexpressed but widely understood by readers or viewers,”²¹⁸ it will more precisely gauge the true impact of advertisements. As a result, while pure issue advocacy – even that which discusses candidates and their positions²¹⁹ – will remain unaffected, the new standard will more effectively encompass those advertisements that the Court in *Buckley* and its progeny has upheld as within FECA’s purview.²²⁰ As in

constitutional validity of [] restrictions on political speech only where the burden is justified by a compelling state interest.”). Cf. *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364, 1370 (1997) (“When deciding whether a[n] . . . election law violates First and Fourteenth Amendment associational rights, we weigh the ‘character and magnitude’ of the burden . . . the rule imposes on those rights against the interests the [government] contends justify that burden, and consider the extent to which the [government’s] concerns make the burden necessary.”) (citation omitted).

²¹⁵ See *supra* text accompanying notes 144-45.

²¹⁶ See *supra* notes 164-69 and accompanying text.

²¹⁷ See *supra* text accompanying notes 142-43.

²¹⁸ *Furgatch*, 807 F.2d at 864.

²¹⁹ As described in *supra* notes 203-205 and accompanying text, the standard would not impinge upon discussion of candidates and their positions that might indirectly affect elections without comprising “express advocacy.” This would satisfy the *Buckley* protection of such speech: “Public discussion of public issues which are also campaign issues readily and unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues . . . tend naturally and inexorably to exert some influence on voting at elections.” *Buckley*, 424 U.S. 1, 42 n.50 (1976).

²²⁰ For example, communication that is “unambiguously campaign related but would not otherwise be reported because it takes the form of independent expenditures” is now captured by the new standard, while before it was not. *Buckley*, 424 U.S. at 81. So too are advertisements that are mere attempts to “avoid the disclosure requirements by routing financial support of candidates through avenues not explicitly covered by the general provisions” of FECA. *Id.* at 76. Likewise, unlike the current standard, a “reasonable person” standard would take into account the distinction Justice

Austin and *Buckley*, because the standard is “precisely targeted to eliminate the distortion” and the corrupting elements of expression, “while also allowing” broad political expression by corporations, labor unions and advocacy groups,²²¹ the standard will have no more than a “reasonable and minimally restrictive” effect on the exercise of fundamental First Amendment rights.²²²

Those courts that have ruled against a loosened “magic words” standard exemplify the common failure among reform opponents to properly analyze evolving campaign finance jurisprudence. First, they stubbornly rely on political expression as the ultimate trump over all regulation of campaign communication, even as the Court has recognized that certain compelling interests justify some infringements upon such expression.²²³ Next, they overlook all but the broadest declarations from the most recent and in-depth Court treatment of “express advocacy” – *MCFL* – which in its more specific language provided for a broader reading of the “magic words” test.²²⁴ Finally, those holdings simply look beyond

Stevens described in *Austin*: that “there is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other.” *Austin*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring).

²²¹ *Austin*, 494 U.S. at 660.

²²² *Buckley*, 424 U.S. at 82. See also *Turner Broad. Sys. v. Federal Communications Comm’n*, 117 S. Ct. 1174, 1199 (1997) (“[T]he essence of narrow tailoring is focus[ing] on the evils the [Government] seeks to eliminate . . . [without] significantly restricting a substantial quantity of speech that does not create the same evils.”) (citation omitted).

²²³ Compare *Faucher v. Federal Election Comm’n*, 928 F.2d 468, 471 (1st Cir. 1991), cert. denied, 502 U.S. 820 (1991) (“The FEC . . . has sought to restrain [political discussion] which the Court in *Buckley* sought to protect. This we cannot allow.”) and *Maine Right to Life Comm. v. Federal Election Comm’n*, 914 F. Supp. 8, 12 (D.Me. 1996) (“FEC restriction of election activities [is] not to be permitted to intrude in any way upon the public discussion of issues [The Court] at all costs avoids restricting, in any way, discussion of public issues.”) with cases cited *supra* note 214. In this way, the Maine district court misses much of the point of *Buckley* and *Austin* when it concedes that the “magic words” approach “does not give much recognition to the policy of the election statute to keep corporate money from influencing elections . . . , but it does recognize the First Amendment interest as the Court has defined it.” *MRTL*, 914 F. Supp. at 12. In fact, the Court requires recognition of both concerns.

²²⁴ *Faucher*, for example, cited *MCFL* only for the general proposition that “an expenditure must constitute ‘express advocacy’ in order to be subject to [election law regulation].” *Faucher*, 928 F.2d at 470 (quoting *MCFL*, 479 U.S. at 249). The court failed to examine the next part of the *MCFL* holding that found “express advocacy” without *Buckley*’s “magic words,” stating, “The fact that this message is marginally less direct than ‘Vote for Smith’ does not change its essential nature.” *MCFL*, 479 U.S. at 249. The Maine district court striking down the FEC’s standard attempted to tackle this language, arguing that the departure from “magic words” was “unsurprising” considering the clear link between the phrase “vote pro-life” and a list of pro-life candidates. *MRTL*, 914 F. Supp. at 11 n.2. But

other areas of current First Amendment doctrine when they claim that a “reasonable person” standard unconstitutionally chills First Amendment rights.²²⁵ Although an austere freedom of political expression argument provides effective rhetoric in the political world,²²⁶ it flounders in the constitutional world of *Buckley*, *MCFL* and *Austin*, where the rights of expression are balanced with other compelling concerns.²²⁷

B. *Strengthening the Coordination Standard*

Like the “express advocacy” standard, the coordination prong – if is to distinguish true issue advocacy from expenditures that are coordinated in a way that threatens corruption and distortion – must map more closely with the reality of

this conclusion only accentuates *MCFL*’s illustration that looking beyond “magic words” determines a communication’s meaning in a way that a rigid “magic words” analysis fails to. See *MCFL*, 479 U.S. at 249.

²²⁵ Compare *Faucher*, 928 F.2d at 471-72 (“[A context-based standard] 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.”) with *Furgatch*, 807 F.2d at 863 (“The doctrines of subversive speech, ‘fighting words,’ libel, and speech in the workplace and in public fora illustrate that when and where speech takes place can determine its legal significance. In these instances, context is one of the crucial factors making these kinds of speech regulable.”) and *supra* notes 209-13 and accompanying text.

²²⁶ Senators vociferously used a First Amendment-trumps-all argument against both the “soft money” ban and issue advocacy legislation in blocking the McCain-Feingold bill in October, 1997. See, e.g., 143 CONG. REC. S10339-05, S10343 (daily ed. Oct. 6, 1997) (statement by Sen. McConnell) (“[McCain-Feingold’s] issue advocacy provisions . . . are unconscionable assaults on the first amendment right of all Americans.”); 143 CONG. REC. S10719-05, S10721 (daily ed. Oct. 9, 1997) (statement of Sen. Roberts) (“[M]oney spent to express your views or the views of voters cannot be regulated or banned without being at odds with the First Amendment.”). But see 143 CONG. REC. S10409-02, S10410 (daily ed. Oct. 6, 1997) (statement of Sen. Levin) (“[T]he Supreme Court explicitly held in *Buckley* that eliminating actual and apparent corruption of our electoral system—corruption . . . was a compelling enough interest to justify Congress in imposing campaign contribution limits, although such limits collide with unfettered first amendment rights of free expression and free association.”).

²²⁷ For discussions of the campaign finance doctrine in this direction see David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL’Y REV. 236 (1991); Miriam Cytryn, *Defining the Specter of Corruption: Austin v. Michigan Chamber of Commerce*, 57 BROOK. L. REV. 903 (1991); Burt Neuborne, *Free Speech and Equality Cases Decided by the United States Supreme Court During the September Term 1995-1996*, 554 PLI/LIT 857, 872-77 (1996); J. Patrick Bradley, Note, *The Constitutionality of Restrictions on Corporate Political Contributions*, 69 WASH. U. L.Q. 935 (1991); Prescott M. Lassman, Note, *Breaching the Fortress Walls: Corporate Political Speech and Austin v. Michigan Chamber of Com.*, 78 VA. L. REV. 759 (1992).

political campaigns. In addition to simply mouthing a vague coordination standard, the law must clearly spell out the meaning of coordination by prohibiting in specific terms many of the ways which coordination can directly or subtly take place in campaigns. Language from McCain-Feingold made a strong move in that direction, outlining numerous specific circumstances that would constitute coordination. First, the bill expressly defined as coordination a set of common forms of subtle yet important coordination heretofore not recognized in the law. For independent contributions, coordination would exist for any payment made “at the request or suggestion of, or pursuant to any particular understanding with a candidate” or her campaign, as well as in a number of other common scenarios.²²⁸ For example, the legislation would find coordination in the following circumstances: if an independent group undertakes “dissemination, distribution or republication” of campaign material; if a group bases a communication on “information about a candidate’s plans, projects, or needs provided to the person making the payment by the candidate or the candidate’s agent”; or if an individual “making the payment” has worked for that candidate’s campaign during the election cycle either in a formal or advisory position, or has retained services of a person or group who has provided services for that candidate’s campaign.²²⁹ For political parties, the legislation requires that parties provide either coordinated or independent expenditures in support of particular candidates, but not both.²³⁰

By mapping more realistically with the subtle coordination that takes place in political campaigns, these provisions – or, if they remain stillborn, similar tooth-inserting standards imposed by Congress or the courts in the future – would have eliminated most of the instances of “issue advocacy” coordination seen in 1996. Most importantly, all DNC and RNC advertisements in the Presidential race would have fallen under the limitations required of coordinated expenditures. This language would also have compelled parties to choose one of two routes in supporting Congressional candidates, rather than following both coordinated and “independent” tracks as they did in 1996. Finally, many of the practices that allow advocacy groups, corporations and labor unions to “virtually coordinate” with parties or candidates would now be prohibited. Perhaps most importantly, a revised coordination standard would in clear terms reaffirm to the public and political operatives the Court’s emphasis that coordination, as much as “express advocacy,” is not permitted in planning, funding or airing issue ads.

²²⁸ Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. § 205(a)(1)(C)(i) (1997).

²²⁹ *Id.* at § 205(a)(1)(C)(ii)-(ix).

²³⁰ *See id.* at § 204 (4)(A).

The incidental restrictions placed upon speech by the bolstered coordination prong described above would be justified. While an overbroad coordination standard might unconstitutionally trample on speech,²³¹ speech emerging from the types of coordination described in McCain-Feingold is not protected from restriction altogether. Rather, because of its intimate relationship to political campaigns, speech that results from these forms of coordination impacts negatively upon the compelling interests identified in *Buckley* and *Austin*, and thus can be regulated constitutionally.²³² In identifying a distinct subset of circumstances that indicate when candidates and those promulgating issue messages have interacted to a degree that belies the Court's past confidence in the safety of independent expression²³³ and ultimately leads to the potential corruption alluded to in *Buckley*,²³⁴ a McCain-Feingold-type definition of coordination is "narrowly tailored" to serve the *Buckley* and *Austin* compelling interests.

VI. CONCLUSION

Issue advertisements pose a unique challenge to the campaign finance world. While they have the capacity to bring real issue discussions to the homes of the American public, they also have the power to drown out locally-tailored elections with Washington-driven rhetoric. At the same time that they seemingly threaten less corruption because in theory they are not coordinated with candidates

²³¹ The FEC voter guide regulation recently struck down by the First Circuit in *Clifton v. Federal Election Comm'n*, 114 F.3d 1309 (1st Cir. 1997), for example, went one step too far in trying to scale back coordination. That regulation barred any non-written "contact" between corporations and labor organizations preparing voter guides and candidates "regarding the preparation, contents and distribution of the voter guide." 11 C.F.R. § 114.4(c)(5)(i), (ii)(A). By barring even "a simple oral inquiry . . . as to a candidate's position," the FEC rule unnecessarily trammied core speech rights. *Clifton*, 114 F.3d at 1312. Although Judge Bownes' dissent in *Clifton* proffers a strong argument in defense of a tighter, narrowly tailored coordination standard which serves important compelling interests, *see id.* at 1317-32, the regulation in question did not pass that muster. On the other hand, McCain-Feingold avoids the infirmity of the FEC voter guide regulation by barring expenditures made after a candidate has provided information on her "plans, projects, or needs." *See* Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. § 205(a)(1)(C)(iii) (1997). While this standard prohibits cooperation involving campaign strategy – cooperation which presents clear benefits to a candidate and a strong likelihood of a quid pro quo arrangement – it does not regulate the communication of policy questions, which may or may not benefit a candidate.

²³² *See supra* text accompanying notes 144-45 & 164-69.

²³³ *See supra* note 13, and accompanying text.

²³⁴ *See supra* text accompanying notes 144-45.

or do not expressly advocate the election of candidates, if they are coordinated or do expressly advocate on behalf of a candidate, they provide a dangerously wide loophole around other laws. And while they in one sense place special interest lobbying into the public airwaves, healthily making the public the target of lobbying rather than the politician, they can also instigate less detectable and possibly more dangerous backroom political bargains by eliminating reporting and disclosure requirements and re-introducing corporate money into the system. In short, while issue ads potentially provide substantial improvements to America's elections, their risks also loom large.

The law's lax treatment of issue advocacy – with a blunt “magic words” standard and an ill-defined coordination standard – neglects this jeopardous dichotomy. The 1996 elections dramatically highlighted the system's failure to properly bound issue advertisements. Only by redefining each standard to accurately account for the reality of political advertising and campaigning can Congress and the Court frame issue advocacy in a way that improves rather than cripples the system and that satisfies the Court's twin concerns for political expression and an uncorrupted campaign system.

