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THE FIRST AMENDMENT NEEDS NO REFORM: PROTECTING LIBERTY FROM CAMPAIGN FINANCE "REFORMERS"

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> WE hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, *Liberty*, and the Pursuit of Happiness - That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed . . . .[1]

> WE the People of the United States, in order to . . . secure the blessings of *liberty* to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.[2]

America was, as President Abraham Lincoln declared at Gettysburg, "conceived in liberty."[3] Lady Liberty graces flags, murals, coins, and the New York Harbor. She symbolizes an essential American ideal that was enshrined in the Bill of Rights and the First Amendment guarantees of free expression and association: "Congress shall make *no* law . . .

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1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

2. U.S. CONST. pmbl. (emphasis added).

3. Abraham Lincoln, *Address Delivered at the Dedication of the Cemetery at Gettsburg (Nov. 19, 1863), reprinted in* THE COLLECTED WORKS OF ABRAHAM LINCOLN 17 (Roy P. Basler ed., 1953).

abridging the freedom of speech, or of the press; or [of] the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[4]

Liberty is under assault, however, by self-styled "reformers" seeking to deprive the people of these foundational rights of our democratic Republic. The United States Supreme Court has erected a high wall of separation to demark unfettered issue advocacy (including political issues) from "express advocacy,"[5] which may be regulated due to a compelling governmental interest. Yet, "reformers" besiege the bulwark, claiming error in the Supreme Court's bright-line defense of liberty and asserting pressing reasons to abandon the First Amendment.

In Part I, this Article reviews the construction and necessity of the wall of separation between express advocacy and unfettered issue advocacy. The strongly-protected liberty of the people to band together to amplify their issue advocacy is discussed in Part II. Parts III (McCain-Feingold) and IV (Shays-Meehan) examine how current campaign finance "reform" efforts would trespass on liberty's land if implemented.

I. ALTHOUGH ISSUE ADVOCACY AFFECTS ELECTIONS, A HIGH WALL SEPARATES UNFETTERED ISSUE ADVOCACY FROM EXPRESS ADVOCACY

Political issue advocacy affects elections. For example, television advertisements criticizing California Governor Gray Davis for electric power "gray-outs" may cause voters to reject his reelection bid. Voter guides published by the National Abortion and Reproductive Rights Action League (NARAL) or the National Right to Life Committee (NRLC) may be carried into the voting booths and used to select candidates favoring or opposing abortion rights. Campaign finance "reformers" decry this fact and call for regulation of issue advocacy. They consider ads comprised of issue advocacy as loopholes needing closure by strict laws.

The First Amendment, however, is not a loophole.[6] The amendment needs no reform. Liberty requires that the freedoms of expression and

4. U.S. CONST. amend. I (emphasis added).

5. Express advocacy is a technical term referring to expressly advocating the election or defeat of a clearly identified candidate for public office.

6. *See generally* James Bopp, Jr. & Richard E. Coleson, *The First Amendment is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 UWLA L. REV. 1 (1997) (setting out a "primer on protected political expression," articulating the "express advocacy" and "major purpose" tests, tracing the history of failed FEC efforts to regulate issue advocacy, and offering proposals for speech-enhancing campaign reform);

association, which are the bedrock of our Republic, are protected, *especially* in the context of political debate and election campaigns.

In *Buckley v. Valeo*,[7] the United States Supreme Court recognized that the First Amendment mandates protection of issue advocacy *even though it affects elections*. The Court's decision belied the claim of some "reformers" that the Court was not sufficiently farsighted to see the effect that issue advocacy would eventually have in influencing elections:

> Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.[8]

The Court declared that this liberty is fully protected, and it explicitly endorsed the use of issue advocacy to influence elections by promoting candidates and their views: "So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are *free to spend as much as they want to promote the candidate and his views.*"[9] For those who argue that the express advocacy test was ill considered by the Supreme Court, a review of *Buckley* belies that claim also. The Court reiterated the express advocacy test in eight different passages throughout its opinion.[10]

The fact that issue advocacy affects election campaigns makes it *less*, not *more*, subject to regulation because "the constitutional guarantee [of free expression] has its fullest and most urgent application precisely to the conduct of campaigns for political office."[11] This is so because free expression is both vital in its own right and essential to representative government.[12] "In a republic where the people [and not their legislators] are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."[13]

Indeed, this motif of the people's sovereignty versus incumbents' wish to be free from citizen groups trumpeting both the candidates' views and

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Wanda Franz & James Bopp, Jr., *The Nine Myths of Campaign Finance Reform*, 10 STAN. L. & POL'Y REV. 63 (1998).

7. 424 U.S. 1 (1976).
8. *Id.* at 42 n.50 (quoting the court of appeals decision).
9. *Id.* at 45 (emphasis added).
10. *Id.* at 43, 44, 44 n.52, 45 (twice), 80 (thrice).
11. *Id.* at 15 (citation omitted).
12. *See* FEC v. Mass. Citizens for Life, 479 U.S. 238, 257 n.10 (1986) (*MCFL*).
13. *Buckley*, 424 U.S. at 14-15.

votes on vital issues of the day is the true center of gravity in Congress in the campaign finance reform conflict.[14] However, the Constitution's Preamble makes plain what the Court has reiterated and what certain "reformers" have neglected, that "[w]e the People of the United States" established and control this government.[15] Therefore, the people's right to speak out about issues and candidates is paramount.

The Supreme Court clearly articulated why protecting the people's free expression right required a high wall of separation between issue and express advocacy in the seminal case, *Buckley v. Valeo*.[16] The Court, faced with constitutional questions regarding the post-Watergate amendments to the Federal Election Campaign Act (FECA), struggled with the question of what type of speech could be constitutionally subject to government regulation. The FECA was written broadly, subjecting to regulation any expenditures[17] on speech that were made "relative to a clearly identified candidate"[18] or "for the purpose of . . . influencing" the nomination or election of candidates for public office.[19]

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14. For example, in a press release available on Senator Thad Cochran's Web site, Cochran provided some reasons why he had switched from opposing campaign finance "reform" to supporting it: "Candidates are unable to compete with independent groups . . . ." Senator Thad Cochran, *Senator Cochran's Statement on Campaign Reform*, *at* http://www.senate.gov/~cochran/press/pr01040.html (last visited Feb. 20, 2001). He declared: "I think we have a system now that is too heavily influenced by fundraising and the spending of money not just by candidates, but other groups . . . . I just think that the whole system has become overwhelmed by organizations which use enormous sums of money to influence campaigns." *Id.* Cochran apparently believes that the free speech and association rights of the people hinge on whether candidates can compete. Ironically, he declared that "we should protect . . . [political parties'] role," but he supports McCain-Feingold, which does the opposite. *Id.*

15. U.S. CONST. pmbl.

16. 424 U.S. 1 (1976).

17. *Id.* at 18-19. The fact that campaign finance laws regulate the spending of money on speech, rather than the speech itself, does not change the constitutional analysis. As the *Buckley* Court explained:

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

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

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

19. Section 431(e) and (f) defined the terms "contribution" and "expenditure" for the purposes of FECA's disclosure requirements in then Section 434(e).

The Court recognized that the difference between issue and candidate advocacy often dissipated in the real world:

> [T]he distinction between discussion of issues and candidates and advocacy of [the] election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.[20]

The dilemma was whether to regulate issue advocacy, as it might influence an election, or to protect issue advocacy, because it is vital to the conduct of our representative democracy and influences elections. The Court recognized that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates."[21] The Court declared advocacy of public and political issues an unfettered liberty:

> Discussion of *public issues and debate on the qualifications of candidates* are integral to the operation of the system of government established by our Constitution. The First Amendment affords the *broadest protection* to such *political expression* in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[22]

To protect the liberty to advocate political issues, the Court erected a high wall to protect issue advocacy. The wall was the express advocacy test, which limited government regulation to communications that "*expressly advocate the election or defeat of a clearly identified candidate.*"[23] The Court narrowed the application of FECA's contribution and expenditure disclosure provisions to express advocacy to prevent both unconstitutional vagueness and overbreadth.[24]

The *Buckley* Court considered whether the interest in preventing actual or apparent corruption of candidates, found sufficiently compelling to justify contribution limits, justified regulating political

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20. *Buckley*, 424 U.S. at 42.

21. *Id.* at 14 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

22. *Id.* (citing Roth v. United States, 354 U.S. 476, 484 (1957)) (emphasis added).

23. *Id.* at 80. To ensure that there was not any confusion about the meaning of express advocacy, the Court gave examples of such express terms – "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.

24. *Id.* at 80; *see also* Bopp & Coleson, *supra* note 6, at 14.

issue advocacy.[25] The Court determined that issue advocacy could not be regulated *even though* it could potentially be abused to obtain improper benefits from candidates.[26]

To fully protect issue advocacy, the Court's express advocacy test focused on the *words* actually spoken by the speaker, requiring that they be words like "vote for" or "elect,"[27] not on the *intent* of the speaker or whether the *effect* of the message would be to influence an election:

> [W]hether words intended and designed to fall short of invitation [to vote for or against a candidate] would miss [the] mark is a question both of *intent* and of *effect*. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning . . . . Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.[28]

A decade later, in *FEC v. Massachusetts Citizens for Life (MCFL)*, the Court reaffirmed the high wall separating unfettered political or public issue advocacy from express advocacy that could be regulated.[29]

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25. *Buckley*, 424 U.S. at 13-14.

26. *Id.* at 45-46.

27. *Id.* at 44 n.52. The express advocacy test is not a "magic words" test, *i.e.*, so long as the words used in footnote fifty-two of the *Buckley* opinion are avoided, political speakers avoid regulation. *Id.* at 44 & n.52. Footnote fifty-two creates an "express words of advocacy test": "This construction would restrict the application of § 608(e)(1) to communications containing *express words of advocacy* of election or defeat, *such as* 'vote for,' . . . ." *Id.* at 44 n.52 (emphasis added).

28. *Id.* at 43 (citation omitted) (emphasis added). While "reformers" often espouse the view that the express advocacy test was intended only to fix the vagueness problem, which this passage addresses, they ignore the Court's confirmation that the express advocacy limitation was also imposed on the FECA "to avoid problems of overbreadth." *MCFL*, 479 U.S. 238, 248-49 (1986) (citing *Buckley*, 424 U.S. at 80).

29. *MCFL*, 479 U.S. at 249 ("We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition in § 441b . . . finding of 'express advocacy' depend[s] upon the use of language such as 'vote for,' 'elect,' 'support,' etc.") (citation omitted). *MCFL* adds another stream of reason and authority to the protection of issue advocacy. The Court held that nonprofit ideological corporations that do not serve as conduits for business corporation contributions cannot even be prohibited from making independent expenditures, such as expenditures expressly advocating a candidate's election or defeat, or contributions to candidates. *Id.* at 264-65. *A fortiori*

The lower federal courts and state courts that have been faced with restrictions on issue advocacy have faithfully adhered to the express advocacy test according to its plain terms.[30] The weight of authority is substantial. The express advocacy test means exactly what it says – political issue advocacy is protected, and campaign finance statutes regulating more than explicit words expressly advocating the election or defeat of clearly identified candidates are impermissibly broad under the First Amendment.[31]

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these common issue advocacy groups cannot be prohibited from engaging in issue advocacy.

30. Lower federal court cases recognizing constitutional protection for unfettered issue advocacy include: Me. Right to Life Comm. v. FEC, 98 F.3d 1 (1st Cir. 1996); Faucher v. FEC, 928 F.2d 468 (1st Cir. 1991); Vt. Right to Life Comm. v. Sorrell, 221 F.3d 376 (2d Cir. 2000); FEC v. Cent. Long Island Tax Reform Immediately Comm., 616 F.2d 45 (2d Cir. 1980); Virginia Society for Human Life v. FEC, 263 F.3d 379 (4th Cir. 2001); Perry v. Bartlett, 231 F.3d 155 (4th Cir. 2000); N.C. Right To Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999); Va. Soc'y For Human Life v. Caldwell, 152 F.3d 268 (4th Cir. 1998); FEC v. Christian Action Network, 92 F.3d 1178 (4th Cir. 1996) (*CAN I*); FEC v. Christian Action Network, Inc., 110 F.3d 1049 (4th Cir. 1997) (*CAN II*); Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503 (7th Cir. 1998); Iowa Right to Life Comm. v. Williams, 187 F.3d 963 (8th Cir. 1999); FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987) (*Furgatch* contains broad dicta, but the Fourth Circuit summarized the narrower holding as: "where political communications . . . include an explicit directive to voters to take some [unclear] course of action, . . . 'context' . . . may be considered in determining whether the action urged is the election or defeat of a . . . candidate . . . ." *CAN II*, 110 F.3d at 1054); Citizens for Responsible Gov't State Political Action Comm. v. Davidson, 236 F.3d 1174 (10th Cir. 2000); Fla. Right to Life v. Lamar, 238 F.3d 1288 (11th Cir. 2001) (affirming Fla. Right to Life v. Mortham, No. 98-770CIVORL19A, 1999 WL 33204523 (M.D. Fla. 1999)). FEC v. Colo. Republican Fed. Campaign Comm., 839 F. Supp. 1448 (D. Colo. 1993), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded on other grounds*, 518 U.S. 604 (1996); FEC v. Christian Coalition, 52 F. Supp. 2d 45 (D.D.C. 1999); FEC v. NOW, 713 F. Supp. 428 (D.D.C. 1989); FEC v. AFSCME, 471 F. Supp. 315 (D.D.C. 1979); Kansans for Life, Inc. v. Gaede, 38 F. Supp. 2d 928 (D. Kan. 1999); Clifton v. FEC, 927 F. Supp. 493 (D. Me. 1996), *aff'd on other grounds*, 114 F.3d 1309 (1st Cir. 1997); Planned Parenthood Affiliates of Mich. v. Miller, 21 F. Supp. 2d 740 (E.D. Mich. 1998); Right to Life of Mich., Inc. v. Miller, 23 F. Supp. 2d 766 (W.D. Mich 1998); N.C. Right to Life, Inc. v. Leake, 108 F. Supp. 2d 498 (E.D.N.C. 2000); Right To Life of Dutchess County, Inc. v. FEC, 6 F. Supp. 2d 248 (S.D.N.Y. 1998); FEC v. Survival Educ. Fund, No. 98 Civ. 0347, 1994 WL 9658, (S.D.N.Y. Jan. 12, 1994), *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995); Oklahomans for Life v. Luton, No. CIV-00-1163, slip. op. (W.D. Okla. May 25, 2001); West Virginians For Life, Inc. v. Smith, 919 F. Supp. 954 (S.D. W. Va. 1996).

State cases recognizing constitutional protection of unfettered issue advocacy include: Alaska v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999); Conn. v. Proto, 526 A.2d 1297 (Conn. 1987); Doe v. Mortham, 708 So. 2d 929 (Fla. 1998); Brownsburg Area Patrons Affecting Change v. Baldwin, 714 N.E. 2d 135 (Ind. 1999); Klepper v. Christian Coalition, 259 A.D.2d 926 (N.Y. App. Div. 1999); Osterberg v. Peca, 12 S.W.3d 31 (Tex. 2000); Va. Soc'y for Human Life v. Caldwell, 500 S.E.2d 814 (Va. 1998); Wash. State Republican Party v. Wash. State Public Disclosure Comm'n, 4 P.3d 808 (Wash. 2000); Elections Bd. v. Wisconsin Mfr. & Commerce, 597 N.W.2d 721 (Wisc. 1999).

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

II. ASSOCIATION TO AMPLIFY ISSUE ADVOCACY IS CONSTITUTIONALLY PROTECTED

The people's issue advocacy groups, labor unions, and political parties are private organizations that provide a vehicle for average citizens to effectively participate in the political process, by pooling resources resources to amplify the citizens' voices in order to advocate issues of public concern, lobby for legislation, and directly promote the election of candidates. The wealthy and powerful have no such need, but citizen groups are a vital populist tool for maintaining that equality envisioned in the *Declaration of Independence.*

The pejorative use of the term "special interests" by campaign finance "reformers" to refer to authentic citizen groups, as opposed to business interests where the notion might have some applicability, displays a profound ignorance of constitutional rights and of the vital contributions such organizations make as mediating elements in the social structure. Authentic grassroots citizen groups are not part of the problem this nation faces; they are part of the solution. Americans, from the beginning, have been a nation of joiners. As Alexis de Tocqueville observed nearly two centuries ago, such associationalism is part of the genius of America: "Americans of all ages, all conditions, and all dispositions constantly form associations."[32] He added that

> [i]n democratic countries the science of association is the mother of science; the progress of all the rest depends upon the progress it has made.
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> Among the laws that rule human societies there is one which seems to be more precise and clear than all the others. If men are to remain civilized or to become so, the art of associating together must grow and improve in the same ratio in which the equality of conditions is increased.[33]

Tocqueville elaborated on the necessity of associations as a check on governmental power, despite the resistance of incumbent government officials to associations and the misguided mistrust some people feel for associations, in words that seem targeted at current campaign finance "reform" efforts, but for the fact that they were written in 1840:

> Among democratic nations it is only by association that the resistance of the people to the government can ever display itself; hence the latter always looks with ill favor on those associations which are not in its power; and it is well worthy of

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32. ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 106 (Phillips Bradley, ed. Vintage Books ed. 1990) (1840) (chap. V, para. 2).

33. *Id.* at 110 (chap. V, para. 14).

> remark that among democratic nations the people themselves often entertain against these very associations a secret feeling of fear and jealousy, which prevents the citizens from defending the institutions of which they stand so much in need. The power and duration of these small private bodies in the midst of the weakness and instability of the whole community astonish and alarm the people, and the free use which each association makes of its natural powers is almost regarded as a dangerous privilege.[34]

Tocqueville continued by warning of the danger of permitting incumbent government officials to control the people's associations:

> Among all European nations there are some kinds of associations or companies which cannot be formed until the state has examined their by-laws and authorized their existence. In several others attempts are made to extend this rule to all associations; the consequences of such a policy, if it were successful, may easily be foreseen.
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> If once the sovereign has a general right of authorizing associations of all kinds upon certain conditions, he would not be long without claiming the right of superintending and managing them, in order to prevent them from departing from the rules laid down by himself. In this manner the state, after having reduced all who are desirous of forming associations into dependence, would proceed to reduce into the same condition all who belong to associations already formed; that is to say, almost all men who are now in existence.[35]

Tocqueville highlighted the vital importance of associations in democracies as bulwarks against the dangers of majoritarianism, despotism, and conspiracies: "At the present time the liberty of association has become a necessary guarantee against the tyranny of the majority . . . . There are no countries in which associations are more needed to prevent the despotism of faction or the arbitrary power of a prince than those which are democratically constituted."[36] The freedom to associate "offers a security against dangers of another kind; in countries where associations are free, secret societies are unknown. In America there are factions, but no conspiracies."[37]

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34. *Id.* at 311-12 (chap. V, para. 31).

35. *Id.* at 312 (chap. V, paras. 32-33).

36. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 194-95 (Phillips Bradley ed., Vintage Books ed. 1990) (1835) (chap. XII, paras. 13-14).

37. *Id.* at 195 (chap. XII, para. 16).

Tocqueville concluded that free association is an inalienable right and issued a warning seemingly targeted directly at campaign finance "reformers":

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures, and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. *No legislator can attack it without impairing the foundations of society.*[38]

The decline of associationalism and its accompanying social capital – symbolized by "bowling alone"[39] – is a matter of contemporary concern. Authentic citizen groups indeed have interests to advance, but such associationalism is an essential dynamic of democracy. They should be encouraged, not demonized.

The right to associate and the ability of average citizens to thereby affect public policy are so essential to our democratic Republic that the United States Supreme Court has recognized free association as a fundamental right with powerful constitutional protections. This liberty to associate, like political speech, is a First Amendment right and "the constitutional guarantee [of the First Amendment] has its *fullest and most urgent application* precisely to the conduct of *campaigns for political office.*"[40] The right was articulated well in *NAACP v. Alabama*[41] when the Supreme Court rejected Alabama's attempt to compel disclosure of the membership list of the National Association for the Advancement of Colored People.[42] The unanimous Court strongly affirmed constitutional protection for free political association:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to

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38. *Id.* at 196 (chap. XII, para. 17) (emphasis added).

39. ROBERT D. PUTNAM, BOWLING ALONE: AMERICA'S DECLINING SOCIAL CAPITAL (1995). Putnam's insights were based, in part, on his twenty-year study of Italy. *Id.* at 344-46. He chronicled the political results of the northern regional governments' emphasis on associationalism (resulting in trust, cooperation, and successful government) versus the southern regional governments' emphasis on radical autonomy (resulting in distrust, discord, and unsuccessful government). *Id.* at 344-46 (noting that Putnam published his findings in MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1993)).

40. Buckley v. Valeo, 424 U.S. 1, 15 (1976) (emphasis added).

41. 357 U.S. 449 (1958).

42. *Id.* at 466.

> engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to *political*, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.[43]

The Court held that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[44]

In *Buckley v. Valeo*, the Court reaffirmed the constitutional protection for association: "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . . [Consequently,] the First and Fourteenth Amendments guarantee 'freedom to associate with others for the common advancement of *political* beliefs and ideas.'"[45] The Court reiterated that "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[46] This highest level of constitutional protection flows from the essential function of associations in allowing effective participation in our democratic Republic. Organizations from political action committees (PACs) to ideological corporations, labor unions, and political parties, exist to permit "amplified individual speech."[47]

These powerful constitutional protections for the political liberties of unfettered issue advocacy and association are the benchmarks against which to measure the two key campaign finance reform proposals for

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43. *Id.* at 460-61 (citations omitted) (emphasis added).

44. *Id.* at 462 (internal quotation and citations omitted) (emphasis added).

45. *Buckley*, 424 U.S. at 15 (citations omitted).

46. *Id.* at 25 (quoting NAACP v. Alabama, 357 U.S. 449, 460-61 (1958)). When only an associational interest is involved, as with limits on cash contributions to candidates, the government need only demonstrate that the "contribution regulation was 'closely drawn' to match a 'sufficiently important interest.'" Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387-88 (2000). However, when speech is limited, the statute is subject to strict scrutiny, requiring the government to demonstrate that the regulation is narrowly tailored to advance a compelling governmental interest. *See Buckley*, 424 U.S. at 64-65. This is the same standard employed for expressive association. Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2456-57 (2000); Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984).

47. Democratic Party of the United States v. Nat'l Conservative PAC, 578 F. Supp. 797, 820 (E.D. Pa. 1983).

2001: McCain-Feingold and Shays-Meehan. Both bills fall beyond the constitutional pale.[48]

III. MCCAIN-FEINGOLD ASSAILS THESE POLITICAL LIBERTIES

"Many of the so-called reforms floating around Washington are in fact nothing more than incumbent protection acts . . . Many politicians feel threatened by negative advertisements and want to control what is said during campaigns."[49] Others want to reduce spending on campaigns, particularly by "outside" groups.[50]

Chief among these proposals is McCain-Feingold, the Bipartisan Campaign Reform Act of 2001 (McCain-Feingold),[51] sponsored principally by Senators John McCain and Russell Feingold. Though announced with the promise of reducing the corrupting influence of big money, McCain-Feingold is instead a broad attack on citizen participation in our democratic Republic. As a result, the bill enhances the power of already powerful wealthy individuals, incumbent politicians, and large news corporations at the expense of the "little guy."

The two weeks of Senate debate and action on amendments to McCain-Feingold had a predictable outcome - serving the respective Senators' electoral self-interests. For example, the Senate approved increased contribution limits to candidates[52] and price controls for candidate broadcast advertisements[53] that fill candidate campaign chests. The Senate also adopted an amendment that raises candidate

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48. *See infra* Parts III & IV.

49. *Comments of House Majority Whip Tom Delay*, MONEY & POLITICS REPORT 1 (May 26, 1999). The comments of Senator Bingaman, when introducing a proposed amendment to McCain-Feingold requiring broadcasters to give candidates free equivalent air time to respond to citizen group ads that "attack or oppose" a candidate, reveals this control motif: "you are conducting a campaign . . . addressing the issues voters care about; you are trying to give the people . . . the best vision you can for where this country should go . . . and you turn on the television . . . and see an ad attacking you for some issue . . . ." 147 CONG. REC. S3111 (daily ed. Mar. 29, 2001) (statement of Sen. Bingaman).

50. *See* 145 CONG. REC. S423 (daily ed. Jan. 19, 1999) (statement of Sen. Feingold). Upon the introduction of Senate Bill 27, the McCain-Feingold Campaign Finance Reform Bill of 1999, Senator Russell Feingold stated: "The prevalence–no–the dominance . . . of money in our system of elections and our legislature will in the end cause them to crumble." *Id.*

51. McCain-Feingold, S. 27, 107th Cong. (2001). As passed by the Senate, the bill is available on-line at the U.S. Congress' Web site. *Thomas*, *at* http://thomas.loc.gov (last visited Apr. 16, 2001).

52. 147 CONG. REC. S3002 (daily ed. Mar. 22, 2001) (Thompson amendment, Senate Amend. 149).

53. 147 CONG. REC. S2600 (daily ed. Mar. 20, 2001) (Toricelli amendment, Senate Amend. 122).

contribution limits when candidates face wealthy opponents who substantially finance their own campaign.[54]

The Senate defeated amendments that would have reduced the flow of money to incumbent politicians, such as the Bennett amendment, which would ban the use of corporate and labor union treasury funds to pay the administrative expenses of connected PACs.[55] Likewise, the Senate defeated the Smith amendment, which would have banned contributions from lobbyists and PACs while Congress was in session.[56] In each of these cases, the incumbent politicians' personal benefit ruled the day.

Finally, the Senate defeated all efforts to delete or weaken McCain-Feingold's central provisions,[57] which assault the average citizen's ability to participate in the political process. These provisions target and restrict citizen groups that serve as the only effective vehicles by which average citizens may pool their money to express themselves effectively: issue advocacy groups, labor unions, and political parties.

Campaign finance "reform" proposals do not, and could not, eliminate the power of the giant news media corporations to promote their special interests because they are protected by the First Amendment from regulation of editorial content and news coverage. In addition, the wealthy may not be prohibited from spending their own money, either to express their views on public issues and candidates[58] or to advocate their

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54. 147 CONG. REC. S2595-96 (daily ed. March 20, 2001) (Domenici amendment, Senate Amend. 115). Obvious questions arise with this so-called "millionaire's amendment": Because political corruption is the justification for contribution limits, why would this concern evaporate in the face of wealthy competition for office? Is the amendment also subject to equal protection attack?

55. 147 CONG. REC. S2550-60 (daily ed. Mar. 20, 2001) (Bennett amendment, Senate Amend. 117).

56. 147 CONG. REC. S2561-67 (daily ed. Mar. 20, 2001) (Smith amendment, Senate Amend. 118).

57. *See, e.g.*, 147 CONG. REC. S3070-76 (daily ed. Mar. 29, 2001) (DeWine amendment, Senate Amend. 152) (noting that the Senate defeated the amendment striking Title II of S. 27).

58. For example, a billionaire New York financier, Jerome Kohlberg, formed and almost entirely bankrolled a nonprofit organization called Campaign for America, which expended nearly $500 thousand in the 1998 election to run independent expenditures attacking Republican Senate nominee Jim Bunning in Kentucky for opposing so-called campaign finance reform. Kohlberg is a long-time contributor to liberal Democratic causes and candidates. The Democratic candidate was Congressman Scotty Baesler, who has strongly advocated placing severe restrictions on the right of such advocacy groups (he calls them "special interests") to spend money to praise or criticize federal politicians. Baesler's own campaign reform bill (House Bill 1366, in 1998) would have prohibited such expenditures, but he hypocritically made no effort to oppose the expenditures on his behalf. *See FEC Drops Case Involving Reform Group Founded by Financier Jerome*

own respective elections. The wealthy, however, do not need to pool their resources to be effective because they can pay for communications about their special interests. Furthermore, millionaire candidates are still advantaged under McCain-Feingold, despite the Domenici amendment, because they need not rely on contributions from others; they can spend their own money to campaign. In addition, officeholders have the incredible power of incumbency to support their campaigns, which is the type of power that Senate action on McCain-Feingold sought to enhance. Thus, campaign finance reform, as proposed by McCain-Feingold, strips power from the people and gives it to the wealthy and powerful. It is no wonder that wealthy foundations and individuals are prime supporters of so-called campaign finance "reform,"[59] that the main stream media is the primary cheerleader for it, and that incumbent politicians are so attracted to it.

A. McCain-Feingold Suppresses Rights of Average Citizens to Participate in the Political Arena by Pooling Resources Because It Bars Corporations and Labor Unions from Engaging in Any "Electioneering Communication"

McCain-Feingold prevents political participation by citizens of average means by broadly defining "electioneering communication" so that issue advocacy expenditures currently permitted become forbidden under federal law for corporations[60] and labor unions.[61] "Electioneering

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Goldberg, MONEY & POLITICS REPORT, Mar. 22, 2001; First General Counsel's Report, FEC MUR 4940 (Dec. 21, 2000).

59. For example, Public Campaign's founder Ellen Miller has criticized the million-dollar contributions to political parties, yet she accepted "$1 million from former Democratic representative Cecil Heftel of Hawaii and $3 million from the foundation of philanthropist George Soros to pay for her crusade to have taxpayers finance congressional campaigns." Chuck Raasch, *Big Money, With Interest*, USA TODAY, June 17, 1997, at A7. Such major donors helped Public Campaign to put together "a $9.2 million, three-year push for the public financing of campaigns." *Id.* Figures on such major donations are difficult to establish, however, because when asked to disclose donors (as McCain-Feingold would require) groups like Public Citizen, Sierra Club Foundation, and the U.S. Public Interest Research Group all decline. *Id.*

The extended Gannett News Service article, from which the above article was derived, provided evidence that major-donor giving to campaign finance "reform" organizations is on the way up. Chuck Raasch, *Do Public Interest Groups That Push Campaign Reform Really Represent Citizens?*, GANNETT NEWS SERV., June 13, 1997, at 3. Raasch also noted that the Schumann Foundation (New Jersey) gave or pledged more than $14 million to various campaign-finance reform causes between 1994 and 1997 and that Robert Pambianco, a scholar of campaign-finance reform, stated that contributions to such efforts "had become trendy among foundations" and were expected to expand. *Id.* at 4.

60. Section 441b(a) says "[i]t is unlawful for . . . any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any

communication" is defined as "any broadcast, cable, or satellite communication" to "members of the electorate" that "refers to a clearly identified [federal] candidate . . . within . . . 60 days before a general . . . election [or 30 days before primaries, conventions, or caucuses]."[62]

This broad definition of "electioneering communication" prohibits issue advocacy communications traditionally conducted by such organizations. Because Congress is often in session within sixty days before a general election and thirty days before a primary, any grassroots lobbying regarding a bill to be voted on during this sixty-day period would be prohibited if the broadcast communication named a candidate by referring to the bill in question or by asking a constituent to lobby his or her Congressman or Senator. Also, because presidential races include ongoing primaries, caucuses, and conventions for months leading up to the election, broadcast advertisements asking constituents to lobby an official who is also a presidential candidate could potentially be banned for most of an election year.

With corporations and labor unions prohibited from making such communications, McCain-Feingold then requires those that may still do so, that is, individuals and PACs, to file reports with the FEC if they expend over $10 thousand per year.[63] Among other things, the reports must list every disbursement over $200 and to whom it was made, the candidate(s) to be identified, and the identity of all contributors whose aggregate contribution is $1,000 or more during the year.[64]

Of course, the no-reference test in McCain-Feingold's "electioneering communication" definition brazenly ignores the high wall of separation protecting issue advocacy. In Michigan, the Secretary of State promulgated a materially-identical rule that banned corporate and labor union communications that contained the "name or likeness of a candidate" from being made within forty-five days of an election.[65] Two

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election." 2 U.S.C. § 441b(a) (2000). McCain-Feingold expands the definition of "contribution or expenditure" in § 441b(b)(2) to include "any applicable electioneering communication." S. 27, 107th Cong. § 203 (2001).

61. The AFL-CIO issued a position paper at its Los Angeles executive council meeting in February 2001, stating strong opposition to McCain-Feingold's restrictions on "electioneering communication" and "coordinated activities" that would prohibit issue advocacy by labor unions. AFL-CIO, S. 27 - McCain-Feingold Campaign Finance Reform Bill (Feb. 2001), *available at* http://www.aflcio.org/reform/mccainbill.htm.

62. S. 27, 107th Cong. § 201 (2001). Electioneering communications was added to the list of activities prohibited by corporations and labor unions. *Id.* § 203.

63. *Id.* § 201.

64. *Id.*

65. *See* Right to Life of Mich., Inc. v. Miller, 23 F. Supp. 2d 766, 767 (W.D. Mich. 1998).

traditional adversaries, Right To Life of Michigan and Planned Parenthood, challenged the rule in separate federal courts and had the rule declared unconstitutional.[66] Likewise, the Second Circuit struck down a "notice of expenditure" statute that defined "mass media activities" as "includ[ing] the name or likeness of a candidate for office" and required reporting if such occurred "within 30 days of a primary or general election."[67] Similarly, the Fourth Circuit struck down a statute requiring reporting of expenditures for communications "if the printed material or advertisement names a candidate."[68]

Anticipating that the federal courts would strike down a provision that bans any *reference* to a candidate during a thirty to sixty day pre-election period, the Senate adopted an even more egregious definition of "electioneering communication," in the Specter amendment, which springs into effect if the thirty or sixty day no-reference ban is stricken.[69] Under the replacement definition, the communications must "promote[] or support[]" or "attack[] or oppose[]" the candidate and be "suggestive of no plausible meaning other than an exhortation to vote for or against that candidate."[70] Notably, this definition applies all the time, not just for the thirty or sixty days before an election.[71] Congress' definition blatantly assaults U.S. Supreme Court precedent because it fails to employ the constitutionally-mandated language and declares that its definition applies "regardless of whether the communication expressly advocates a vote for or against a candidate."[72]

In sum, McCain-Feingold treats issue advocacy communications by nonprofit corporations and labor unions as express advocacy communications and organizations participating in issue advocacy as PACs. However, as already established, Congress is not constitutionally warranted to regulate issue advocacy.[73]

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66. Planned Parenthood Affiliates of Mich., Inc. v. Miller, 21 F. Supp. 2d 740, 741, 746 (E.D. Mich. 1998); *Right to Life of Mich.*, 23 F. Supp. 2d at 767, 771.

67. Vt. Right to Life v. Sorrell, 221 F.3d 376, 379-80 (2d Cir. 2000) (quoting VT. STAT. ANN. tit. 17, § 2883).

68. Perry v. Bartlett, 231 F.3d 155, 159 n.2 (4th Cir. 2000) (quoting N.C. GEN. STAT. §163-278.12A).

69. S. 27, 107th Cong. § 201 (2001).

70. *Id.* This language also raises void-for-vagueness constitutionality concerns, especially in light of the precision required where precious First Amendment rights are concerned.

71. *Id.*

72. *Id.*

73. *See supra* Part II.

B. The Minor Exception for Certain Nonprofits – Practically Eliminated by Amendment – Requires Them to Act Like Quasi-PACs, in Violation of Constitutional Rights

McCain-Feingold makes a very minor exception for nonprofits: (1) permitting expenditures for "electioneering communication"; (2) applying only to those organizations tax exempt under sections 501(c)(4) or 527 of the Internal Revenue Code; and (3) applying only if expenditures are made by a quasi-PAC established by the corporation, to which contributions can only be made by individuals, and all receipts and disbursements must be reported.[74]

The first thing to note about this minor exception is that it only applies to section 501(c)(4) and section 527 organizations. All other nonprofits are excluded from engaging in issue advocacy for a couple of months prior to an election, including section 501(c)(3) organizations, veterans groups, trade associations, and labor unions. These organizations, using existing resources, are still prohibited from making such communications. Notably, most issue-advocacy organizations are organized under section 501(c)(3).

Furthermore, a quasi-PAC is required to report all contributors of $1,000 or more.[75] This is a very substantial burden because it exposes contributors to harassment and intimidation by ideological foes.[76] In

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74. S. 27, 107th Cong. § 203 (2001). Furthermore, if the "electioneering communication" is "coordinated" with a candidate's election, it is subject to candidate contribution limits. *Id.* § 214. Moreover, a "501(c)(4) organization that derives amounts from business activities or receives funds from any [corporation] . . . shall be considered to have paid for any communication out of such amounts unless such organization paid for the communication out of [the quasi-PAC fund]." *Id.* § 203. Section 203 applies regardless of whether the business income flows from the sale of items closely related to the ideological issue of the nonprofit (e.g., sale of pro-life literature by the National Right to Life Committee), how minimal the corporate contributions are, whether "electioneering communication" is the major purpose of the organization, or whether the organization poses any threat of quid pro quo corruption, contrary to the teaching of the federal courts in several cases. *See, e.g.*, Day v. Holahan, 34 F.3d 1356, 1364-65 (8th Cir. 1994).

75. S. 27, 107th Cong. § 201 (2001).

76. Campaign finance "reformer" organizations accept major donations (e.g., Public Campaign accepted "$1 million from former Democratic representative Cecil Heftel of Hawaii and $3 million from the foundation of philanthropist George Soros"), but then declined to disclose their donors. Chuck Raasch, *Big Money, With Interest*, USA TODAY, June 17, 1997, at A7.

The extended Gannett News Service article, from which the above article was derived, gave the reasons stated by these organizations for not wanting to disclose their donors. Note the irony of the answers given in light of the donor disclosure requirements that McCain-Feingold would impose on other citizen advocacy groups that obviously have similar rights and interests:

Buckley, the United States Supreme Court held that such burdens could not be applied to issue-oriented groups because disclosure of private associations is an unconstitutional burden.[77]

What McCain-Feingold initially seemed to offer, it promptly withdrew with the adoption of the Wellstone amendment. As amended, the preceding exception applies only where the communication is not "targeted."[78] For example, broadcast communications are targeted when they are aimed "primarily [at] residents of the State for which the . . . candidate is seeking office."[79]

C. McCain-Feingold Prohibits Corporations and Labor Unions from Engaging in Any "Coordinated Expenditure"

McCain-Feingold prohibits corporations and labor unions from funding any "coordinated expenditure."[80] Originally the bill banned "coordinated *activity*," but Senator McCain acknowledged that the ban was unconstitutionally overbroad when he submitted a successful

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> Top officials in Public Citizen and the Sierra Club Foundation, a separate tax-exempt offshoot of the environmental organization, argued that divulging their donor list either would give an unfair advantage to competitors or unfairly expose identities of their members.
>
> As I'm sure you are aware, citizens have a First Amendment right to form organizations to advance their common goals without fear of investigation on harassment." Public Citizen President Joan Claybrook told GNS." . . . We respect our members' right to freely and privately associate with others who share their beliefs, and we do not reveal their identities. We will not violate their trust simply to satisfy the curiosity of Congress, or even the press." . . .
>
> Bruce Hamilton, national conservation director for the Sierra Club Foundation, said . . . "[t]hat is basically like saying . . . 'give us your membership . . . .'" In effect, it is saying, "we want public disclosure of the 650,000 members of the Sierra Club," which is a valuable resource, coveted by others, because they can turn around and make their own list.
>
> And it can also be turned around and used against them. We have members in small towns in Wyoming, Alaska, (who could be hurt) if word got out they belonged to the Sierra Club.

Chuck Raasch, *Do Public Interest Groups That Push Campaign Reform Really Represent Citizens?*, GANNETT NEWS SERV., June 13, 1997, at 3.

77. Buckley v. Valeo, 424 U.S. 1, 42-45 (1976); *see also* NAACP v. Alabama, 357 U.S. 449, 462 (1958) (mandating that disclosure of contributors violates privacy of donors and inhibits free association).

78. S. 27, 107th Cong. § 204.

79. *Id.*

80. *Id.* § 214; *see also* 2 U.S.C. § 441b(a) (2000). "Coordinated expenditure" is "a payment made in concert or cooperation with, at the request or suggestion of, or pursuant to any *general* or particular *understanding* with, such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." S. 27, 107th Cong. § 214 (2001) (emphasis added).

amendment to alter the language.[81] The new language still uses overbroad and vague terminology that will convert many constitutionally permissible expenditures into forbidden contributions.

McCain-Feingold instructs the Federal Election Commission (FEC) to create regulations to implement the definition of coordinated expenditure and specifies that the new regulations "*shall not require collaboration or agreement* to establish coordination."[82] This coordination provision suffers several constitutional flaws: (1) "general understanding" is unconstitutionally vague; (2) "coordinated expenditure" is overbroad because it includes issue advocacy and is not justified by a compelling governmental interest; (3) "coordinated expenditure" without "collaboration or agreement" is overbroad; and (4) while PACs could do "coordinated expenditures," they are limited by contribution limits, virtually eliminating constitutionally protected independent expenditures.

1. "General Understanding" Is Unconstitutionally Vague

A "coordinated expenditure" includes "a payment made . . . pursuant to any *general . . . understanding* with [a] candidate."[83] The term "general understanding" is unconstitutionally vague because it provides no notice to organizations, subject to civil and criminal sanctions, as to what activity is prohibited. The express advocacy test was created in *Buckley* to cure vagueness in FECA and should be employed here for the same

81. 147 CONG. REC. S3184-87, S3193-94 (daily ed. Mar. 30, 2001) (SA 165).

82. S. 27, 107th Cong. § 214 (2001) (emphasis added).

83. *Id.* FECA bans a corporate/labor union "contribution or expenditure." 2 U.S.C. § 441b(a) (2000). The phrase "contribution or expenditure" is defined in § 441b(b)(2). "Contribution" is further defined in § 431(8). McCain-Feingold, however, amends this definition by adding language that implements its drastically expanded coordination theory of "contribution" by listing a "coordinated expenditure" and an expenditure coordinated with a political party as contributions regardless of whether they involve express advocacy. S. 27, 107th Cong. § 214 (2001). The bill also amends § 431(8) by adding the definition of "coordinated activity." *Id.* McCain-Feingold then adds additional language to define "coordinated expenditure or other disbursement" using its broad "general understanding" language. *Id.* A consequence of adding the expanded definition of "coordinated activity" to the definition of "contribution" in § 431(8) is that an organization whose major purpose becomes "coordinated activity" is deemed to be a federal PAC and therefore subject to all PAC limitations and regulations. Of course, issue advocacy cannot properly be counted as political speech that renders an organization a PAC. *See supra* notes 21-24 and accompanying text (discussing the protected nature of unfettered issue advocacy).

reason. Vital First Amendment rights require bright-line protection so that speakers need not "hedge and trim."[84]

2. "Coordinated Expenditure" Is Overbroad Because It Includes Issue Advocacy and Is Not Justified by a Compelling Governmental Interest

In addition to serving as a bulwark against vagueness, the express advocacy test also prevents overbreadth in the First Amendment area.[85] To prevent overbreadth, the Supreme Court held that the government only has an interest in regulating *speech* that "expressly advocate[s] the election or defeat of a clearly identified candidate."[86] Therefore, the express advocacy test should govern coordinated expenditures just as it did for uncoordinated expenditures in *Buckley* and *MCFL*.[87]

The FEC's efforts to regulate issue advocacy as coordinated expenditures have twice been struck down.[88] A federal court in Colorado rejected the FEC's attempts to extend its coordination regulations into the realm of issue advocacy, finding that "the fact that [the coordination provision] implicates first amendment freedoms argues for adoption of the more narrowly defined 'express advocacy' interpretation in order to minimize intrusions."[89] Therefore, the court concluded "that 'express advocacy' is required in order for a coordinated expenditure to be 'in connection with' the general election campaign."[90]

A federal court in Maine also blocked efforts to treat issue advocacy as coordinated, holding that "as long as the Supreme Court holds that expenditures for issue advocacy have broad First Amendment protection, the FEC cannot use the mere act of communication between a corporation and a candidate to turn a protected expenditure for issue advocacy into an unprotected contribution to the candidate."[91]

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84. *See* Buckley v. Valeo, 424 U.S. 1, 43 (1976) (quoting Thomas v. Collins, 323 U.S. 516, 535 (1945)).

85. *Id.* Regulation that extends beyond the government's compelling interest is overbroad. *See id.*

86. *MCFL*, 479 U.S. 238, 248-49 (1986) (quoting *Buckley*, 424 U.S. at 80).

87. For a fuller discussion of why coordinated expenditures must exclude issue advocacy and the lowered governmental interest in regulating such expenditures see James Bopp, Jr. & Heidi K. Abegg, *The Developing Constitutional Standards for "Coordinated Expenditures": Has the Federal Election Commission Finally Found a Way to Regulate Issue Advocacy?*, 1 ELECTION L.J. 209 (2002).

88. *See* FEC v. Colo. Republican Fed. Campaign Comm., 839 F. Supp. 1448, 1454-55 (D. Colo. 1993); Clifton v. FEC, 927 F. Supp. 493, 496-500 (D. Me. 1996).

89. *Colo. Republican*, 839 F. Supp. at 1454.

90. *Id.* at 1455.

91. *Clifton*, 927 F. Supp. at 500.

Even the lone federal district court to allow some theoretical regulation of coordinated issue advocacy would only permit regulations that reach slightly beyond the area of express advocacy.[92] The federal district court in Washington, D.C. theorized that the FEC might be allowed to regulate payments for advertisements so close to the express advocacy threshold that they "would be every bit as beneficial to the candidate as a cash contribution of equal magnitude," such as "gauzy candidate profiles prepared for television broadcast or use at a national political convention" or "coordinated attack advertisements, through which a candidate could spread a negative message about her opponent."[93]

In contrast, the circuit court in Washington, D.C. upheld the FEC's recognition that the express advocacy requirement was vital to its regulatory scheme and that its regulatory power therefore did not reach corporate donations for a non-political picnic sponsored by a committee and organized by a Congressman.[94] In that case, the FEC followed a clear and objective test "for distinguishing between political and non-political congressional events," establishing that "[a]n event is non-political if (1) there is an absence of any communication expressly advocating the nomination or election of the congressman appearing or the defeat of any other candidate, and (2) there is no solicitation, making, or acceptance of a campaign contribution for the congressman in connection with the event."[95] Although the Court of Appeals for the District of Columbia Circuit stopped short of holding the FEC's express advocacy test to be constitutionally required in the context of coordinated expenditures, it did uphold the test as "logical, reasonable, and consistent with the overall statutory framework."[96] This description does not apply to the far-reaching and standardless approach that McCain-Feingold proposes.[97]

McCain-Feingold's effort to turn express advocacy independent expenditures into prohibited corporate contributions by means of a broad definition of coordination also bears close examination with respect to whether a compelling interest could justify such intrusion on First Amendment rights. The governmental interest in *banning*

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92. *See generally* FEC v. Christian Coalition, 52 F. Supp. 2d 45 (D.D.C. 1999).

93. *Id.* at 88.

94. Orloski v. FEC, 795 F.2d 156, 158 (D.C. Cir. 1986) (describing the picnic); *id.* at 160 (giving the FEC's position); *id.* at 165-67 (upholding the FEC's position).

95. *Id.* at 160.

96. *Id.* at 167.

97. *See supra* notes 60-62 and accompanying text.

corporate contributions is the concern that a corporation may skew the political process by advocating the election or defeat of candidates through the use of large quantities of funds obtained, not from contributors interested in the corporation's political agenda, but from investors interested in making money through the corporate form.[98]

Requiring *disclosure* of independent expenditures on express advocacy is permissible because it "lessens the risk that individuals will spend money to support a candidate as a quid pro quo for special treatment."[99] However, *limits* on independent expenditures, even limits construed only to encompass express advocacy expenditures, violate the Constitution.[100] Hence, the severity of the burden posed by contribution limits allows their application only to a subset of the broader category of express advocacy, which can be subjected to disclosure provisions.

The Court has emphasized that limits on *expenditures* impose a far greater burden on speech than limits on *contributions*: "expenditure limitations . . . represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech," whereas contribution limits "entail[] only a marginal restriction upon the contributor's ability to engage in free communication."[101] This is because a "contribution serves as a general expression of support for the candidate" that "does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing."[102]

In contrast, a limit on communications "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[103] It is because of this distinction that contributions are subject to limits that cannot be imposed upon expenditures.[104]

Although McCain-Feingold seeks to treat the proposed communications as contributions, the impact of § 441a's limits would be that of a spending limit rather than a contribution limit. As the Supreme Court has noted, "coordinated expenditures ... share some of the constitutionally relevant features of independent expenditures."[105]

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98. *See MCFL*, 479 U.S. 238, 257-59 (1986).
99. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 356 (1995).
100. *See* Buckley v. Valeo, 424 U.S. 1, 43-48 (1976)
101. *Id.* at 19-21.
102. *Id.* at 21.
103. *Id.* at 19.
104. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 386-88 (2000).
105. Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 624 (1996).

Consequently, McCain-Feingold lacks the requisite compelling governmental interest to justify its conversion of independent expenditures into prohibited corporate contributions.

There is also an extremely practical reason for avoiding what McCain-Feingold attempts. If coordination is broadly defined, then many political activities would prompt complaints to the FEC that would become burdensome investigations to determine whether coordination has occurred. If issue advocacy may be a coordinated expenditure, then every citizen group may be investigated for every communication. The investigation itself could become a punishing burden.

While theoretically it may be possible to do issue advocacy without running afoul of its being a prohibited "electioneering communication" or "coordinated expenditure," only the reckless, foolish, or wealthy and powerful are likely to try. Particularly in Washington, D.C., the punishment is in the process. Any organization that does something that could be deemed of value to a candidate can expect to be the subject of an FEC complaint and investigation to determine whether the activity was "coordinated." For instance, publicly praising an officeholder for her vote on a bill invites investigation by the FEC. In addition, daring to tell constituents to get an incumbent to change his position on an upcoming vote could provoke an FEC investigation. This is the world of ubiquitous FEC investigations that all advocacy groups can expect under McCain-Feingold.

These "mere" investigations themselves violate the First Amendment. As the Supreme Court explained when Congress was busy investigating Communist influence in the 1940s and 1950s, "[t]he mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of government[] interference" with First Amendment freedoms.[106]

3. "Coordinated Expenditure" Without "Collaboration or Agreement" Is Overly Broad

McCain-Feingold instructs the FEC to promulgate rules implementing this "general understanding" concept of coordination without requiring "collaboration or agreement."[107] Under current law, coordination between a candidate and a citizen group exists only when there is

106. Watkins v. United States, 354 U.S. 178, 197 (1957); *see also* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); White v. Lee, 227 F.3d 1214, 1228-29 (9th Cir. 2000) (ruling that an investigation by HUD officials unconstitutionally chilled First Amendment rights).

107. S. 27, 107th Cong. § 214 (2001).

actually prior communication about a specific expenditure for a specific project that effectively puts the expenditure under the candidate's control or is made based on information provided by the candidate about the candidate's needs or plans.[108] However, McCain-Feingold expands "coordination" to include undefined activity absent such "collaboration or agreement."[109]

For example, if an incorporated ideological organization praised Senator McCain for his work on campaign finance "reform" early in a session of Congress and worked with him on promoting such reform legislation, then coordination could be established as a result of this general understanding, and, consequently, expenditures by the organization would be deemed coordinated and would be a contribution to his campaign.[110] This contribution would be illegal because corporations cannot make contributions to candidates.[111]

Under McCain-Feingold, American citizens who communicated or worked with their elected officials could be punished for making any subsequent efforts to praise the candidate's issue position or to support the candidate in his or her campaign because such activity might be considered a coordinated activity. This is repugnant to our constitutional scheme of participatory government in a democratic Republic run by and answerable to the people. In a conceptually related context, *Clifton v. FEC*,[112] the Court of Appeals for the First Circuit struck down the FEC's voter guide regulations, which prohibited any oral communications with candidates in preparation of voter guides.[113] The court held that this rule is "patently offensive to the First Amendment" and that it is "beyond reasonable belief that, to prevent corruption or illicit coordination, the

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108. *See infra* notes 117-125 & accompanying text (describing the current status of the law). The FEC has also published final rules governing coordinated expenditures that defines "coordination" narrowly. *See* 11 C.F.R. § 100.23(c) (2001). McCain-Feingold repeals these rules. S. 27, 107th Cong. § 214 (2001).

109. S. 27, 107th Cong. § 214 (2001) (amending 2 U.S.C. § 431(8) to include payments made "pursuant to any general or particular understanding with a candidate or his campaign machinery").

110. 2 U.S.C. § 431(8) (2000); S. 27, 107th Cong. § 214 (2001).

111. A "contribution" must be reported by a candidate, even if he does not know about it. 2 U.S.C. § 434 (2000). It is a potential crime if he does not. *Id.* § 437g(d) (if the violation is found to be "knowing and willful" despite the candidate's assertion of no knowledge).

112. 114 F.3d 1309 (1st Cir. 1997).

113. *Id.* at 1317.

government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues."[114]

Under McCain-Feingold as introduced, coordination would also have been presumed if the ideological corporation used the same vendor of "professional services," including "polling, media advice, fundraising, campaign research, political advice, or direct mail services (except for mailhouse services)" if the vendor had worked for a candidate and if the vendor is retained by the corporation to do work related to that candidate's election.[115] Under the Senate-passed version of McCain-Feingold, FEC regulations would be required to address the issue of a common vendor and similar presumably coordinated activities.[116]

Such presumptions are fatally infirm because coordination must be proven. In *Colorado Republican Federal Campaign Committee v. FEC*,[117] the FEC took the position that party expenditures were presumed to be coordinated with their candidates as a matter of law.[118] The Supreme Court rejected this view stating that "[a]n agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one. . . . [T]he government cannot foreclose the exercise of constitutional rights by mere labels."[119] The Court held that there must be "actual coordination as a matter of fact."[120] Congress or the FEC, therefore, cannot merely recite some factual scenarios wherein it might be possible, or even probable, that coordination with candidates takes place and then presume as a matter of law that it has occurred in such instances.[121] To do so, would allow the government by mere labels to drastically curtail independent expenditures, which cannot be constitutionally limited.[122]

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114. *Id.* at 1314. Furthermore, McCain-Feingold prohibits officeholders from assisting a citizen group in fundraising, unless it is for the group's PAC, S. 27, 107th Cong. § 101 (2001), thereby driving an even bigger wedge between officeholders and citizen groups.

115. Senate Bill 27, as introduced in the Senate, is available online at http://thomas.loc.gov.

116. S. 27, 107th Cong. § 214 (2001).

117. 518 U.S. 604 (1996).

118. *Id.* at 619.

119. *Id.* at 621-22 (citations and internal quotations omitted).

120. *Id.* at 619.

121. *See id.* at 627.

122. *Id.* at 627; *see also id.* at 644-48 (Thomas, J., concurring); FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985); Buckley v. Valeo, 424 U.S. 1, 47-51 (1976); N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 18-19 (1st Cir. 1996); Common Cause v. Schmitt, 512 F. Supp. 489, 493-94 (D.D.C. 1980); Ga. Right to Life v. Reid, No. 1:94-cv-2744-RLV (N.D. Ga. Jan. 22, 1996).

McCain-Feingold's finding of coordination if there is any general understanding with the candidate about the expenditure,[123] goes way beyond the courts' narrow understanding of coordination. Consistent with other federal courts, in *FEC v. Christian Coalition*,[124] the United States District Court for the District of Columbia held that a communication

> becomes "coordinated[]" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners.[125]

This is a far cry from a "general understanding."

4. PACs Could Do a "Coordinated Activity," but Are Severely Limited by Contribution Limits, Eliminating Most Independent Expenditures

For any individual or organization (a federal PAC) that can actually do a "coordinated expenditure," the "coordinated expenditure" would be limited by contribution limits.[126] So a substantial amount of traditional "independent expenditures" by PACs would be swept under the control of McCain-Feingold as contributions and limited because a multi-candidate PAC can only make a contribution of $5,000 per election to a candidate.[127]

D. For the Few Independent Expenditures Not Trapped by Other Provisions, Disclosure Must Be Made When Contracting for Media Time, Creating Opportunity for Mischief by Opposing Candidates

The small number of independent expenditures that are not trapped by the coordination problem yet are hammered by McCain-Feingold because the independent expenditure must be reported when a contract is made for broadcast time, not when the communication is made as

123. S. 27, 107th Cong. § 214 (2001).
124. 52 F. Supp. 2d 45 (D.D.C. 1999).
125. *Id.* at 92.
126. 2 U.S.C. § 441a (2001).
127. 2 U.S.C. § 441a(a)(2)(A) (2001).

under current law.[128] This substantially advances when reporting is due and creates a window of opportunity during which incumbent politicians can try to kill the communication by threatening the broadcaster or organization's donors with retaliation, contacting corporate board members to use their influence, or threatening to oppose legislation favored by the contracting organization or broadcasting corporation.

Common sense dictates rejection of McCain-Feingold's conflation of an "expenditure"[129] with an "independent expenditure."[130] While an *expenditure* may properly encompass a contract for printing or air time, no *independent expenditure* even exists until express advocacy exists, which in turn depends on *communication* to an audience.[131] The FEC understood this in the past,[132] as evidenced by its rule at 11 C.F.R. § 100.16, defining "independent expenditure":

> The term *independent expenditure* means an expenditure for a communication 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.[133]

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128. S. 27, 107th Cong. § 201 (2001).

129. 2 U.S.C. § 431(9) (defining "expenditure" as including "any purchase, payment, distribution . . . and a written contract, promise, or agreement to make an expenditure").

130. 2 U.S.C. § 431(17) (stating that "'independent expenditure' means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate . . . .").

131. *See* James Bopp, Jr. & Richard E. Coleson, *Comments on Proposed Rules at 11 C.F.R. Parts 100, 104, and 109 Regarding Independent Expenditure Reporting* (June 8, 2001), *available at* http://www.fec.gov/pages/ind_expcomments6-08-01.pdf. Among other things the comments note that:

> Common sense has always told public policy organizations that a printed independent expenditure communication is reportable when it is posted and that broadcast express advocacy communications are reportable when put out on the air. That has been the uniform practice of all organizations in their reporting of independent expenditures to date under existing rules.

Id. at 6 n.5.

132. At the time of this writing, November 2001, the FEC is apparently in the process of ill-advised rulemaking – beyond current statutory authority – proposing to require independent expenditures to be reported when a contract is made for the communication. *Id.* at 3 (quoting 66 Fed. Reg. 23,628). The present authors' comments in opposition may be viewed on the FEC's Web site at http://www.fec.gov/ register.htm.

133. 11 C.F.R. § 100.16 (2001) (underscoring added). This requirement of communication is clearly correct. The transitive verb "advocate," as in "expressly advocating," means "[t]o speak, plead, or argue in favor of," which necessarily requires an

Major public policy organizations routinely buy air time in advance of elections in key markets in order to have broadcast time available if the organization decides to make independent expenditures. Then the airtime may not be used due to strategy reasons (and contracts are generally no problem because broadcasters usually have ready markets for freed-up airtime before elections). For example, the organization may decide that independent expenditures are needed more in a different race that has just become more critical based on current polling data.

One example is that of a planned independent expenditure on printed express advocacy pieces in support of Senatorial candidate John Ashcroft by the National Right to Life Committee's PAC in the 2000 Missouri election.[134] When Ashcroft's opponent died, National Right to Life Committee's (NRL) PAC did not think it was necessary to release the brochures and elected to spend its money on other races. Both contracts and payments were made, but there was no communication. It would have been inaccurate and misleading to the public to have such expenditures reported as independent expenditures.

Another example, typical of major public policy organizations, is found in NRL PAC's practice of arranging for telemarketing firms to make express advocacy phone calls into targeted areas at election time. The general agreement is made well in advance of the election, but the agreement is only for a set range of expenditures and the rate per call. At this point, the amount of money that will be available to spend is unknown, for it has not yet been raised. In what state or races the calls will be made is unknown; in fact, it may be decided on the day before the phone calling begins, as last-minute polling indicates where there is a need. Thus, at the time of the agreement for telemarketing services, the total amount to be spent is unknown, as is the location of the calls. The idea of reporting when an agreement for services is made would simply be unworkable for telemarketing. Express advocacy only comes into being when the calling begins.

The same is true of print communications. Major organizations often purchase paper stock in large quantities long before elections. Some generally used materials, such as brochures, may also be printed in advance without any knowledge of where the materials will actually be mailed. The combination of a warehouse full of printed brochures and a

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audience as evidenced by the word's etymology. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000)).

134. James Bopp, Jr. is General Counsel for the National Right to Life Committee. Information about NRL PAC is based on personal knowledge.

paid invoice from the printer does not make an independent expenditure because an independent expenditure requires communication. Unless the brochure is put in the mail, there is no communication, no express advocacy, and no independent expenditure. Therefore, logically, there could be no reporting of an independent expenditure when a contract for printing or air time is made because, absent express advocacy communication to the public, an independent expenditure could not exist.

As may be seen, the proposal to require reporting of independent expenditures when contracts are made for printing or air time is both illogical and unworkable in the real world of major public policy organizations. The present practice of reporting independent expenditures when they are communicated is in place because it is the only reasonable, workable one.

Incumbents, of course, appreciate the proposed legislation because it would provide advance opportunity to dissuade broadcasters and newspapers from carrying independent expenditure communications. Such things do happen.[135]

McCain-Feingold would provide increased time for such mischief, at the expense of First Amendment rights. If broadcasters are willing to cancel advertisements to which they have already committed and that are in process,[136] even though it means they may suffer unwanted publicity for pulling ads in progress, how much easier will it be for intimidation to prevail with the extra time the bill would provide before broadcasting even begins? Candidates seeing reports of contracts would immediately

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135. A concrete example is given by the present authors in their *Comments on Proposed Rules at 11 C.F.R. Parts 100, 104, and 109, supra* note 131, which may be found, along with its exhibits, on the FEC's Web site at http://www.fec.gov/register.htm. It involves the case of *National Right to Life PAC v. Friends for Bryan*, a 1988 case brought in state court by NRL PAC against Nevada Governor Richard Bryan's U.S. Senatorial campaign committee for tortious interference with contractual relations (due to cancelled broadcast arrangements). *See generally* Nat'l Right to Life PAC v. Friends of Bryan, 741 F. Supp. 807 (D. Nev. 1990). Other letters using the same boilerplate language as ones sent in Nevada were employed in North Dakota. The source of this systematic campaign of intimidation was apparently an October 21, 1988, form letter put in evidence that was prepared by Robert F. Bauer, Counsel to the Democratic Senatorial Campaign Committee, from which the other letters were obviously derived. This letter, obtained by legal discovery, reveals a well-orchestrated intimidation effort. The evidence revealed that Governor Bryan's lawyer, Jeffrey L. Eskin, also sent threatening letters to stations concerning independent expenditure ads by the American Medical Association PAC and the Auto Dealers and Drivers for Free Trade PAC. This evidence demonstrates what is usually invisible to the public – a widespread practice of well-planned, systematic intimidation attempts against broadcasters to gain political advantage.

136. *See supra* note 135 (discussing NRL PAC's advertisements that were in process).

demand to see copies of the ads for which the contract had been made, claiming the ads must be perused for libelous or inaccurate materials even though the ad scripts might not even have been created yet. As a result of the opportunity for interference provided by the proposed rule, even if these efforts only delay ads being aired that would be a satisfactory result for the opposition.

As a result of the harassment that would likely arise from the advance reporting of contracts for independent expenditures, many broadcasters would likely be tempted simply not to accept express advocacy communications, thereby depriving advocacy organizations of their opportunity for free speech. The vital ability of Americans to participate in the political process would therefore be thwarted, to the detriment of the Republic.

E. The News Media Exception Highlights the Expanded Power McCain-Feingold Gives Powerful News Corporations and the Wealthy

McCain-Feingold contains an exception from the definition of "electioneering communication" for "a news story, commentary, or editorial distributed through the facilities of any broadcasting station," provided the station is not "owned or controlled by any political party, political committee, or candidate . . . ."[137] However, biased news coverage, whether by slant, tone, manipulation of images, volume of coverage, or even outright advocacy of election or defeat of a candidate by a news corporation, is nowhere restricted by McCain-Feingold. While McCain-Feingold tries to gag ideological corporations, it completely ignores the powerful *business* corporations that own major broadcasting outlets, such as General Electric, which owns NBC; Disney, which owns ABC; and Microsoft, which co-owns MSNBC. *The New York Times* and other newspapers have repeatedly run editorials strongly advocating the passage of McCain-Feingold, but under McCain-Feingold the many ideological corporations that oppose such legislation would be gagged.[138]

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137. S. 27, 107th Cong. § 201 (2001).

138. Running a search on "McCain-Feingold" and "Shays-Meehan" in the archive search feature of *The New York Times*' Web site reveals myriad articles lauding the pair. http://www.nytimes.com (last visited Apr. 16, 2002)). A review of the *The New York Time's* abstracts of its own editorials yields the following examples of its glowing praise for the pair of bills: Editorial, *A Win for McCain-Feingold*, N.Y. TIMES, Mar. 28, 2001, at A20 ("Editorial lauds Senate for rejecting [Senator] Chuck Hagel's watered-down campaign finance reform bill . . . .") (quoting abstract on Web page); Editorial, *Campaign Finance's Crucial Vote*, N.Y. TIMES, July 12, 2001, at A22 ("Editorial . . . says supporters of reform need to vote for Shays-Meehan and to oppose any 'killer amendments' designed to repel potential votes.") (quoting abstract from Web page); Editorial, *Demanding a Vote on*

While the news media is protected by the same First Amendment as are other citizen groups, this exception makes plain that McCain-Feingold is a direct attack only on the average citizen who needs to exercise his constitutional right of association in order to effectively participate in the political arena. Similarly, wealthy individuals are not affected by the McCain-Feingold restrictions. First, if they choose, they can start or buy a media outlet and use it with impunity to support the issues and candidates they choose. Second, as individuals, they can do what is forbidden to corporations and labor unions. Third, they are unaffected by the donor reporting requirements because there are no donors to disclose but themselves. Passage of McCain-Feingold will greatly increase their power vis-a-vis citizens of average means.[139] Thus, it appears that the multi-million dollar contributions that the wealthiest individuals and private foundations[140] are making to reformer groups would gain a good return if McCain-Feingold were enacted.

Reform, N.Y. TIMES, July 17, 2001, at A18 ("Editorial urges House majority that favors campaign-finance reform to insist that Speaker Dennis Hastert keep his word and allow fair vote on Shays-Meehan bill; says majority should be prepared to sign discharge petition forcing Rules Committee to return bill to floor if he fails to schedule immediate vote.") (quoting abstract from Web page); Editorial, *Mr. McCain's Journey*, N.Y. TIMES, Apr. 4, 2001, at A20 ("Editorial hails [Senator] John McCain[] for galvanizing public support for campaign finance reform over opposition of Republican Congressional leaders ....") (quoting abstract on Web page); Editorial, *Perils for Campaign Reform*, N.Y. TIMES, Mar. 27, 2001, at A22 ("Editorial urges Senate to defeat amendment by Republican [Senator] Chuck Hagel to McCain-Feingold campaign-finance reform bill ....") (quoting abstract from Web page); Editorial, *The Battle for Shays-Meehan*, N.Y. TIMES, July 20, 2001, at A20 ("Editorial ... says strict discipline will be required of Democrats, and continued courage will be required of moderate Republicans who have previously been willing to vote for reform.") (quoting abstract from Web page); Editorial, *The Battle to Save Shays-Meehan*, N.Y. TIMES, July 30, 2001, at A16 ("This week marks the beginning of yet another critical phase in the struggle to rescue campaign finance reform ....") (quoting abstract from Web page).

139. S. 27, 107th Cong. § 313 (2001). McCain-Feingold increases the power of the wealthy, even as candidates, since it includes a provision prohibiting candidates from using campaign funds for personal expenses. *Id.* The wealthy already have the funds to pay living expenses while campaigning full time. Citizens of average means, however, are faced with a dilemma – do they campaign only at night and on weekends in order to keep their job to feed their family, or do they quit their job to campaign full time and face a crippling loss of family income. Furthermore, this provision benefits all incumbents, whether wealthy or not, since the government continues to pay them a salary, even though they are campaigning full time.

140. *See, e.g.*, AMERICAN CONSERVATIVE UNION FOUNDATION, WHO'S BUYING CAMPAIGN FINANCE "REFORM"? (2001) (The American Conservative Union was an original plaintiff in *Buckley v. Valeo*). The report followed the money of who is financing the campaign for campaign finance reform and concluded that it is "controlled and financed by liberal Democrats," that "[s]ince 1966, the ... 'campaign' has raised and spent more than $73 million," that "[f]unding the ... campaign are a core of liberal foundations

F. McCain-Feingold Further Limits Average Citizen Participation in the Political Arena by Restricting the Activities of Political Parties

McCain-Feingold reflects the Senate's woeful ignorance of — or outright disdain for — the constitutionally protected role political parties play in our democratic Republic. With its misguided goal of eliminating so-called soft money,[141] McCain-Feingold has two dramatic adverse effects on political party activity: it imposes federal election law limits on state and local political party activities and it dramatically limits the issue advocacy, legislative, and organizational activities of political parties. These effects are neither desirable nor constitutional. The Supreme Court has said "[w]e are not aware of any special dangers of corruption associated with political parties . . . ."[142] That assertion is backed both by the case law and by the overwhelming political science evidence concerning how political parties operate.

Haley Barbour, the former Chairman of the Republican National Committee, defined a political party as "an association of like-minded people who debate issues, who attempt to influence government policy, and who work together to elect like-minded people to local, State and Federal office."[143] Therefore, political parties are first associations of people, not simply repositories for campaign contributions or "super-PAC's." Second, political parties have a legitimate role in debating issues, promoting ideas, and in formulating public policy. Third, national parties have significant local and state components, they are national, not federal, committees. National parties exist for the purpose of electing federal and state candidates *and* for affecting federal and state public policy. National parties have considerable, constitutionally protected interests in participating in state and local elections.

In *FEC v. Colorado Republican Federal Campaign Committee (Colorado Republican II)*,[144] the Supreme Court held that political parties are essentially just like every other group, so that they logically can do the same things other groups can do.[145] For example, political parties can

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who also finance other ultra-liberal organizations and causes," and that one major donor to the campaign has been George Soros, who since 1997 "has provided $4.7 million." *Id.* at ix. The report is available online at http://www.conservative.org/financereform/report.htm (last visited Apr. 26, 2002).

141. S. 27, 107th Cong. § 101 (2001).

142. Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 616 (1996).

143. *Campaign Finance Reform Legislation: The Role of Political Parties: Hearing Before the House Oversight Comm.*, 104th Cong. 10-11 (1995) (statement of Haley S. Barbour, former Chairman, Republican National Committee).

144. 121 S. Ct. 2351 (2001).

145. *Id.* at 2362-66.

organize themselves along similar lines as ideological corporations by setting up an educational fund or a PAC. In *Colorado Republican II*, two theories were advanced: (1) that parties were unique and could therefore do unlimited coordinated expenditures[146] and (2) that parties were just like any other group.[147] The Court embraced the latter position.[148] The logic of parties being treated like any other group is that they are not just candidate-election organizations and they have the rights of any other group, especially amplifying the voices of members in issue advocacy. The Court plainly said as much: "Parties . . . perform functions more complex than simply electing candidates [and] . . . [i]t is the accepted understanding that a party combines its members' power to speak by aggregating contributions and broadcasting messages more widely than individual contributors generally could afford to do . . . ."[149] Thus, there is no constitutional warrant for depriving parties of "soft money" for such activity.

In many contexts, the Supreme Court has also recognized the constitutionally significant role played by political parties in our democratic Republic, undercutting any asserted interest in restricting them as current campaign finance "reforms" propose. In 2000, the Supreme Court struck down California's blanket primary law because it unconstitutionally interfered with political parties' protected political association.[150] As Justice Scalia wrote for seven justices: "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself."[151] Justice O'Connor has recognized:

> There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government. The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of

146. *Id.* at 2360-61 ("The Party's argument that its coordinated spending, like its independent spending should be left free from restriction under the *Buckley* line of cases boils down to this: because a party's most important speech is aimed at electing candidates and is itself expressed through those candidates, any limit on party support for a candidate imposes a unique First Amendment burden.").

147. *Id.* at 2361.

148. *Id.* at 2362-66.

149. *Id.* at 2364-65.

150. *See generally* Cal. Democratic Party v. Jones, 120 S. Ct. 2402 (2000).

151. *Id.* at 2408.

> our two-party system, which permits both stability and measured change.[152]

"Measured change," however, is not often the goal of incumbent politicians before most elections. This realization could go a long way toward explaining why incumbent politicians in the Senate favor reducing the impact political parties traditionally have in mobilizing voters to support challengers in competitive races. Political scientists have long recognized that political parties are the most influential institution in the electoral process for creating greater turnover in legislatures.[153] Indeed, *increasing* the role of political parties is the practical formula for improving many of the ills McCain-Feingold purports to address.[154]

In 1976, a bi-partisan group of over three hundred professional political scientists and political practitioners formed the Committee for Party Renewal.[155] In 1984, the Committee issued *Principles of Strong Party Organization*,[156] which, based on the consensus views of these political scientists, advocated that:

> (1) Political parties should govern themselves . . . .
>
> (2) Political parties should use caucuses and conventions to draft platforms and endorse candidates . . . .
>
> (3) Political party organization should be open and broadly based at the local level . . . .

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152. Davis v. Bandemer, 478 U.S. 109, 144-45 (1986) (O'Connor, J., concurring); *see also* Eu v. San Francisco Democratic Cent. Comm., 489 U.S. 214, 244 (1989); Republican Party of Conn. v. Tashjian, 479 U.S. 208, 214-15(1986); Democratic Party of United States v. Wis. *ex rel.* La Follette, 450 U.S. 107, 121-22 (1981); Cousins v. Wigoda, 419 U.S. 477, 487-88 (1975); Storer v. Brown, 415 U.S. 724, 728-29 (1974); Gaffney v. Cummings, 412 U.S. 735, 754 (1973); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

153. *See, e.g.*, MICHAEL J. MALBIN & THOMAS L. GAIS, THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES 158 (1998) ("Political parties . . . consistently gave disproportionately to candidates who were in close races, especially challengers and open-seat candidates. Party spending, therefore, seems to be an important vehicle for satisfying one of the two major goals of campaign finance reform: encouraging electoral competition.").

154. Anthony Gierzynski & David A. Breaux, *The Role of Parties in Legislative Campaign Financing*, 15 AM. REV. OF POLITICS 171-189 (1994) ("[I]ncreasing the party role would reduce the gap between incumbent revenues and challenger revenues."). Furthermore, "a greater role for parties in financing elections would result in more equitable distribution of campaign money and a greater level of competition in legislative campaigns." *Id.* at 172.

155. COMMITTEE FOR PARTY RENEWAL, DECLARATION OF PRINCIPLE (1977), *available at* http://www.apsanet.org/~pop/declaration.htm.

156. COMMITTEE FOR PARTY RENEWAL, THE PRINCIPLES OF STRONG PARTY ORGANIZATION (1984), *available at* http://www.apsanet.org/~pop/strong_party.htm (italics omitted).

> (4) Political parties should advance a public agenda . . . .
> (5) Political parties should endorse candidates for public office . . . .
> (6) Political parties should be effective campaign organizations . . . .
> (7) Political parties should be a major financier of candidate campaigns . . . .
> (8) Political parties should be the principal instruments of governance . . . .
> (9) Political parties should maintain regular internal communications . . . .
> (10) Election law should encourage strong political parties . . . .[157]

McCain-Feingold violates these principles, weakening political parties to the detriment of the Republic. Thus, McCain-Feingold is not only unconstitutional, it is also irrational.

1. McCain-Feingold Federalizes Many Activities of State and Local Political Parties

McCain-Feingold federalizes many activities of state and local political parties. Under McCain-Feingold, if there is a federal candidate on the ballot, any "federal election activity" must be paid for with money raised under the limits of federal law, not with money raised lawfully under state law.[158] "Federal election activity" includes "voter registration" during the 120 days before an election, "voter identification, get-out-the-vote activity, or [any activity promoting a political party]."[159] Therefore, if state and local political parties participate in "federal election activity," they must use "hard money" (money subject to FECA restrictions) for such activity if a federal candidate is on the ballot.

These activities are traditional activities that state and local parties have always been involved with and that the national political parties have supported. The fact that there is a federal candidate on the ballot, along with the state and local candidates for whom state and local parties have the greater concern, does not justify federalizing and limiting these activities.

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157. *Id.*
158. S. 27, 107th Cong. § 323 (2001).
159. *Id.*

2. McCain-Feingold Prohibits National Political Parties from Using Soft Money to Pursue Issue Advocacy, Legislative, and Organizational Activities

Because McCain-Feingold prohibits the raising of "soft money" by national political parties,[160] these parties would have no such money available for issue advocacy, legislative, and organizational activities. It treats national political parties as if they were just federal-candidate election machines. As a result, McCain-Feingold has effectively amputated the other important, historical activities of political parties.

These restrictions fail constitutional muster. Political parties enjoy the same unfettered right to participate in issue advocacy as other entities, which is especially appropriate because advancing a broad range of issues is their *raison d'etre.*[161] Reforms banning political parties from receiving and spending so-called soft money cannot be justified as preventing corruption (the only possible compelling interest), since the Supreme Court has already held that interest insufficient for restricting issue advocacy in *Buckley.*[162] If individuals and narrow interest groups enjoy the basic First Amendment freedom to discuss issues and the position of candidates on those issues, how can political parties, which have wide bases of interests that are necessarily tempered and diffused, be deprived of the right to engage in such issue advocacy?

However, proponents of abolishing "soft money" argue that this is simply a "contribution limit."[163] The fallacy of that argument, of course, is that the Supreme Court has justified contribution limits only on the ground that large contributions create the reality or appearance of quid pro quo corruption,[164] which cannot justify a limit on issue advocacy.[165]

Furthermore, the proposed ban on soft money contributions cannot be justified on the theory that political parties corrupt federal candidates,

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160. S. 27, 107th Cong. §§ 101, 323 (2001).

161. *See, e.g.*, Republican Party Platform 2000, *available at* http://www.rnc.org/gopinfo/platform, and America 2000: Democratic Party Platform, *available at* http://www.democrats.org/about/platform.html.

162. Buckley v. Valeo, 424 U.S. 1, 45 (1976).

163. Amicus Curiae Brief of U.S. Senators Carl Levin, John D. McCain, and Russell D. Feingold at 9, Republican Nat'l Comm. v. FEC, Nos. 98-5263, 98-5364, 1998 U.S. App. LEXIS 28505 (D.C. Cir. Nov. 6, 1998).

164. *See generally* James Bopp, Jr., *All Contribution Limits Are Not Created Equal: New Hope in the Political Speech Wars*, 49 CATH. U. L. REV. 11 (1999); James Bopp, Jr., *Constitutional Limits on Campaign Contribution Limits*, 11 REGENT U. L. REV. 235 (1998-99).

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

which the Supreme Court rejected in *Colorado Republican II*.[166] In that case, the FEC took the position that independent, uncoordinated expenditures by political parties ought to be treated as contributions to the benefitted candidate.[167] Such treatment would have resulted in allowing individuals, candidates, and political action committees to spend unlimited amounts of money on independent expenditures to advocate the election of a candidate, while limiting the amount a political party could spend for the same purpose.

The Supreme Court disagreed with the FEC, noting that "[w]e are not aware of any special dangers of corruption associated with political parties."[168] After observing that individuals could contribute more money to political parties ($20,000) than to candidates ($1,000) and PACs ($5,000) and after recognizing that the "FECA permits unregulated 'soft money' contributions to a party for certain activities," the Court concluded that the "opportunity for corruption posed by these greater opportunities for contributions is, at best, attenuated."[169] The Court continued in this vein with respect to the FEC's proposed ban on political party independent expenditures, which has a direct application to McCain-Feingold's ban on "soft money" contributions:

> [R]ather than indicating a special fear of the corruptive influence of political parties, the legislative history [of the Act] demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections .... We therefore believe that this Court's prior case law controls the outcome here. We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties.[170]

The concurring justices also found little, if any, opportunity for party corruption of candidates because of parties' very nature and structure.[171]

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

> The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption,

166. 518 U.S. 604, 617-18 (1996).

167. *Id.* at 619.

168. *Id.* at 616.

169. *Id.*

170. *Id.* at 618.

171. *Id.* at 626 (Kennedy, J., Rehnquist, C.J., Scalia, J., concurring in the judgment); *see also id.* at 631 (Thomas, J., Rehnquist, C.J., Scalia, J., concurring in the judgment).

> for one of the essential features of democracy is the presentation to the electorate of varying points of view.[172]

If this is true of PACs, then *a fortiori* there can be no corruption or appearance of corruption resulting from issue advocacy by political parties.

In addition, the Supreme Court in *MCFL* provided further guidance on whether the threat of corruption is posed by an organization such as a political party.[173] The Court considered the ban on independent expenditures by corporations under 2 U.S.C. § 441b.[174] The *MCFL* Court evaluated whether there was any risk of corruption with regard to an MCFL-type organization that would justify such a ban on its political speech.[175] While the Court considered whether an ideological corporation was sufficiently like a business corporation to justify the ban on using corporate dollars for independent expenditures, there are several transferable concepts to evaluating the threat of corruption posed by a political party.[176]

The concern raised by the FEC in *MCFL* was that § 441b served to prevent corruption by "prevent[ing] an organization from using an individual's money for purposes that the individual may not support."[177] The Court found that "[t]his rationale for regulation is not compelling with respect" to MCFL-type organizations because "[i]ndividuals who contribute to [an MCFL-type organization] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes."[178] "[I]ndividuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction."[179] Finally, the Court found that "a contributor dissatisfied with how funds are used can simply stop contributing."[180] Thus, the Court held that the prohibitions on corporate contributions and expenditures in § 441b could not be constitutionally applied to nonprofit ideological corporations that do not serve as a conduit for business corporation contributions.[181]

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172. FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 498 (1985).
173. *See MCFL*, 479 U.S. 238, 252 & n.6 (1986).
174. *Id.* at 241.
175. *See id.* at 263-64.
176. *See id.*
177. *Id.* at 260.
178. *Id.* at 260-61.
179. *Id.* at 261.
180. *Id.*; *see also* Day v. Holahan, 34 F.3d 1356, 1363-65 (8th Cir. 1994).
181. *MCFL*, 479 U.S. at 263-64.

Political parties similarly pose no risk of corruption because people give money to parties precisely because they support what the political party stands for.[182] A contribution to a political party is for the purpose of enhancing advocacy of the issues that the party represents. Any individual unhappy with the use of the money may simply quit contributing and leave the political party. In sum, the threat of corruption cannot justify a limit on issue advocacy, and, even if it could, political parties pose no threat of corruption to their candidates.

The Supreme Court found that, just as independent expenditures of interest groups pose no danger of corrupting candidates, neither do those of political parties.[183] While no one disputes that expenditures on express advocacy actually coordinated with candidates are properly contributions to the candidate because of the possibility of quid pro quo corruption, the Court held that coordination must be proven as a matter of fact; it cannot be presumed.[184] "Reforms" may not presume coordination where it does not actually exist.

Those who would attempt to justify the new restrictions on political parties in McCain-Feingold on the ground that the Supreme Court upheld limits on individual and political committee contributions to candidates in *Nixon v. Shrink Missouri Government PAC*[185] are wrong. On April 10, 2001, just eight days after McCain-Feingold passed the Senate, the United States District Court for the District of Alaska followed the Supreme Court's numerous precedents by recognizing the unique associational interests embraced by political parties and held that a state statute was unconstitutional as applied to "soft money" contributions under state law to political parties.[186] The Court held that political parties have a constitutional right to maintain separate accounts to fund issue advocacy and voter mobilization programs.[187] Furthermore, it held that the government has no interest sufficiently important to justify the imposition of limits on contributions to those accounts.[188] "Soft money" bans are unconstitutional.[189]

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182. *See id.*

183. *Id.* at 260-63.

184. *Id.* at 248-49, 263-65.

185. 120 S. Ct. 897, 908-10 (2000).

186. Jacobus v. Alaska, No. A97-0272, 2001 U.S. Dist. LEXIS 12905, at *29-*30 (D. Alaska Apr. 10, 2001).

187. *Id.* at *21-*23.

188. *Id.* at *29-*30.

189. *See* Bradley A. Smith, *Soft Money. Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179, 180 (1998).

In addition to being unconstitutional, the soft money ban in McCain-Feingold is actually counter-productive in the eyes of political scientists based on the unique role political parties play in the electoral process.[190] In a college political science textbook about campaign finance published in 2000, the author, himself a proponent of other reforms, praised the effects of soft money for creating increased voter turnout:

> Party soft money can be spent on issue advertisements – the "air war" – or on identifying, registering, and getting voters to the polling places – the "ground war." Both of these uses – especially the latter – should be seen as positive developments. Issue advertisements can strengthen the parties by allowing the parties a role in setting the electoral agenda. Identifying, registering, and getting voters to the polls increases participation – including groups underrepresented in the pluralist system – and cannot be seen as anything but positive.[191]

Thus, because of the unique, constitutionally important role played by political parties, any effort to improve the electoral process ought to "steer money to the political parties and encourage them to use that money for activities that reinvigorate U.S. elections."[192] Furthermore, as one prominent proponent of campaign finance reform has conceded, political parties are the solution rather than the problem: "For political parties, there seems little alternative to simply legitimizing what has already happened de facto: the abolition of all limits . . . . [S]uch an outcome is not to be lamented. Political parties *deserve* more fundraising freedom, which would give these critical institutions a more substantial role in elections."[193]

Thus, there is no justification, in either policy or law, for the severe limits on national, state, and local political parties that McCain-Feingold imposes. Although the House version of the campaign finance reform

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190. *See, e.g.*, ANTHONY GIERZYNSKI, MONEY RULES: FINANCING ELECTIONS IN AMERICA (2000).

191. *Id.* at 125. This view of political parties is nothing new. *See* WALTER DEAN BURNHAM, CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS 133 (1970). Burnham stated that:

> [P]olitical parties, with all of their well-known human and structural shortcomings, are the only devices thus far invented by the wit of Western man which with some effectiveness can generate countervailing collective power on behalf of the many individuals powerless against the relatively few who are individually – or organizationally – powerful.

Id.

192. GIERZYNSKI, *supra* note 190, at 125.

193. LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS 334 (1996) (emphasis in original) (referring specifically to "soft money" contributions).

bill has similarities to McCain-Feingold, it is no more rational or constitutional.

IV. SHAYS-MEEHAN SIMILARLY ASSAULTS THE POLITICAL LIBERTIES OF EXPRESSION AND ASSOCIATION

In the U.S. House of Representatives, House Bill 380 (the Bipartisan Campaign Finance Reform Act of 2001) is commonly known as Shays-Meehan.[194] Like McCain-Feingold, Shays-Meehan would severely restrict the ability of citizen groups to communicate with the public regarding the positions and voting records of public office candidates and incumbents – or even upcoming votes in Congress. Because many of the flaws of the two bills overlap and because Shays-Meehan has disappeared into committee, this section will briefly highlight the features and flaws of Shays-Meehan, relying on the constitutional analysis already provided in the discussion of McCain-Feingold.

In general, Shays-Meehan would impose a year-round prohibition on unions and corporations (including citizen groups) from paying for public communications that an FEC regulator might consider "for the purpose of influencing a Federal election," if that communication is pursuant to any "general or particular understanding with a candidate,"[195] or if the citizen group has any of several broad categories of direct, indirect, presumed, or actual links to a candidate.[196] These prohibitions apply "regardless of whether the . . . communication . . . is express advocacy."[197]

Even if a group seeks to avoid coordination by avoiding virtually all two-way conversation with its congressmen, or other candidates, the organization must avoid issuing communications that comment favorably or critically on a candidate year round because of the broad definition of "express advocacy."[198] Even avoiding such "coordination" or "express advocacy" is insufficient in the sixty-day blackout period before

194. Shays-Meehan, H.R. 380 (107th Cong., 2001), is available online at the U.S. Congress' Web site at http://www.thomas.loc.gov. Page cites in this analysis are to the PDF document found there. As of March 15, 2001, H.R. 380 was referred to the Subcommittee on Employer-Employee Relations of the House Education and Workforce Committee, where it has remained until the writing of this article in November 2001.

195. H.R. 380, 107th Cong. § 206 (2001). An example of this activity would be an understanding that an organization would publicize which candidates sign a "pledge" form on a certain bill.

196. *Id.* § 101. "Candidate" includes all federal incumbents (unless they have announced retirement) from the day after election. *Id.* Therefore, a senator is a candidate for his or her entire six year term.

197. *Id.* §§ 201(c), 206.

198. *Id.* § 201(b).

elections, during which even mentioning a candidate's name would be deemed express advocacy of the election or defeat of a clearly identified candidate and therefore forbidden on broadcast media to corporations and labor unions.[199] Shays-Meehan would only permit such forms of speech to PACs, which would seriously restrict the rights of citizen groups wanting to engage in issue advocacy.

Shays-Meehan purports to make an exception for voting records and voter guides, but the exception would deprive citizen groups of their current ability to express a viewpoint on the issues being discussed, e.g., by making "correct" answers all pluses and "incorrect" answers all minuses.[200] Thus, the sort of voter guides typically done by citizen groups would be banned under this alleged "exception."

A. Year-Round Restrictions and Sixty-Day Blackouts Ignore the High Express-Advocacy Wall

As noted in Part I, a high wall of separation divides the liberty of unfettered political issue advocacy from express advocacy. Nonetheless, Shays-Meehan attempts to move that constitutionally-dictated wall by expanding the reach of express advocacy. Section 201 expands the definition of "express advocacy" to include "words that in context can have no reasonable meaning other than to advocate the election or defeat of one or more clearly identified candidates" or "expressing unmistakable and unambiguous support for or opposition to one or more clearly identified candidates when taken as a whole and with limited reference to external events, such as proximity to an election."[201]

These incursions into protected issue advocacy territory would include virtually any sort of commentary on the voting records or positions of politicians. Disgruntled candidates would complain to the FEC if they thought commentary was negative, and if it was positive their opponents would file the complaint. On contentious social issues, value judgments on a candidate's view would be difficult to state without triggering a possible complaint under Shays-Meehan's standard of "unmistakable and unambiguous support for or opposition to" a candidate.[202] These year-round restrictions are supplemented by a sixty-day blackout period before primary and general elections when corporations and unions are

199. *Id.* § 201.
200. *Id.* § 201(b)(20)(B).
201. *Id.* § 201.
202. *Id.* § 201(b)(20)(B)(i).

banned from even "referring to one or more clearly identified candidates in a paid advertisement that is transmitted through radio or television."[203]

Measuring these proposed restrictions against the constitutional standard reveals their constitutional shortcomings. It is impossible to imagine that the First Amendment, which requires the express advocacy bright line to protect issue advocacy, will countenance a law that proscribes the mere mention of a politician's name in a broadcast advertisement sixty days before an election.

While slightly less blatant, the definition of express advocacy that speaks of "unmistakable and unambiguous support for or opposition to one or more clearly identified candidates when taken as a whole and with limited references to external events, such as proximity to an election"[204] clearly goes beyond the Supreme Court's definition, which requires examination of the words of the communication itself, without outside references, to see if there are explicit words that expressly advocate the election or defeat of a clearly identified candidate.[205] The key terms of Shays-Meehan, such as "unmistakable and unambiguous support," "anything of value," and "in connection with,"[206] are terms of subjective judgment and therefore are beyond the scope of the objective criteria that the Supreme Court authorized in this crucial First Amendment area. With the new *mandatory* prison sentences that Shays-Meehan would authorize,[207] the language is too ambiguous and too far into the protected territory of issue advocacy for the Supreme Court to sustain it. And name-or-likeness, blackout periods have been found unconstitutional in the federal courts.[208]

B. The Voter Guide "Exception" Ignores the High Express-Advocacy Wall

Shays-Meehan provides an "exception" to the year-round ban on commentary on politicians by corporations or unions for publication of voter guides and voting records.[209] However, such score cards typically characterize politicians' point of view as positive or negative and include

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203. *Id.* § 201(b) (noting that for the President and Vice President, the sixty-day blackout is only before the general election).

204. *Id.* § 201(b)(20)(A)(iii).

205. *See supra* Part I.

206. H.R. 380, 107th Cong. § 206(a)(1)(C) (2001) (stating that "'[c]oordinated activity' means anything of value provided by a person in connection with a Federal candidate's election . . . .").

207. *Id.* § 1201.

208. *See supra* Part III.A.

209. H.R. 380, 107th Cong. § 206 (2001).

explicit commentary. All of this would be forbidden by Shays-Meehan. Under the bill, a scorecard would be an illegal corporate campaign contribution year-round unless it:[210]

> [1.] presents information solely about the voting record or position on a campaign issue of one or more candidates (including any statement by the sponsor of the voting record or voting guide of its agreement or disagreement with the record or position of a candidate), so long as the voting record or voting guide when taken as a whole does not express unmistakable and unambiguous support for or opposition to one or more clearly identified candidates;
>
> [2.] is not coordinated activity . . . [and questions to candidates may only be in writing]; and
>
> [3.] does not contain [express advocacy] or words that in context can have no reasonable meaning other than to urge the election or defeat of one or more clearly identified candidates.[211]

Measuring these restrictions on issue advocacy against the constitutional standard, it is clear that Shays-Meehan has gone astray. The words regulated are not explicit words that expressly advocate the election or defeat of a clearly identified candidate, as the Supreme Court has held that the Constitution mandates.[212] The words would be subject to rulemaking by the FEC, which has often demonstrated that it believes it can sense such an "urge," even when it is not expressed in explicit words.[213] The presumption of coordination that is obvious in the second point is based on an unconstitutional concept of coordination.[214]

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210. However, even if a communication meets all of the government-imposed speech specifications, it would still be forbidden if it is deemed to be coordinated with a candidate or party, a term that is defined in the bill with broad expansiveness. H.R. 380, 107th Cong. § 206 (2001).

211. *Id.* § 201.

212. *See supra* Part I.

213. The specific conditions set forth in the definition of "express advocacy" and the voter guide exception track past attempts by the FEC to regulate commentary on politicians that have been repeatedly invalidated under the First Amendment. For example, the "unambiguous support" definition of "express advocacy" is similar to a 1995 definition declared unconstitutional by the First Circuit in *Maine Right to Life Committee, Inc. v. FEC.* 98 F.3d 1 (1st Cir. 1996). It is also similar to the FEC's "circumstances" definition emphatically rejected by the Fourth Circuit in *FEC v. Christian Action Network.* 110 F.3d 1049, 1056-57, 1061-62 (4th Cir. 1997). Its controls of speech content and tone in voter guides are similar to FEC regulations declared unconstitutional by the First Circuit in *FEC v. Clifton.* 114 F.3d 1309, 1317 (1st Cir. 1997). For a detailed discussion of these and other cases, see Bopp & Coleson, *supra* note 6.

214. *See supra* Part III.C.

Therefore, the restriction is unconstitutional, and the exception is a meaningless gesture, pretending to offer what it withholds.

C. Allowing Only PACs to Comment Ignores the High Express-Advocacy Wall

Shays-Meehan would ban expenditures by citizen groups to comment on incumbents or candidates except through a PAC, with all the attendant compliance burdens. This would silence many small citizen groups that lack the resources to consult specialist lawyers and to hire accountants and compliance staff to meet the complex and burdensome compliance requirements. This is unconstitutional.

In *MCFL*,[215] the Supreme Court held that it was unconstitutional to enforce FECA to prohibit nonprofit, issue-oriented corporations from making expenditures even for *express advocacy*, or to require that it be done through a PAC.[216] The Court described the speech-suppressing effect of such a policy as "substantial" and enumerated the burdens of complex compliance requirements on small, simple citizen groups.[217] The Court held that there was no justification for such burdens because such groups posed no danger of corruption, the only possible justification for such a law.[218] If there is no justification for limiting the *express advocacy* of such citizen groups, there can be no justification to so limit their *issue advocacy* by including it in a flawed, overreaching definition of "express advocacy."

Even those groups with the resources and sophistication to operate a PAC would be severely limited because of existing restrictions on PACs. For example, no person may contribute more than $5,000 per year to a particular PAC, PACs connected to a parent-citizen group may solicit PAC contributions only from group members, and the name of all donors over $200 must be reported.[219] Shays-Meehan would reduce the contribution amount requiring reporting to $50.[220] Thus, Shays-Meehan would sharply reduce the amount of commentary about incumbent politicians and candidates, which is obviously the unconstitutional goal.

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215. 479 U.S. 238 (1986).
216. *Id.* at 253-56, 263-64.
217. *Id.* at 252-56.
218. *Id.* at 263-65.
219. 2 U.S.C. § 441a(a), 2 U.S.C. § 441b(b)(4)(B)(C), and 2 U.S.C. § 434(b)(3)(A).
220. H.R. 380, 107th Cong. § 303 (2001).

D. "Coordinated Activity" Sets a Trap

Shays-Meehan would also suppress issue advocacy by trying to make much of it a forbidden corporate contribution. The bill does this by ignoring the express advocacy line and expanding the meaning of "coordination with a candidate," laying a trap for the unwary through numerous tripwires triggering "coordination."[221] Section 206 of the bill defines "coordinated activity" as

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221. Breaking out the language of the coordination provision, section 206 of Shays-Meehan provides the following tripwires that trigger "coordination" under the bill: (1) cooperation with candidate; (2) consultation with candidate; (3) in concert with candidate; (4) at request of candidate; (5) at suggestion of candidate; (6) pursuant to general understanding with candidate; (7) pursuant to particular understanding with candidate; (8) use of part of campaign material of candidate; (9) person is employee of candidate's committee; (10) person is a fund raiser for candidate's committee; (11) person is agent of candidate's committee; (12) person was member of candidate's committee; (13) person was employee of candidate's committee; (14) person was fund raiser for candidate's committee; (15) person was agent for candidate's committee; (16) person retains professional services of any person who has provided polling services to candidate; (17) person retains professional service of any person who is providing polling services to candidate; (18) person retains professional services of any person who has provided media advice to candidate; (19) person retains professional services of any person who is providing media advise to candidate; (20) person retains professional services of any person who has provided fundraising services to candidate; (21) person retains professional services of any person who is providing fundraising services to candidate; (22) person retains professional services of any person who has provided campaign research to candidate; (23) person retains professional services of any person who is providing campaign research to candidate; (24) person retains professional services of any person who has provided direct mail services to candidate; (25) person retains professional services of any person who is providing direct mail services to candidate; (26) person has participated in discussions with candidate regarding advertising; (27) person has participated in discussions with candidate regarding message; (28) person has participated in discussions with candidate regarding allocation of resources; (29) person has participated in discussions with candidate regarding fund raising; (30) person has participated in discussions with candidate regarding campaign operations; (31) person has participated in discussions with candidate regarding campaign tactics; (32) person has participated in discussions with candidate regarding campaign strategy; (33) person has communicated with agent of candidate's committee regarding advertising; (34) person has communicated with agent of candidate's committee regarding; (35) person has communicated with agent of candidate's committee regarding allocation of resources; (36) person has communicated with agent of candidate's committee regarding fund raising; (37) person has communicated with agent of candidate's committee regarding campaign operations; (38) person has communicated with agent of candidate's committee regarding campaign tactics; (39) person has communicated with agent of candidate's committee regarding campaign strategies; (40) person has participated in discussions with candidate's coordinating political party regarding advertising; (41) person has participated in discussions with candidate's coordinating political party regarding message; (42) person has participated in discussions with candidate's coordinating political party regarding allocation of resources; (43) person has participated in discussions with candidate's coordinating political party regarding fundraising; (44) person has participated in discussions with candidate's coordinating political party regarding campaign tactics; (45)

> anything of value provided by a person in connection with a Federal candidate's election who is ... acting in coordination with that candidate ... (regardless of whether the value provided is in the form of a communication which [sic] expressly advocates a vote for or against any candidate) [and includes] payment[s] made ... pursuant to any general ... understanding

as well as payments presumed to be coordinated because of common use by the person and a candidate of "professional services."[222]

As described above, the government may only regulate express advocacy, not issue advocacy.[223] Therefore, only communications constituting express advocacy ought to be treated as contributions. The Supreme Court has held and reaffirmed that the high wall of separation between unfettered issue advocacy and express advocacy is mandated by the U.S. Constitution to prevent both vagueness and overbreadth.[224] Shays-Meehan's "coordinated activity" language suffers from both.

1. "Coordinated Activity" Ignores the Express Advocacy Line and Is Unconstitutionally Vague

Shays-Meehan's "coordinated activity" language violates the due process guarantee against vague laws, which is particularly troubling in the First Amendment context. Where government seeks to regulate political speech "'so closely touching our most precious freedoms,' precision of regulation must be the touchstone."[225] A lack of specificity poses a severe threat to the exercise of First Amendment rights. As the Supreme Court explained, such vague laws threaten to "trap the innocent by not providing fair warning," they give reign to "arbitrary and discriminatory application," and they force citizens to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."[226] Hence, "[t]o avoid uncertainty, and therefore invalidation of a regulation of political speech, the Supreme Court in *Buckley*, established a bright-line test."[227] This test limits regulation to

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person has participated in discussions with candidate's coordinating political party regarding campaign strategy. *See* H.R. 380, 107th Cong. § 206 (2001).

222. *Id.*

223. *See supra* Part I.

224. *MCFL*, 479 U.S. 238, 248-49 (1986).

225. Iowa Right to Life Comm. v. Williams, 187 F.3d 963, 968 (8th Cir. 1999) (quoting Buckley v. Valeo, 424 U.S. 1, 41 (1976)).

226. *Buckley*, 424 U.S. at 41 n. 48 (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)) (internal quotation marks omitted).

227. *Iowa Right to Life*, 187 F.3d at 969.

communications that "contain express language of advocacy with an exhortation to elect or defeat a candidate."[228]

Shays-Meehan ignores this necessity for a bright line. Instead, the bill reaches "anything of value . . . in connection with a Federal candidate's election . . . regardless of whether the value provided is in the form of a communication which expressly advocates a vote for or against any candidate."[229] While this regulation by its own terms extends well beyond the realm of express advocacy, its outer boundaries cannot be discerned with any degree of certainty.

Such failure to limit the scope to express advocacy cannot be tolerated by the First Amendment. As the Eighth Circuit explained in striking down an Iowa law that did provide some guidance:

> [A]bsent the bright-line limitation in *Buckley*, "the distinction between issue discussion (in the context of electoral politics) and candidate advocacy would be sufficiently indistinct that the right of citizens to engage in the vigorous discussion of issues of public interest without fear of official reprisal would be intolerably chilled."[230]

Even if the speech is "coordinated" with a candidate, it does nothing to alleviate its vagueness. A blurring of the lines between express advocacy and issue advocacy poses the identical threats of uncertain prohibitions and selective enforcement regardless of whether the communications are coordinated. As the Supreme Court has explained,

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.[231]

Discussions of issues and candidates do not cease to overlap simply because the speaker coordinates its message with a politician. In fact, the same intimate link between candidates and issues that necessitates a bright regulatory line also makes coordination with candidates an invaluable aid to the effective promotion of issues.

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228. *Id.* at 969-70.

229. H.R. 380, 107th Cong. § 206 (2001)

230. *Iowa Right to Life*, 187 F.3d at 970 (quoting FEC v. Christian Action Network, Inc., 110 F.3d 1049, 1051 (4th Cir 1997)).

231. *Buckley*, 424 U.S. at 42.

Indeed, the uncertainty posed by vague regulations may actually pose a greater threat to free speech and association in this context than in the uncoordinated contexts analyzed in *Buckley* and *MCFL* because the burdens posed by investigation are likely to be substantially greater. To determine a violation under Shays-Meehan, the FEC would have to evaluate not merely the communication itself, but also whether it had been coordinated with the identified candidate. Exploring and establishing whether or not coordination actually occurred may necessitate an incredibly burdensome and intrusive investigation into the affairs of both the organization and the candidate. Such a burdensome investigation would, in and of itself, strip the organization of its First Amendment rights.

Unlike other regulatory agencies, the "subject matter which the FEC oversees . . . relates to the behavior of individuals and groups *only insofar as they act, speak and associate for political purposes.*"[232] Accordingly, the scope of the FEC's investigatory powers is more limited than that of other agencies.[233] This is so because the investigative process itself "tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas."[234]

If an investigation targets a group's lawful issue advocacy, "[t]he First Amendment may be invoked against infringement of the protected freedoms."[235] This is so because the Supreme Court has found that the mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions, or associations is a measure of government interference.[236] Such disclosures "can seriously infringe on privacy of association and belief guaranteed by the First Amendment."[237]

As demonstrated by the FEC's attempt to enforce a coordination provision against the Christian Coalition, an investigation into whether issue advocacy has been coordinated can impose a severe burden upon speakers engaging in constitutionally protected activity.[238] The FEC's attempt led to lengthy discovery and voluminous facts, which were

232. FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 387 (D.C. Cir. 1981) (citing 2 U.S. C. §§ 431, 441a) (emphasis in original).

233. *See id.*

234. Sweezy v. New Hampshire, 354 U.S. 234, 245 (1957).

235. Watkins v. United States, 354 U.S. 178, 197 (1957).

236. *Sweezy*, 354 U.S. at 250.

237. Buckley v. Valeo, 424 U.S. 1, 64 (1976).

238. FEC v. Christian Coalition, 52 F. Supp. 2d 45 (D.D.C. 1999).

established by testimony and documents from numerous individuals, including a former president of the United States.[239]

2. "Coordination With a Candidate" Is Expanded Beyond Court-Defined Boundaries

Shays-Meehan also expands the concept of "coordination with a candidate." Section 206 of the bill defines "coordinated activity" as:

> [A]nything of value provided by a person in connection with a Federal candidate's election who is (or at any time during the same election cycle has been) acting in coordination with that candidate (or an agent of that candidate) on any campaign activity in connection with a Federal election in which such candidate seeks nomination or election to Federal office (*regardless of whether the value provided is in the form of a communication which [sic] expressly advocates a vote for or against any candidate*), and includes any of the following . . . ."[240]

The list that follows includes (1) "[a] payment made by a person in cooperation . . . with, at the request or suggestion of, or pursuant to a general or particular understanding with a candidate."[241]

Current constitutional law provides that coordination with a candidate requires that the citizen group have an actual prior communication about a specific expenditure for a specific project that results in the expenditure being under the control of a candidate or being based on information provided by the candidate about the candidate's plans or needs.[242] The new definition above is vastly expansive and places citizen groups that lobby and incumbent politicians at risk. For example, the mere discussion with a member of Congress about a candidate's "message" (such as a specific bill introduced by that member of Congress) any time during the two-year term of office would create coordination. Thereafter, the citizen group would be forbidden at any time in any manner to make any public communication that would be "of value" to the lawmaker because it would be an illegal corporate campaign contribution. In addition, literature promoting a congressman's bill in his home state could become a contribution. Because judicial precedent is clearly to the contrary, this provision will not withstand judicial scrutiny.

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239. *See id.* at 93, 94 n.56.

240. H.R. 308, 107th Cong. § 206 (2001) (emphasis added).

241. *Id.*

242. *See supra* Part III.D.

3. Coordination With Shared "Professionals" May Be Presumed

Section 206 of Shays-Meehan further creates a presumption of coordination, converting both issue advocacy and express advocacy to forbidden contributions, where

> the person making the payment retains the professional services [defined as "polling, media advice, fundraising, campaign research or direct mail"] of any person that has provided or is providing those services in the same election cycle to a candidate (including services provided through a political committee of the candidate's political party) in connection with the candidate's pursuit of nomination for election, or election, to Federal office, ... and the person retained is retained to work on activities relating to that candidate's campaign.[243]

This provision amounts to an unconstitutional penalty on free speech. An incorporated citizen group cannot be forced to forfeit its right to associate freely with legitimate providers of professional services in order to exercise its freedom of speech. Moreover, a vendor at any point during an election cycle could unilaterally decide to sell election-related services to a candidate, thereby canceling the free speech rights of all the vendor's PAC clients regarding that candidate. In some areas, there may be only one or two vendors of a specific service that a PAC requires to make its independent expenditure, and this bill could consequently eliminate the ability to make PAC expenditures.

The First Amendment permits spending limits to be applied to an express advocacy expenditure only if that expenditure has actually been discussed between the candidate and the person or citizen group. Coordination may not be presumed on the basis of some relationship. In *Colorado Republican II*,[244] the Supreme Court emphatically rejected the FEC's position that a political party expenditure may be presumed coordinated with the party's federal candidate.[245] The Court declared that the proper test was to determine whether the specific expenditure was in fact the subject of communication between those making the expenditure and the candidate.[246] If the Constitution forbids applying such a coordination presumption between a party and its nominee, the same principle plainly applies in the present situation.

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243. H.R. 308, 107th Cong. § 206 (2001).
244. 518 U.S. 604 (1996).
245. *Id.* at 619-26.
246. *Id.* at 617-18, 622.

E. The Congressional Member Endorsement Ban Violates Free Expression

Section 101 of Shays-Meehan would prohibit members of Congress from endorsing the fundraising efforts of citizen groups that use any part of the money for communications to the public by any medium at any time of the year that "promotes," "supports," "attacks," or "opposes" any candidate.[247] This would encompass many routine communications by a citizen group to promote pending legislation. Political party officials would also be prohibited from raising money for any 501(c)(3) (including charities), 501(c)(4), or 527 organizations.[248]

F. Advance Notice Requirements Permit Interference With Speech

Section 204 of Shays-Meehan requires that independent expenditures be reported as soon as any contract is signed for the communication, which could be weeks or months in advance of the dissemination of the communication to the public.[249] As noted above, this does not make sense in the context of how such communications are really done and is bad policy because it allows opportunity for interference with planned communications, especially by incumbents.

G. The Mandatory Prison Sentence Chills Free Expression

Despite the added ambiguity imposed by Shays-Meehan and the coordination traps it creates, its creators have decided to impose a mandatory minimum one-year prison sentence for "knowing and willful" violations of any of the above restrictions that involve a "contribution" or "expenditure" of $2,000 or more in a calendar year.[250] This, coupled with the increasing complexity of the FECA, would cast an Alberta-clipper level of chill over constitutionally protected free speech about politicians, forcing many small citizen groups into silence and greatly encumbering the more sophisticated with the need to "hedge and trim," as the United States Supreme Court described it in *Buckley*.[251]

V. CONCLUSION

Issue advocacy in the context of electoral politics enjoys absolute First Amendment protection. The Supreme Court has defined only a narrow

247. H.R. 380, 107th Cong. § 101 (2001).
248. *Id.* § 201.
249. *Id.* § 204; *see also supra* Part III.D.
250. H.R. 380, 107th Cong. § 1201(2001).
251. 424 U.S. 1, 43 (1976).

scope of non-issue advocacy that can be regulated—only explicit words expressly advocating the election or defeat of a clearly identified candidate. Congress cannot eviscerate this bright line test with a no-advocacy, no-reference test. Political parties are not excluded from this protection and cannot be constitutionally forbidden from receiving and expending "soft money." There is no need for exclusion because by their nature political parties are incapable of corrupting their own candidates.

Congress cannot take away the constitutional right to engage in unfettered issue advocacy and unlimited independent expenditures by simply presuming that coordination with candidates exists. Legislatively created labels cannot obviate the freedom of speech. The Supreme Court has stated that:

> In the free society ordained by our Constitution it is not the government, but the people – individually as citizens and candidates and collectively as associations and political committees – who must retain control over the quantity and range of debate on public issues in a political campaign.[252]

McCain-Feingold and Shays-Meehan would virtually destroy the ability of citizen groups to participate in our Republic, thereby trampling on freedom of speech and association with respect to the most vital issues of our day. Fortunately, the federal courts have shown greater solicitude for the Constitution and the workings of our Republic, along with less respect for the incumbent-protection urges of members of Congress, and may be relied upon to promptly bury such alleged "reform." However, members of Congress have also taken an oath to uphold the Constitution. Passage of McCain-Feingold and Shays-Meehan would be in derogation of that oath and duty.

The First Amendment is not a loophole to be plugged by unconstitutional legislation in misguided efforts to "reform" campaign finance. Free political speech was the first and is the best campaign finance reform; it is the very core of what James Madison drafted and the Framers adopted when they guaranteed the people that "Congress shall make no law . . . abridging the freedom of speech."[253] The First Amendment needs no reform.

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252. *Id.* at 57.

253. U.S. CONST. amend. I.