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Comment

The End of Sham Issue Advocacy: The Case to Uphold Electioneering Communications in the Bipartisan Campaign Reform Act of 2002

*Andrew Pratt**

The 2002 election year marked the end of political campaigns as we know them. Candidates for federal office must now contend with the Bipartisan Campaign Reform Act of 2002 (BCRA),¹ which transforms how future elections will run. The BCRA imposes disclosure requirements on campaign-related communications² and prohibits the use of “soft money” by political parties.³ President George W. Bush signed the

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1. Pub. L. No. 107-155, 2002 U.S.C.C.A.N. (116 Stat.) 81. The bill is commonly known as “McCain-Feingold,” after its main Senate co-sponsors, Senators John McCain (R-AZ) and Russell Feingold (D-WI). The main House of Representatives co-sponsors were Christopher Shays (R-CT) and Martin Meehan (D-MA).

2. *Id.* §§ 201-204. For a further discussion of this issue, also known as “electioneering communications,” see *infra* notes 15-22 and accompanying text.

3. BCRA § 101, 2002 U.S.S.C.A.N. (116 Stat.) at 82-86. “Soft money” is commonly defined as money raised outside the contribution limits set forth in the Federal Election Campaign Act (FECA), 2 U.S.C. § 431 (1971). Under the FECA, a person may donate \$1,000 per federal candidate, per election. See *Buckley v. Valeo*, 424 U.S. 1, 7 (1976) (per curiam). These donations are generally known as “hard money.” Once these limits are met, persons still wishing to donate may give unlimited amounts of soft money to the candidate’s political party, “with the understanding that the contribution to the party will produce increased party spending for the candidate’s benefit.” *Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 447 (2001).

The BCRA also contains many miscellaneous provisions, none of which will be covered in this Comment. Among other things, the BCRA prohibits

BCRA into law on March 27, 2002,⁴ and its constitutionality was immediately challenged on First Amendment grounds by a host of plaintiffs, chiefly Senator Mitch McConnell.⁵

The BCRA's controversial nature spotlights the inherent tension between regulation of political campaigns and free speech. On one hand, with soft money donations (and corporate scandals) at an all-time high,⁶ the general public may be eager to put the brakes on runaway campaign spending.⁷ On the other hand, any restrictions on campaign financing may also violate the First Amendment.⁸ A three-judge panel in a federal district court is currently weighing each side of the issue,⁹ and the losing party will almost certainly appeal directly to the Supreme Court.¹⁰

The Supreme Court has a number of campaign finance

candidates from fundraising on federal property, strengthens the ban on donations from foreign nationals, and regulates donations to presidential inauguration committees. See BCRA §§ 302, 303, 308, 2002 U.S.S.C.A.N. (116 Stat.) at 96, 103.

4. See Press Release, Office of the Press Secretary, President Signs Campaign Finance Reform Act (Mar. 27, 2002), <http://www.law.stanford.edu/library/campaignfinance/signing.statement.327.html>.

5. See Plaintiffs' Second Amended Complaint for Declaratory and Injunctive Relief, *McConnell v. Fed. Election Comm'n*, No. 02-0582 (D.D.C. May 7, 2002), <http://lawschool.stanford.edu/library/campaignfinance/mcconnell-v-feccomplaint50702.pdf>. Senator McConnell is a Republican from Kentucky.

6. See, e.g., Seth P. Waxman, *Free Speech and Campaign Reform Don't Conflict*, N.Y. TIMES, July 10, 2002, at A21 ("After Enron and the Lincoln Bedroom, does anyone doubt that enormous political contributions provide donors with disproportionate access to elected federal officials?"); Common Cause, *Soft Money Laundromat Donor Profiles*, at <http://www.commoncause.org/laundromat/stat/topdonors01.htm> (last visited Feb. 8, 2003) (listing total soft money donations during the 2001-2002 election cycle to Republicans at \$161.4 million and to Democrats at \$120.8 million).

7. See, e.g., ELIZABETH DREW, *CITIZEN MCCAIN 2* (2002) (noting that over six million people voted for campaign finance reformer McCain in the 2000 Republican presidential primary election).

8. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

9. See The Campaign & Media Legal Ctr., *McConnell v. FEC: Status Update*, at <http://www.camlc.org> (Nov. 7, 2002).

10. The BCRA provides for expedited review. A challenge is first filed with a three-judge court in the United States District Court for the District of Columbia, with an appeal to be directly heard by the United States Supreme Court. BCRA, Pub. L. No. 107-155, § 403, 2002 U.S.S.C.A.N. (116 Stat.) 81, 113-14.

precedents to guide its path.¹¹ The seminal case on this issue is *Buckley v. Valeo*.¹² These cases suggest that the Court is hospitable to campaign finance reform, especially in the area of disclosure requirements for “electioneering communications.”¹³ Although the BCRA also prohibits the use of soft money by political parties, this Comment focuses solely on the constitutionality of the Act’s electioneering communication disclosure provisions.¹⁴

This Comment argues that the BCRA’s electioneering disclosure regulations are constitutional. Part I delineates the BCRA’s electioneering provisions. Part II evaluates the Supreme Court’s standard in *Buckley v. Valeo* and its evolution in subsequent cases. Part III argues that the BCRA’s electioneering provisions are constitutional under the *Buckley* framework. Finally, Part IV analyzes Senator McConnell’s complaint and determines that it must fail because the BCRA is narrowly tailored to fulfill compelling governmental interests.

11. See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 348-49 (1995) (holding that Ohio’s campaign disclosure regulations do not apply to an individual pamphleteer); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 669-70 (1990) (holding that a nonprofit business-oriented corporation must comply with Michigan’s campaign disclosure regulations); *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259 (1986) (holding that campaign disclosure regulations do not apply to a nonprofit, political-oriented corporation).

12. 424 U.S. 1, 35, 84 (1976) (per curiam) (holding that Congress may constitutionally regulate certain forms of political speech, such as campaign contributions and disclosure of communications).

13. The BCRA defines electioneering communications as campaign-related advertisements aired in close proximity to a primary or general election. See *infra* notes 15-22 and accompanying text.

14. For discussions on soft money limitations, see generally Robert F. Bauer, *Going Nowhere, Slowly: The Long Struggle over Campaign Finance Reform and Some Attempts at Explanation and Alternatives*, 51 CATH. U. L. REV. 741 (2002); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994); Richard Briffault, *Campaign Finance, the Parties and the Court: A Comment on Colorado Republican Federal Campaign Committee v. Federal Elections Commission*, 14 CONST. COMMENT. 91 (1997); Richard L. Hasen, *Shrink Missouri, Campaign Finance, and “The Thing that Wouldn’t Leave,”* 17 CONST. COMMENT. 483 (2000); Lisa P. Howle, *Campaign Finance Reform: Meaningful Reform Impinges on Unfettered Political Speech, Violating the First Amendment*, 75 U. DET. MERCY L. REV. 143 (1997); Stephanie P. Manson, *When Money Talks: Reconciling Buckley, the First Amendment, and Campaign Finance Reform*, 58 WASH. & LEE L. REV. 1109 (2001).

I. THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002

Section 201 of the BCRA introduces the phrase “electioneering communication” into the campaign finance lexicon.¹⁵ These communications are defined as any broadcast, cable, or satellite advertisement that refers to a clearly identified candidate for federal office and is targeted to the relevant electorate¹⁶ within sixty days before a general election or thirty days before a primary election.¹⁷ Once an expenditure is defined as an electioneering communication, the BCRA regulations attach.¹⁸ An entity funding communications that cost \$10,000 or more and are targeted to the relevant electorate must disclose its identity, its principal place of business, and the elections to which the electioneering communications pertain.¹⁹ These disclosures must be made to the Federal Election Commission (FEC) within twenty-four hours of the expenditure.²⁰

During the run-up to an election, the electioneering communication definition attempts to eliminate the controversial distinction between advocacy of a candidate and advocacy of an issue.²¹ In essence, the BCRA holds that an advertisement that contains a reference to a clearly identified candidate within sixty days of a general election or thirty days of a primary election is express advocacy of a candidate and

15. BCRA, sec. 201(a), § 304(f)(3), 2002 U.S.S.C.A.N. (116 Stat.) at 89.

16. An electioneering communication is targeted to the relevant electorate if it can be received by 50,000 or more persons in a congressional district or the state in which a candidate for senator seeks to represent. *See id.* sec. 201(a), § 304(f)(3)(C).

17. *Id.* sec. 201(a), § 304(f)(3)(A)(i)(II). The Federal Election Commission recently promulgated a rule that defined an electioneering communication during a primary election for presidential and vice-presidential candidates. An advertisement is an electioneering communication if it can be received by 50,000 or more people in a state that holds a presidential primary within thirty days, or if it can be received by 50,000 or more people anywhere in the country within thirty days of the beginning of a national party nominating convention. *See Electioneering Communications*, 67 Fed. Reg. 65,189, 65,211 (Oct. 23, 2002) (to be codified at 11 C.F.R. pt. 100).

18. *See* BCRA, sec. 201(a), § 304(f), 2002 U.S.S.C.A.N. (116 Stat.) at 88-90.

19. *Id.* sec. 201(a), § 304(f)(2)(A)-(F).

20. *Id.* sec. 201(a), § 304(f)(1). The FEC recently promulgated rules exempting communications by state and local candidates and communications by nonprofit corporations organized under 26 U.S.C. § 501(c)(3) from the BCRA's disclosure requirements. *See Electioneering Communications*, 67 Fed. Reg. at 65,199.

21. *See infra* notes 40-45 and accompanying text (explaining the difference between express advocacy and issue advocacy).

may be regulated.²² The BCRA's electioneering provisions will probably be upheld by the Supreme Court only if it follows its campaign finance precedents, such as *Buckley v. Valeo*.²³

II. BUCKLEY YOUR SEAT BELTS: THE SUPREME COURT GOES DOWN THE CAMPAIGN FINANCE ROAD

A. BUCKLEY V. VALEO CHANGES THE POLITICAL LANDSCAPE

Buckley v. Valeo has stood as the Court's definitive campaign finance precedent for over twenty-five years, although the per curiam opinion was hurriedly drafted in time for the 1976 elections.²⁴ The case arose when various candidates for federal office, political parties, and other organizations challenged the validity of the Federal Election Campaign Act (FECA).²⁵ In one portion of the ruling, the Court examined the FECA's disclosure requirements²⁶ on campaign expenditures, such as electioneering communications relative to a "clearly identified candidate."²⁷ Because disclosure requirements infringed upon a campaign speaker's unfettered First Amendment right to speak, the Court held these regulations to "exacting scrutiny."²⁸ The Court used this high standard to protect the dictates of the First Amendment, as "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a

22. If the electioneering communication definition is found to be too vague or broad by a court, the BCRA provides an alternative definition that mandates disclosure of communications which promote, support, attack, or oppose a candidate "and which also [are] suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." BCRA, sec. 201(a), § 304(f)(3)(A)(ii), 2002 U.S.S.C.A.N. (116 Stat.) at 89.

23. 424 U.S. 1 (1976) (per curiam).

24. See Hasen, *supra* note 14, at 483.

25. See *Buckley*, 424 U.S. at 7-8.

26. The FECA mandated that any person who contributed or expended more than \$100 in a year must file a disclosure statement with the FEC. See *id.* at 74-75. The Court held in another part of the opinion that the FECA's limitations on campaign contributions were not unconstitutional on their face, while limitations on campaign expenditures violated the First Amendment. *Id.* at 35, 51.

27. *Id.* at 44.

28. *Id.* at 64. This test was first promulgated in *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (holding that Alabama's request to compel the state NAACP chapter to reveal the names and addresses of its members would cause its members to withdraw from the Association out of fear, thus violating the members' First Amendment right to associate).

mere showing of some legitimate governmental interest.²⁹ The FECA's disclosure requirements also produced problems of vagueness and overbreadth;³⁰ these concerns are also asserted today by the BCRA's critics and must be overcome for the Act to survive constitutional attack.³¹ In short, the FECA regulations in *Buckley* had to be narrowly tailored to meet a compelling governmental interest.³²

The government's justification for the disclosure regulations was threefold. First, disclosure requirements serve informational purposes by allowing voters to evaluate "each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches."³³ Second, if all contributions and expenditures were disclosed to the public, corruption would be deterred, especially in the form of quid pro quos between candidates and interest groups.³⁴ Third, disclosure requirements are an essential means of detecting other campaign contribution violations.³⁵ The Court concluded that "disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption."³⁶ In this application, however, the Court noted that the disclosure requirements appeared unconstitutionally vague.³⁷ The disclosure requirements were thus modified to apply only when campaign expenditures contained words of express advocacy.³⁸ In other words, no reporting or disclosure

29. *Buckley*, 424 U.S. at 64.

30. *Id.* at 76-84.

31. *See infra* notes 135-67 and accompanying text (discussing how the BCRA's electioneering provisions do not suffer from problems of vagueness and overbreadth).

32. *See Buckley*, 424 U.S. at 64.

33. *Id.* at 67.

34. *Id.* The Court of Appeals discussed possible quid pro quos from campaign contributions, which included a pledge by the dairy industry to contribute \$2 million, broken into small amounts, to President Richard Nixon's 1972 reelection campaign. *See Buckley v. Valeo*, 519 F.2d 821, 839 n.36 (D.C. Cir. 1975). Possibly as a result of the contributions, in March 1971 Nixon overruled his Secretary of Agriculture and ordered price supports for the dairy industry. *See id.*

35. *See Buckley*, 424 U.S. at 67-68.

36. *Id.* at 68.

37. *Id.* at 42 (stating that the FECA's "clearly identified candidate" language could broadly encompass discussions of political issues as well as advocacy of particular candidates).

38. *See id.* at 44.

requirements would apply to an individual (or a union or a corporation) who did not expressly advocate for or against a candidate while making a campaign expenditure.³⁹

In a frequently cited footnote, the Court defined the term “express advocacy.”⁴⁰ If a communication uses words “such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject,’” it expressly refers to a candidate.⁴¹ All advertisements not using these “magic words” generally are unregulated “issue advocacy” communications.⁴² Issue advocacy advertisements are thus an unregulated loophole for campaign-related speech because they are not subject to disclosure under the FECA.⁴³ Issue advocacy proponents cite the First Amendment as justification for the lack of regulation on the communications.⁴⁴ At any rate, the *Buckley* Court’s conclusion is relatively clear: A communication

39. See *id.* at 80.

40. *Id.* at 44 n.52.

41. *Id.* This footnote was embedded in the Court’s discussion of the FECA’s \$1,000 limitation on campaign expenditures relative to a clearly identified candidate. Later in the opinion, in its discussion on the FECA’s disclosure requirements, which is more relevant to this Comment, the Court referred back to this footnote to define express advocacy. *Id.* at 80 n.108.

42. For a basic discussion on issue advocacy advertisements, see generally Christopher J. Ayers, Perry v. Bartlett: A Preliminary Test for Campaign Finance Reform, 79 N.C. L. REV. 1788 (2001); Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751 (1999); Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 MINN. L. REV. 1773 (2001) [hereinafter Hasen, *Measuring*]; Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265 (2000) [hereinafter Hasen, *Surprisingly*]; Kirk L. Jowers, *Issue Advocacy: If It Cannot Be Regulated When It Is Least Valuable, It Cannot Be Regulated when It Is Most Valuable*, 50 CATH. U. L. REV. 65 (2000); Scott E. Thomas & Jeffrey H. Bowman, *Is Soft Money Here to Stay Under the “Magic Words” Doctrine?*, 10 STAN. L. & POL’Y REV. 33 (1998).

43. See Hasen, *Measuring*, *supra* note 42, at 1776-77. Professor Hasen notes that issue advocacy communications are outside the ambit of the FECA’s regulations “because the advertisement ends with something like, ‘Call Smith and tell her what you think of her Medicare plan’ rather than ‘Defeat Smith.’” *Id.* at 1777. For a few examples of how this advertising method works, see *infra* text accompanying notes 88-96.

44. See, e.g., James Bopp, Jr. & Richard E. Coleson, *Fatal Flaws in the Bipartisan Campaign Reform Act of 2002*, MONEY & POL. REP. (BNA), Apr. 22, 2002, at 1, 2, <http://www.brookings.edu/dybdocroot/gs/cf/debate/Bopp.pdf> (“The [BCRA] unabashedly seeks to eliminate issue advocacy by pulling down the twin pillars of free expression and association.”); Jowers, *supra* note 42, at 65 (“Unfortunately, campaign finance reformers, and at times the Federal Election Commission . . . remain undeterred by the First Amendment.”).

using the magic words, or their equivalent, is subject to the FECA's disclosure requirements, but all other communications are unregulated issue communications.⁴⁵

B. *BUCKLEY* UNDERGOES A METAMORPHOSIS: HOW ITS CAMPAIGN FINANCE STANDARD EVOLVED OVER TWENTY-FIVE YEARS

1. *Federal Election Commission v. Massachusetts Citizens for Life*

Ten years after *Buckley*, the Court in *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL)* extended its definition of express advocacy past the magic words test.⁴⁶ MCFL was a small nonprofit corporation that advocated a pro-life viewpoint.⁴⁷ Prior to the state's 1978 primary election, MCFL prepared a voter's guide that identified pro-life candidates.⁴⁸ On the back page of the guide, "VOTE PRO-LIFE" was printed in large letters, and the flyer listed the candidates for every office in every district in Massachusetts.⁴⁹ The flyer identified each candidate as either supporting or opposing pro-life principles, and it included thirteen photographs of candidates that received MCFL's highest pro-life rating.⁵⁰ The Court held that the MCFL voter's guide expressly advocated for specific candidates.⁵¹ The guide did not discuss mere political issues, but instead provided "an explicit directive: vote for these (named) candidates."⁵² In other words, the guide used words of express advocacy even though none of the words in *Buckley's* magic words test were written on the flyer.⁵³ This ruling applied the express advocacy definition with enough flexibility to include some language other than the

45. See *Buckley*, 424 U.S. at 44 n.52.

46. See 479 U.S. 238, 249 (1986).

47. See *id.* at 241.

48. See *id.* at 243.

49. See *id.*

50. See *id.* at 243-44.

51. See *id.* at 249.

52. *Id.* This is the first and only time the Court has discussed the meaning of express advocacy since *Buckley*. See Briffault, *supra* note 42, at 1755.

53. See *MCFL*, 479 U.S. at 249. The Court notes this fact when it said "[t]he fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature." *Id.*

magic words listed in *Buckley*.⁵⁴ As one scholar noted, “*Massachusetts Citizens for Life, Inc.*, thus, modestly broadened *Buckley*’s definition of what constitutes express advocacy.”⁵⁵

Because MCFL used words of express advocacy, it would presumably have had to disclose its identity and sources of funding under the FECA. The Court, however, sympathized with MCFL. As an incorporated entity, MCFL already had to deal with stringent disclosure requirements for its campaign spending.⁵⁶ Forcing another disclosure requirement on MCFL would “create a disincentive for the organization itself to speak.”⁵⁷ In response to the government’s concern with the appearance of corruption resulting from the campaign expenditure, the Court determined that MCFL was only a political corporation, not a typical for-profit entity, so it could have no corruptive influence.⁵⁸ In other words, MCFL’s communications could not be corruptive because it “was formed to disseminate political ideas, not to amass capital.”⁵⁹ Although the Court found the FECA provisions inapplicable to MCFL, the opinion is noteworthy because it broadened the meaning of express advocacy past the rigid magic words test.⁶⁰ Four years later, the Court upheld the imposition of campaign disclosure requirements on business corporations.⁶¹

2. *Austin v. Michigan State Chamber of Commerce*

Since the passage of the Tillman Act in 1907, Congress has restricted corporations and unions from contributing directly to

54. See *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (per curiam).

55. Briffault, *supra* note 42, at 1756.

56. See *MCFL*, 479 U.S. at 254.

57. *Id.* at 254 n.7.

58. *Id.* at 259.

59. *Id.* In a later case, the Court found that a nonprofit business corporation could have a corruptive influence through its communications. See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 662 (1990); *infra* text accompanying notes 63-72.

60. See *supra* text accompanying notes 53-55. The BCRA essentially codified *MCFL*’s holding when it exempted small nonprofit organizations from its electioneering communication disclosure requirements. See BCRA, Pub. L. No. 107-155, sec. 203(b), § 316(c)(2), 2002 U.S.S.C.A.N. (116 Stat.) 81, 91. Furthermore, the FEC exempted additional nonprofit corporations organized under 26 U.S.C. § 501(c)(3) from the electioneering communication definition. See *Electioneering Communications*, 67 Fed. Reg. 65,189, 65,211 (Oct. 23, 2002) (to be codified at 11 C.F.R. pt. 100).

61. See *Austin*, 494 U.S. at 662.

campaigns.⁶² The Court upheld state campaign finance restrictions on a nonprofit corporation's political activities in *Austin v. Michigan State Chamber of Commerce*.⁶³ In 1985, Michigan had a special election to fill a vacancy in its state House of Representatives.⁶⁴ The Michigan State Chamber of Commerce attempted to place a newspaper advertisement supporting a certain candidate, but it proposed to pay for the ad out of its general treasury, which violated Michigan campaign finance laws.⁶⁵ In upholding the restrictions, the *Austin* Court found that there was a compelling state interest because "the unique legal and economic characteristics of corporations necessitate some regulation of their political expenditures to avoid corruption or the appearance of corruption."⁶⁶ The Court was concerned that these advantageous corporate characteristics would result in immense campaign contributions, which would in turn corrupt the political process.⁶⁷ The state interest was narrowly tailored because the Michigan statute still allowed corporations to make campaign expenditures, with the caveat that the spending must come out of a segregated fund, like a political action committee.⁶⁸ The *Austin* Court explained that *MCFL*, which invalidated disclosure regulations on political nonprofit corporations,⁶⁹ was distinguished because the Michigan State Chamber of Commerce was primarily engaged in business activities.⁷⁰ Thus, *Austin* may be understood as validating general campaign finance regulations on corporations,⁷¹ but the Court did not comment on whether the Chamber of Commerce's advertisement was express advocacy. Because the proposed ad

62. See *Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208-09 (1982).

63. 494 U.S. 652, 662 (1990).

64. See *id.* at 656.

65. See *id.* The Michigan State Chamber of Commerce never ran the advertisement, but instead sought injunctive relief from enforcement of the state disclosure regulations, alleging they were unconstitutional. See *id.*

66. *Id.* at 658-59. Characteristics that are unique to corporations are traits like limited liability and perpetual life. See *id.*; see also *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986) ("The availability of [the corporate treasury] may make a corporation a formidable political presence . . .").

67. See *Austin*, 494 U.S. at 660.

68. See *id.*

69. *MCFL*, 479 U.S. at 259-63.

70. See *Austin*, 494 U.S. at 662.

71. See *id.* at 672 (Brennan, J., concurring).

stated “Elect Richard Bandstra,” however, it constituted express advocacy under *Buckley’s* magic words test.⁷² It took five more years before the Court applied its fledgling campaign finance principles outside of the corporate context.

3. *McIntyre v. Ohio Elections Commission*

*McIntyre v. Ohio Elections Commission*⁷³ involved the Court striking down a state law that imposed a fine on anyone who distributed anonymous campaign literature.⁷⁴ After first noting that the author’s right to remain anonymous “is an aspect of the freedom of speech protected by the First Amendment,”⁷⁵ the Court rejected Ohio’s purported campaign disclosure interests in preventing fraudulent statements and providing voters with additional information.⁷⁶ Therefore, the Court invalidated the state’s fine on anonymous pamphleteers.⁷⁷

McIntyre should not be read as proscribing all state efforts to require disclosure of campaign materials, however. The Court went out of its way to mention that the decision did not apply to communications in candidate elections.⁷⁸ The opinion also provided a solid basis for preserving disclosure requirements on corporations by stating that “[c]orporate

72. *Id.* at 714 app. (Kennedy, J., dissenting); *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (per curiam) (listing “elect” as one of its magic words).

73. 514 U.S. 334 (1995).

74. Mrs. Margaret McIntyre handed out anonymous leaflets that opposed a school tax levy. *See id.* at 337. Although she was fined only \$100 under state law, and despite her death during the litigation, her estate pursued her claim on First Amendment grounds. *See id.* at 340.

75. *Id.* at 342.

76. *Id.* at 348-53. Ohio’s interest in providing voters with additional election-related information was insufficient, because “in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader’s ability to evaluate the document’s message.” *Id.* at 348-49.

77. *Id.* at 357.

78. The Court noted that

[i]n candidate elections, the Government can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures. Disclosure of expenditures lessens the risk that individuals will spend money to support a candidate as a *quid pro quo* for special treatment after the candidate is in office. Carriers of favor will be deterred by the knowledge that all expenditures will be scrutinized by the Federal Election Commission and by the public for just this sort of abuse.

Id. at 356 (citing *Buckley v. Valeo*, 424 U.S. 1, 76 (1976) (per curiam)).

advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.”⁷⁹

The line of cases following *Buckley* fails to fully address how to require disclosure on campaign-related material, although it does provide justification for state disclosure requirements on corporations and individuals.⁸⁰ These cases also do little to elaborate on the Court’s definition of express advocacy, with *MCFL* being the only case to reach the issue.⁸¹ Most of the federal appellate courts, some with a little reluctance, have followed lockstep with *Buckley*’s magic words test narrowly interpreting express advocacy.⁸² The BCRA is an example of Congress attempting to fix *Buckley*’s test by finding a solution to the dilemma of “sham issue advocacy.”⁸³

79. *Id.* at 354 n.18 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978)). This statement supports the *Austin* Court’s decision to allow campaign regulations on corporations. *See supra* text accompanying note 71.

80. *See supra* text accompanying notes 63-79 (discussing the Court’s holdings in *Austin* and *McIntyre*).

81. *See supra* text accompanying notes 46-61.

82. *See, e.g.*, *Chamber of Commerce v. Moore*, 288 F.3d 187, 190, 198-99 (5th Cir. 2002) (holding that certain television advertisements which clearly and exclusively refer to candidates are issue-oriented, although the court admitted the result “may be counterintuitive to a commonsense understanding of the message conveyed by the television political advertisements at issue”); *Citizens for Responsible Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000) (“[C]ommunications that do not contain express words advocating the election or defeat of a particular candidate are deemed issue advocacy, which the First Amendment shields from regulation.”); *Iowa Right to Life Comm., Inc., v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) (noting the governmental concern that groups will simply avoid the “magic words” test to couch their advertisements in issue advocacy, but found that *Buckley*’s bright-line test controls); *Fed. Election Comm’n v. Christian Action Network, Inc.*, 110 F.3d 1049, 1057 (4th Cir. 1997) (observing that the FEC’s contention that it knows express advocacy when it sees it is impermissibly vague); *Faucher v. Fed. Election Comm’n*, 928 F.2d 468, 472 (1st Cir. 1991) (holding that it is impossible to tell when issue advocacy bleeds into express advocacy, so *Buckley*’s bright-line test is needed).

83. “Sham issue advocacy” describes an advertisement that has the unmistakable intent of express advocacy but simply avoids the magic words test. *See Hasen, Measuring, supra* note 42, at 1776. The ad is thus considered to be issue advocacy, not because it focuses on an issue, but because it avoids the magic words of express advocacy. *See id.*

C. THE PROBLEM OF SHAM ISSUE ADVOCACY

Through its magic words test, the *Buckley* Court laid down a bright-line rule to distinguish express advocacy from issue advocacy.⁸⁴ Financiers of express advocacy communications had to disclose their identities, but the groups behind issue advocacy advertisements could remain anonymous.⁸⁵ Special interest groups thus began to produce ads focusing on candidates without using the magic words of express advocacy.⁸⁶ These sham issue ads are not regulated by the FECA, and they have proliferated with astonishing ease:

It is child's play for political advertisers and campaign professionals to develop ads that effectively advocate or oppose the cause of a candidate but stop short of the formal express advocacy that the courts permit to be regulated. The most common tactic for political advertisers is to include some language calling for the reader, viewer, or listener to respond to the message by doing something other than voting.⁸⁷

One scholar recently spotlighted the problems posed by sham issue advocacy advertisements by focusing on the following communication aired during Montana's 1996 congressional campaign:

Who is Bill Yellowtail? He preaches family values, but he took a swing at his wife. Yellowtail's explanation? He "only slapped her," but her nose was broken. He talks law and order, but is himself a convicted criminal. And though he talks about protecting children, Yellowtail failed to make his own child support payments, then voted against child support enforcement. Call Bill Yellowtail and tell him we don't approve of his wrongful behavior. Call (406) 443-3620.⁸⁸

This advertisement was paid for by the "Citizens for Reform," which spent \$2 million nationwide distributing similar issue advertisements on the eve of the election.⁸⁹ The ad does not focus on issues; it puts the emphasis on Yellowtail and his lack of character. Under the *Buckley* magic words

84. See *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (per curiam).

85. See *id.* at 80 ("[The FECA] does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result.").

86. One commentator put the magic words dilemma in a commercial context: "This is akin to claiming that an ad using the phrase 'Join the Pepsi generation' does not promote Pepsi because it does not use the word 'buy.'" Trevor Potter, *New Law Follows Supreme Court Rulings*, MONEY & POL. REP. (BNA), Apr. 22, 2002, at 1, 7, <http://www.brook.edu/dbydocroot/gs/cf/debate/Potter.pdf>.

87. Briffault, *supra* note 42, at 1759.

88. *Id.* at 1751.

89. See *id.* at 1751-52, 1752 n.3.

test,⁹⁰ however, the ad avoided expressly advocating Yellowtail's defeat or his opponent's election.⁹¹ Therefore, under *Buckley's* rubric, it was an advertisement about issues and exempt from disclosure requirements under the FECA.⁹²

Consider another example. In 1996, the Republican National Committee produced an advertisement on behalf of presidential candidate Bob Dole.⁹³ The ad's transcript read as follows:

Mr. Dole. We have a moral obligation to give our children an America with the opportunity and values of the nation we grew up in.

Voice Over. Bob Dole grew up in Russell, Kansas. From his parents he learned the value of hard work, honesty and responsibility. So when his country called, he answered. He was seriously wounded in combat. Paralyzed, he underwent nine operations.

Mr. Dole. I went around looking for a miracle that would make me whole again.

Voice Over. The doctors said he'd never walk again. But after 39 months, he proved them wrong.

A Man Named Ed. He persevered, he never gave up. He fought his way back from total paralysis.

Voice Over. Like many Americans, his life experience and values serve as a strong moral compass. The principle of work to replace welfare. The principle of accountability to strengthen our criminal justice system. The principle of discipline to end wasteful Washington spending.

Mr. Dole. It all comes down to values. What you believe in. What you sacrifice for. And what you stand for.⁹⁴

The Dole advertisement did not use any of *Buckley's* magic words or their functional equivalents, so it was not considered to be an express advocacy ad.⁹⁵ While the ad did briefly mention the issues of welfare, criminal justice, and wasteful spending, the ad was primarily about Bob Dole.⁹⁶

Sham issue advertising presents a problem, as the ads are very prevalent in today's campaigns. According to a study by the Brennan Center for Justice, in 1998 political parties and

90. See *Buckley*, 424 U.S. at 44 n.52.

91. See Briffault, *supra* note 42, at 1751. Yellowtail's opponent was Republican Rick Hill. See *id.*

92. See *id.* at 1752.

93. See 148 CONG. REC. S2115 (daily ed. Mar. 20, 2002) (statement of Sen. Levin).

94. *Id.*

95. See *id.*

96. In other words, "[a]ny reasonable person who hears that ad knows it is an ad supporting the candidacy of Bob Dole." *Id.*

groups spent an estimated \$30 million on issue ads.⁹⁷ Just two years later, an estimated \$200 million was spent on such ads.⁹⁸ The problem inherent in such proliferation is “[v]iewers see more and more ads, [and] as long as the ads avoid using magic words, the electorate gets less and less information about who is behind them.”⁹⁹ Disclosure requirements on sham issue advocacy communications, on the other hand, expose campaign financiers to the public, which fulfills the public’s interest in a better informed electorate.¹⁰⁰

It is also noteworthy how many advertisements go out of their way to avoid using words of express advocacy. In 2000, for example, only 2% of ads run by political parties and other groups used *Buckley’s* magic words.¹⁰¹ A popular way to avoid disclosure regulations is to end an advertisement that criticizes a candidate by urging audience members to “call” the candidate or the relevant political group to express their views.¹⁰² Since such an ad merely tells its viewers to “call” a candidate, it is not expressly advocating for or against the candidate’s opponent, even though the viewer may come away with that impression.¹⁰³ Again, once a communication is classified as issue advocacy, it escapes all disclosure requirements imposed by the FECA.¹⁰⁴ To fix this problem, Congress passed the BCRA, which regulates sham issue advocacy advertisements.¹⁰⁵

97. See Craig B. Holman & Luke McLoughlin, Brennan Ctr. for Justice, *Buying Time: The Fallacies of Campaign Reform and our Advertising Laws*, at http://www.brennancenter.org/presscenter/oped_2002_0402.html (last visited Feb. 21, 2003).

98. See *id.*

99. *Id.*

100. See *infra* notes 118-26 and accompanying text.

101. See Holman & McLoughlin, *supra* note 97 (“Most tellingly, 90 percent of candidate ads—which are by definition considered express advocacy whether they use magic words or not—did not employ magic words. The fact that so few candidate ads incorporate magic words highlights how unnecessary explicit words are to convey an explicit electioneering message.”).

102. See Briffault, *supra* note 42, at 1759-63. A study of issue ads in 1997-98 found that almost 80% exhort a viewer to make a phone call. See *id.* (citation omitted).

103. See *id.*

104. See *supra* note 43 and accompanying text.

105. See *supra* notes 15-22 and accompanying text (defining the term “electioneering communication”).

III. THE BIPARTISAN CAMPAIGN REFORM ACT'S ELECTIONEERING PROVISIONS ARE CONSTITUTIONAL UNDER *BUCKLEY* AND OTHER SUPREME COURT PRECEDENT

The BCRA's disclosure requirements apply to all advertisements that refer to a clearly identified federal candidate, are targeted to the relevant electorate, and appear within sixty days before a general election or thirty days before a primary election.¹⁰⁶ This legislation is justifiable because *Buckley's* magic words test for express advocacy disclosure requirements is ineffective.¹⁰⁷

As discussed in Part II, the Supreme Court has ruled twice on the subject of express advocacy.¹⁰⁸ While *Buckley* defined express advocacy pursuant to the magic words test,¹⁰⁹ *MCFL* expanded the definition to include communications that do not recite *Buckley's* magic words test verbatim.¹¹⁰ This section demonstrates that the BCRA's electioneering provisions are constitutional under *Buckley's* "exacting scrutiny" standard¹¹¹ because they reflect compelling governmental interests in fully informing the electorate, preventing corruption, or the

106. See BCRA, Pub. L. No. 107-155, sec. 201(a), § 304(f)(3)(A)(i), 2002 U.S.S.C.A.N. (116 Stat.) 81, 89.

107. See, e.g., Potter, *supra* note 86, at 10 ("Because the court's [sic] 'magic words' test has proven eminently avoidable as it has been exploited these past ten years, it has opened an enormous loophole in the nearly century-old prohibition against corporate and union spending in federal elections."); Thomas & Bowman, *supra* note 42, at 35 ("A test requiring the magic words 'elect,' 'support,' etc., or their nearly perfect synonyms for a finding of express advocacy would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the [FECA].") (quoting Fed. Election Comm'n v. Furgatch, 807 F.2d 857, 863 (9th Cir. 1987)); Brennan Ctr. for Justice, Policy Comm. on Political Adver., *Five New Ideas to Deal With the Problems Posed by Campaign Appeals Masquerading as Issue Advocacy*, at http://www.brennancenter.org/programs/cmagg_temp/cmagg_recs.html (last visited March 22, 2003) ("Participants in the political arena, by simply eschewing the use of the magic words of express advocacy, have been able to turn the world of campaign finance upside down..."); Holman & McLoughlin, *supra* note 97 ("The magic-words test appears to have been eclipsed by modern advertising techniques, though it remains in many corners the prevailing standard for express advocacy.")

108. See *supra* notes 24-60 and accompanying text (discussing *Buckley* and *MCFL*).

109. See *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (per curiam).

110. See *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249-50 (1986).

111. See *Buckley*, 424 U.S. at 64; see also *supra* notes 28-29 and accompanying text.

appearance of corruption, and detecting other campaign finance violations.¹¹² Although the Act has a few weaknesses,¹¹³ it does not suffer from the fatal wounds of vagueness or overbreadth, and it follows Supreme Court precedent.¹¹⁴

A. THE BCRA'S ELECTIONEERING PROVISIONS REFLECT COMPELLING GOVERNMENTAL INTERESTS

In *Buckley*, the government offered three interests to justify the FECA's disclosure requirements: The provisions provide information to the voters; they deter the appearance of corruption between candidates and campaign contributors; and they gather necessary data to detect other campaign violations.¹¹⁵ These interests are essentially replicated in the BCRA.¹¹⁶ The *Buckley* Court accepted that the First Amendment may be curtailed pursuant to a balancing test in certain situations, as "there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved."¹¹⁷ Therefore, if the BCRA's disclosure provisions are narrowly tailored, with little chance of invalidating true issue advocacy, they should be upheld as constitutional.

1. The Government's Interest in Providing Information to the Electorate

The Court has validated the governmental interest in giving voters as much information as possible about their political candidates:

[D]isclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. . . . The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.¹¹⁸

112. See *infra* notes 118-36 and accompanying text.

113. See *infra* notes 166-73 and accompanying text.

114. See *infra* notes 135-67, 172-82 and accompanying text.

115. See *Buckley*, 424 U.S. at 66-68; see also *supra* text accompanying notes 33-35.

116. See *infra* notes 118-36 and accompanying text.

117. *Buckley*, 424 U.S. at 66 (quoting *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)).

118. *Id.* at 66-67 (quoting H.R. REP. NO. 92-564, at 4 (1971)) (footnote

For example, an environmentalist voter may be interested in the level of expenditures certain oil companies make on behalf of a candidate. Or, a pro-life voter would reasonably want to know if any pro-choice groups fund certain candidates. Because “[e]lections are our central form of collective political decision-making,”¹¹⁹ it is reasonable to conclude that disclosure provisions are an effective way of giving the public the informational tools to make tough decisions. There are numerous examples of political advertisements on television or radio that bear the name of a secretive organization as financier.¹²⁰ President George W. Bush also supported the informational interest when he noted that the disclosure provisions “will promote the free and swift flow of information to the public regarding the activities of groups and individuals in the political process.”¹²¹

In the end, it is misleading to the public to allow mysterious political groups and organizations to criticize or support a candidate without public knowledge of the organization’s identity. The BCRA’s disclosure requirements require an organization to disclose its funding sources to empower the public to make informed decisions.¹²² These

omitted). Professor Lillian BeVier, on the other hand, states that voters value information about where the candidate stands on the issues over information regarding what groups financially support the candidate. Lillian R. BeVier, *Mandatory Disclosure, “Sham Issue Advocacy,” and Buckley v. Valeo: A Response to Professor Hasen*, 48 UCLA L. REV. 285, 303 (2000). Realistically, it is probably difficult to draw conclusions on what information voters value most. The strength of the government’s informational interest is that it lays all relevant information about candidates on the table, so each voter may decide on his or her own terms.

119. Briffault, *supra* note 42, at 1763 (“Campaign communications are a crucial part of elections, and, as the Supreme Court has indicated, may be regulated in order to advance the goals of deliberative, democratic decision-making.”).

120. One example from the 2002 mid-term elections occurred in Minnesota. There, a Virginia-based organization called Americans for Job Security (AJS) spent more than \$1 million in television and radio ads criticizing Senator Paul Wellstone, who was facing a tough reelection battle before his death. Eric Black & Greg Gordon, *Group Buying Anti-Wellstone Ads Targets States with Close Races*, STAR TRIB., Oct. 24, 2002, at B1. The organization’s lone full-time employee claimed that AJS was a nonpolitical trade association and did not intend to influence the election. *Id.* Wellstone did benefit from another nefarious association, the Internet-based MoveOnPAC.org, which steered \$644,000 towards the senator. *Id.*

121. Office of the Press Secretary, *supra* note 4.

122. See BCRA, Pub. L. No. 107-155, sec. 201(a), § 304(f), 2002 U.S.C.A.N. (116 Stat.) 81, 88-90.

provisions embody the spirit of the First Amendment that “debate on public issues should be uninhibited, robust, and wide-open.”¹²³ If sham issue advocacy communications are unable to adequately disclose their financiers, they will be replaced by more refined communications. It is true, however, that a group’s First Amendment rights are implicated when they are barred from anonymously funding an electioneering communication. The BCRA protects these interests by not regulating all advertisements, as disclosure is only required for communications that are targeted to the relevant electorate and are broadcast within a close proximity before an election.¹²⁴ Ultimately, the public will benefit from its increased knowledge of a campaign’s funding sources.

2. The Government’s Interest in Preventing the Appearance of Corruption

The *Buckley* Court accepted the government’s contention that disclosure provisions are valuable because they serve to deter corruption:

[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate’s most generous supporters is better able to detect any post-election special favors that may be given in return.¹²⁵

If the public has the necessary information to discover corrupt practices, it can deter corruptive influences of undisclosed campaign contributions and expenditures. In other words, “[s]unlight is . . . the best of disinfectants; electric light the most efficient policeman.”¹²⁶ It is foreseeable that an organization that expends large amounts of unregulated money advocating a candidate could benefit after that candidate comes to power.

For example, in the 2000 Republican presidential primary campaign, commercials began airing in key television markets criticizing candidate John McCain’s environmental voting record.¹²⁷ The advertisements, although intended to advocate

123. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

124. See *supra* notes 16-17 and accompanying text.

125. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) (footnote omitted).

126. *Id.* (quoting LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY* 62 (Nat’l Home Library Found. ed., 1933)).

127. Hasen, *Surprisingly*, *supra* note 42, at 267-68 (citing Richard Perez-

the election of then-Texas Governor George W. Bush, never said so in express terms.¹²⁸ The expenditures were bankrolled to the tune of \$2.5 million by Sam Wyly, a key Bush supporter.¹²⁹ When asked about the ads, Wyly said that “of course” he wanted the commercials to benefit Bush.¹³⁰ No evidence has arisen which suggests that Bush has given political favors to Wyly. That fact, however, is not sufficient grounds for denying the governmental interest in preventing the appearance of corruption.¹³¹ In this example, the government had an interest in deterring actual corruption or the appearance of corruption. The Wyly-Bush relationship appeared to be corrupt, and similar situations should be avoided in the future. The government’s interest in an informed electorate also is implicated, as voters may want to know what type of an individual would buy such an advertisement for a candidate.

Mandated disclosure also could snuff out independent expenditures such as Wyly’s. In this situation, outside parties will either not want their names to be exposed, or they will disclose their electioneering communications, and public opinion will decide on the merits of their relationships with candidates. Again, this argument references the government’s informational interest. If the citizenry has all relevant information at its disposal, it will be better able to decide whether a certain candidate has been corrupted by independent expenditures.¹³²

Pena, *The Ad Campaign: Air of Mystery Clouds Shot at McCain*, N.Y. TIMES, Mar. 3, 2000, at A15).

128. *See id.*

129. *Id.*

130. *Id.* at 267 n.13 (quoting Richard W. Stevenson & Richard Perez-Pena, *Wealthy Texan Says He Bought Anti-McCain Ads: Also a Big Bush Donor*, N.Y. TIMES, Mar. 4, 2000, at A1).

131. Another example of the corruption interest occurred in the case of super-contributor Roger Tamraz. Tamraz made large campaign contributions to the Republicans in the 1980s, then to the Democrats in the 1990s, and “was unabashed in admitting his political contributions were made for the purpose of obtaining access to people in power.” 148 CONG. REC. S2115 (daily ed. Mar. 20, 2002) (statement of Sen. Levin). When asked at a government hearing “to reflect on his \$300,000 contribution to obtain access, Tamraz said, ‘I think next time, I’ll give \$600,000.’” *Id.*

132. *See supra* notes 118-26 and accompanying text.

3. Government's Interest in Detecting Other Campaign Violations

Finally, the *Buckley* Court noted that disclosure requirements allow the FEC to determine if other campaign violations have occurred.¹³³ If electioneering communications were subject to full disclosure, for example, it would be easy to tell when a certain individual or group had exceeded the allowable contribution limits toward a candidate.¹³⁴ The three compelling state interests discussed in this section validate the BCRA as a crucial benchmark in campaign finance policy, despite the statute's few minor weaknesses.

B. THE BCRA'S DISCLOSURE REQUIREMENTS ARE NARROWLY TAILORED TO AVOID PROBLEMS OF VAGUENESS AND OVERBREADTH

The BCRA has avoided the pitfalls of vagueness and overbreadth in its electioneering provisions.¹³⁵ Pursuant to the BCRA, all communications that refer to a clearly identified candidate, target the relevant electorate, and are released sixty days before a general election or thirty days before a primary election, are express advocacy and must be disclosed.¹³⁶ Read as a whole, these provisions rebut vagueness and overbreadth concerns. If a court exclusively focused on the first prong,

133. See *Buckley v. Valeo*, 424 U.S. 1, 67-68 (1976) (per curiam).

134. One example of this interest coming into play occurred in Minnesota's 2002 gubernatorial campaign. Republican candidate Tim Pawlenty was forced to pay a fine when it was discovered that his campaign and the state Republican Party impermissibly cooperated on an advertisement. See Dane Smith, *Ethics Panel Fines GOP over Pawlenty Ads*, STAR TRIB., Oct. 11, 2002 at A1. The advertisement featured Pawlenty himself in a dialogue with the camera, although a disclaimer noted that it was paid for by the Republican party and not sponsored by Pawlenty. See *id.* Minnesota's Campaign Finance and Public Disclosure Board held that the party and the campaign illegally collaborated on the ads. See *In re the (Tim) Pawlenty for Governor Comm.*, No. 15475 (Minn. Campaign Fin. & Disclosure Bd. Oct. 21, 2002), available at <http://www.cfboard.state.mn.us/bdinfo/pawlentycon.htm>. Thus, the cost of the ads was charged as a party contribution to Pawlenty's campaign, which was well in excess of the \$20,000 allowed by state law. See Smith, *supra*. Essentially, because the Republican party had to disclose itself as the financier of the ad, the illegal corroboration with Pawlenty was exposed. This Comment will not expand on the government's interest in detecting other campaign violations, as it is not central to the sham issue advocacy analysis.

135. See BCRA, Pub. L. No. 107-155, sec. 201(a), § 304(f), 2002 U.S.C.A.N. (116 Stat.) 81, 88-95.

136. See *supra* notes 15-22 and accompanying text.

however, the provision would be void for vagueness.¹³⁷ The prong that should save the entire provision from successful vagueness and overbreadth challenges is the third prong: the time requirement.¹³⁸ This prong provides a bright line, so political parties and other groups will have clear guidance as to when disclosure is necessary. The bright line also does not affect true issue advocacy and fulfills the governmental interest in preventing corruption through unregulated advertisements during the crucial months before an election.

1. The BCRA's Bright-Line Timing Restrictions Are Not Vague

The timing of a political communication often determines if it expressly advocates a candidate or instead advocates an issue. Political communications aired in close proximity to an election, for example, "are likely to have their principal impact on voters' Election Day decisions, rather than on either general political discourse or particular government actions."¹³⁹ The timing of these communications should expose them to the BCRA regulations because the communications "ought to be presumed to be part of the election."¹⁴⁰ According to one study, in the 1998 election season only 35% of advertisements released before September mentioned a candidate, but after September 1, 80% of advertisements mentioned a candidate.¹⁴¹

137. The first prong, that an electioneering communication must "refer to a clearly identified candidate," standing alone leaves too many unanswered questions: How does an advertisement refer to a candidate? If we see the candidate's picture or hear the candidate's voice, is that enough? How is a candidate clearly identified? If the advertisement refers to a piece of legislation with the candidate's name on it, is that enough? The importance of avoiding vagueness is that "[d]ue process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal." *Buckley*, 424 U.S. at 77.

138. See BCRA, sec. 201(a), § 304(f)(3)(A)(i)(II), 2002 U.S.C.C.A.N. (116 Stat.) at 89.

139. Briffault, *supra* note 42, at 1783.

140. *Id.*

141. *Id.* at 1784. For critics of the BCRA who assert that its electioneering communication definition will stifle issue advocacy, it must be understood that the impact of an advertisement will change depending on when it is released:

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

Another study noted that “[a]pproximately 86% of group-sponsored issue ads aired within sixty days of the 2000 general election were electioneering issue ads rather than genuine issue ads.”¹⁴² The BCRA’s electioneering communication definition provides for this pre-election upswing in candidate ads, as it dictates that advertisements released within sixty days of a general election must be fully disclosed.¹⁴³

Professor Richard Briffault recently asserted that “[t]here must be a bright-line definition that makes it clear to speakers, regulators, and courts whether the speech falls within the pre-election period.”¹⁴⁴ The BCRA’s sixty and thirty day thresholds provide this bright-line and thus avoid vagueness concerns. In short, the BCRA’s timing provisions meet the Court’s established vagueness standard because “they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with.”¹⁴⁵ Furthermore, an electioneering communication will not be subject to disclosure regulations unless it refers to a clearly identified candidate and is targeted to the relevant electorate,¹⁴⁶ and then only if it costs more than \$10,000.¹⁴⁷ These are all objective criteria that should be easily recognized by a group producing a communication: “What organization would be unaware that it is mentioning a candidate, would be unaware of where the candidate’s voters are, or would have trouble counting back 60 days from an election?”¹⁴⁸ Apart from avoiding vagueness problems, the BCRA’s objective factors also save the statute from overbreadth concerns.

2. The BCRA’s Bright-Line Timing Requirements Are Not Overbroad

The BCRA presumes that all advertisements are expressly related to an election if they occur sixty days before a general

Id.

142. Holman & McLoughlin, *supra* note 97.

143. BCRA, sec. 201(a), § 304(f)(3)(A)(i)(II)(aa), 2002 U.S.C.C.A.N. (116 Stat.) at 89.

144. Briffault, *supra* note 42, at 1784.

145. Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973).

146. BCRA, sec. 201(a), § 304(a)(3)(A)(i)(I), (III), 2002 U.S.C.C.A.N. (116 Stat.) at 89; *see supra* notes 16-17 and accompanying text.

147. *See* BCRA, sec. 212(a), § 304(g)(2)(A), 2002 U.S.C.C.A.N. (116 Stat.) at 93.

148. *See* Potter, *supra* note 86, at 13.

election or thirty days before a primary.¹⁴⁹ This provision has incited great controversy because the BCRA's opponents assert that it will serve as an outright ban on political speech.¹⁵⁰ This contention is misleading. The BCRA does not ban such communications. Instead, anyone wishing to fund the communications, such as corporations or unions, must pay for the advertisements out of a political action committee and not out of a general treasury.¹⁵¹ The ads also must be disclosed to the FEC within twenty-four hours.¹⁵²

Moreover, the BCRA's electioneering definition is not overbroad because empirical evidence shows that the BCRA will not restrict legitimate issue advertisements. For example, a study of the 2000 elections showed that under the Shays-Meehan sixty-day standard,¹⁵³ only three advertisements (accounting for 0.6% of all ads) would have been considered to be genuine issue advocacy ads.¹⁵⁴ If the BCRA would have been in effect in 1998, there would have been only two genuine issue ads.¹⁵⁵ What these statistics mean is that the remaining

149. See BCRA, sec. 201(a), § 304(f)(3)(A), 2002 U.S.C.C.A.N. (116 Stat.) at 89.

150. See, e.g., Bopp & Coleson, *supra* note 44, at 8 ("Plainly, this 60-day gag rule ignores the express advocacy test and encompasses issue advocacy."); Jowers, *supra* note 42, at 81 ("The most compelling instance of this overbroad definition is that it completely prohibits corporations and labor organizations from engaging in these types of otherwise protected communications."); Office of the Press Secretary, *supra* note 4 ("I also have reservations about the constitutionality of the broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election.").

151. See Potter, *supra* note 86, at 10.

152. See BCRA, sec. 201(a), § 304(f)(1), 2002 U.S.C.C.A.N. (116 Stat.) at 88.

153. Shays-Meehan was the House version of the McCain-Feingold bill, which combined to make the BCRA. The Shays-Meehan sixty-day test is, for purposes of this Comment, identical to the BCRA's electioneering communication definition.

154. See 148 CONG. REC. S2117-18 (daily ed. Mar. 20, 2002) (statement of Sen. Jeffords).

155. See *id.* Consider the text of one of the genuine issue ads:

[Announcer] It's almost too much to swallow. Year after year the federal government takes a bigger piece of the pie. In fact in 1998 we'll pay more in federal taxes than at any time in American history except for World War II. And now with the [first] budget surplus, in thirty years all the Washington politicians can talk about is getting their hands on more of your dough. Call Harry Reid and John Ensign and tell them no matter who goes to Washington you want them to cut your taxes. Otherwise they'll be nothing left but the crumbs.

Hasen, *Measuring*, *supra* note 42, at 1794. Reid and Ensign were the candidates in Nevada's U.S. Senate race, and the advertisement did not

communications are essentially sham issue advocacy. In other words, the current campaign finance regime treats the ads as issue-oriented when their clear intent is to support or attack candidates. The BCRA closes this giant loophole in campaign finance law but does not stifle issue-oriented speech.

It is also important to recall that the BCRA only imposes disclosure requirements on communications that cost more than \$10,000.¹⁵⁶ This \$10,000 rule prevents the Act from being unconstitutionally overbroad. All campaign spenders who expend less than \$10,000 per year do not need to report their expenditures, regardless of how political their actions are.¹⁵⁷ This provision ensures that speakers who do not employ large sums of money will not be deterred from engaging in nominal political speech. This chilling of low-level, grass-roots speech was a concern that was addressed both by the BCRA and by the Court's holding in *McIntyre*.¹⁵⁸ It makes no sense for the government to impose disclosure regulations on an entity that spends less than \$10,000 on campaign communications, which is a nominal sum in today's campaigns.¹⁵⁹ In that situation, the governmental interests—providing information to voters, preventing corruption or the appearance of corruption, and ferreting out other campaign abuses—are not present.¹⁶⁰ This is because a “cheap” advertisement is not likely to reach a broad cross-section of people, so it will probably not introduce any widely disseminated new campaign information. Therefore, it is improbable that a quid pro quo would be exchanged for such a small expenditure. Onerous disclosure requirements imposed on a small, informal operation instead would likely stifle its speech.¹⁶¹

Imposing disclosure requirements on larger organizations

expressly advocate either candidate but instead focused on the issue of taxes. *See id.*

156. BCRA, sec. 212(a), § 304(g)(2)(A), 2002 U.S.C.C.A.N. (116 Stat.) at 93.

157. *See id.*

158. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 355 (1995) (“A written election-related document—particularly a leaflet—is often a personally crafted statement of a political viewpoint.”).

159. The total amount of soft money, not to mention hard money, spent in the 2002 election cycle was over \$250 million. Common Cause, *supra* note 6.

160. *See supra* notes 115-36 and accompanying text.

161. *See Briffault, supra* note 42, at 1790 (“Not only is there less public benefit in regulating small spenders, but there may be a greater burden on political expression and personal autonomy if the regulation includes individuals or grass-roots groups whose small expenditures are more likely to reflect deeply held personal views.”).

and corporations, however, does not unconstitutionally suppress First Amendment rights, as disclosure requirements on these organizations are narrowly tailored to support governmental interests.¹⁶² The BCRA's \$10,000 threshold thus preserves the regulatory framework on large, sophisticated campaign speakers¹⁶³ while providing a cushion for modest speakers.¹⁶⁴ In short, the \$10,000 threshold requirement satisfies the dictates of the First Amendment while allowing for the governmental interests in informative, non-corrupt campaigns. Finally, a communication must reach 50,000 people to be regulated under the BCRA.¹⁶⁵ This threshold requirement further ensures that the BCRA is not overbroad because communications aired through mediums that typically do not reach 50,000 people, such as low-power radio or television, will not have to comply with potentially onerous regulations.

C. MINOR WEAKNESSES IN THE BCRA

The BCRA has a few weaknesses inherent in its structure, but none of these deficiencies is enough to invalidate the Act. One weakness is present in the provision that mandates disclosure for all communications that cost more than \$10,000.¹⁶⁶ The \$10,000 baseline is not indexed to inflation.¹⁶⁷ In the future, many smaller political organizations could find themselves having to disclose their activities, even though they are putting out the same amount of limited political

162. See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 666 (1990) (holding that in regards to regulations on corporate political spending, "the State's decision to regulate only corporations is precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effect of political 'war chests'").

163. These large political spenders probably would not be deterred from a system of disclosure for heretofore known issue advocacy. As one scholar noted, "I have strong doubts that the AFL-CIO would have been deterred from running its \$35 million in issue ads in the 1996 presidential election if the law required disclosure of its contributors or expenditures." Hasen, *Surprisingly*, *supra* note 42, at 280-81.

164. Speaking of disclosure effects on small, political organizations, the Supreme Court has said that "the administrative costs of complying with such increased responsibilities may create a disincentive for the organization itself to speak." *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 254 n.7 (1986).

165. BCRA, Pub. L. No. 107-155, sec. 201(a), § 304(f)(3)(C), 2002 U.S.C.C.A.N. (116 Stat.) 81, 90.

166. *Id.* sec. 212(a), § 304(g)(2)(A).

167. See *id.*

communications. A simple amendment indexing this provision to inflation would solve the problem.¹⁶⁸

Also, some associations could be fearful of disclosing their expenditures because of retaliatory measures by groups that oppose their viewpoints.¹⁶⁹ The BCRA makes no such exemption for these types of controversial associations, so they may be chilled from engaging in any electioneering communications.¹⁷⁰ Any number of associations, such as groups advocating communist or racist views, could be reluctant to disclose their identities and donors out of fear of retaliation by groups that oppose their beliefs.¹⁷¹ If these fears are justified, these associations would essentially forfeit their right to speak. Because of this narrowly circumscribed instance, it would be wise to amend the BCRA to protect vulnerable associations. Such an amendment must be carefully monitored, however, because an exemption could be subject to widespread abuse by organizations that seek to avoid disclosure requirements by dubiously claiming they are otherwise fearful to speak. While the BCRA is not perfect, it is a crucial first step towards limiting the quantity of electioneering communications funded by anonymous groups. Concerns with the BCRA should be addressed through congressional amendment, not judicial fiat.

D. THE BCRA'S REGULATIONS DO NOT RUN AFOUL OF SUPREME COURT PRECEDENT

A new definition of express advocacy must be unambiguous and narrowly drawn, but it also must avoid obstacles presented by previous Supreme Court holdings. The Court's decision in *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL)*, which held that a small nonprofit, political corporation did not have to comply with federal disclosure

168. To analogize, such a problem hampered the FECA's campaign contribution limitations, which restricted individual donations to \$1,000 per candidate, per election. At the time the BCRA was being formulated, the \$1,000 contribution limit was worth almost \$3,000 after inflation. See DREW, *supra* note 7, at 14.

169. The Supreme Court addressed this issue during the civil rights movement when it ruled that the Alabama chapter of the NAACP did not have to disclose the names of its members under state law, since the law would have effectively silenced the NAACP membership out of fear. See *NAACP v. Alabama*, 357 U.S. 449, 463 (1958).

170. See *id.*

171. See *id.*

requirements, can be distinguished from the BCRA.¹⁷² The corporation in *MCFL* was exempted from disclosure requirements precisely because it was a small, politically-oriented company, and onerous regulations would have stifled its motivation to enter the political arena.¹⁷³ Instead of contradicting *MCFL*, the BCRA has expressly followed the decision by exempting organizations identified in Internal Revenue Code sections 501(c)(4) and 527(e)(1) from its disclosure requirements.¹⁷⁴ The Court held in *Austin* that larger, business-oriented organizations may be regulated via disclosure requirements,¹⁷⁵ so any exception created in *MCFL* is limited to small, political organizations. This issue is addressed by the BCRA.¹⁷⁶ Finally, while *McIntyre* invalidated disclosure requirements on a lone pamphleteer, the case turned on the fact that the election at issue was a school tax levy, and not a candidate election.¹⁷⁷ The government's interest in preventing corruption was thus inadequate because there were no candidates to corrupt, and a school tax levy itself cannot be corrupted.¹⁷⁸

Opponents of campaign finance reform who rely on *McIntyre* as proof that all campaign disclosure requirements are presumptively unconstitutional are incorrect.¹⁷⁹ The Court repeatedly has stated that disclosure of corporate and other organizational communications in candidate elections is a compelling governmental interest that is not overruled by *McIntyre*'s invalidation of disclosure requirements with respect

172. See 479 U.S. 238, 263 (1986); see also *supra* notes 46-60 and accompanying text.

173. See *MCFL*, 479 U.S. at 254.

174. See BCRA, Pub. L. No. 107-155, sec. 203(b), § 316(c)(2), 2002 U.S.C.C.A.N. (116 Stat.) 81, 91. The FEC has extended this exemption to 501(c)(3) corporations. See *Electioneering Communications*, 67 Fed. Reg. 65,189, 65,199 (Oct. 23, 2002) (to be codified at 11 C.F.R. pt. 100).

175. See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658-59 (1990) (noting that a corporation receives special state-sponsored advantages which make it amenable to campaign regulation); see also *supra* notes 63-72 and accompanying text.

176. See *supra* note 20.

177. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348-56 (1995); see also *supra* notes 73-79 and accompanying text.

178. See *McIntyre*, 514 U.S. at 352; Hasen, *Surprisingly*, *supra* note 42, at 274 (distinguishing *McIntyre* from *Buckley*).

179. See *BeVier*, *supra* note 118, at 288 ("*McIntyre* reaffirms the Court's commitment to strict scrutiny of disclosure requirements in order to preserve the right to engage in political advocacy unencumbered by burdensome regulations that produce few benefits.>").

to a lone pamphleteer.¹⁸⁰ Despite the likelihood that the BCRA is constitutional, given the issues at stake, it is not surprising that the BCRA's opponents have undertaken the task of invalidating the Act in court. This Comment's final section will apply the arguments discussed in previous sections to *McConnell v. FEC*.

IV. *MCCONNELL v. FEC*: MCCONNELL'S CHALLENGE SHOULD FAIL

More than eighty plaintiffs have challenged the BCRA's campaign disclosure requirements as impermissible infringements on the First Amendment.¹⁸¹ Almost every provision of the Act was questioned in more than eleven different actions, which were subsequently consolidated into *McConnell v. FEC*.¹⁸² Because the BCRA is so controversial, the Act provides for an expedited judicial process,¹⁸³ so the Supreme Court could hear the case as early as spring of 2003.¹⁸⁴ The *McConnell* plaintiffs first allege that regulation of speech that "does not expressly advocate the election or defeat of a clearly identified candidate" is an unconstitutional abridgement of the First Amendment.¹⁸⁵ This argument essentially opposes the imposition of express advocacy disclosure requirements onto sham issue advocacy advertisements.¹⁸⁶ The BCRA, on the other hand, responsibly holds that all ads in reference to a clearly identified candidate will be considered to be express advocacy if they occur within sixty days before a general election or thirty days before a primary election.¹⁸⁷ Speech must be disclosed in this instance, but it is not unduly restricted.¹⁸⁸

180. See *McIntyre*, 514 U.S. at 354 n.18.

181. See The Campaign & Media Legal Ctr., *supra* note 9.

182. See *id.*

183. See *supra* note 10 and accompanying text (describing that a challenge to the BCRA is first heard by a three-judge district court in the District of Columbia, with appeals to be directly certified to the U.S. Supreme Court).

184. See The Campaign & Media Legal Ctr., *supra* note 9.

185. See Plaintiffs' Second Amended Complaint for Declaratory and Injunctive Relief ¶48, *McConnell v. Fed. Election Comm'n*, No. 02-0582 (D.D.C. May 7, 2002), <http://lawschool.stanford.edu/library/campaignfinance/mcconnell-v-feccomplaint50702.pdf> (last viewed Mar. 31, 2003).

186. See *id.*

187. See *supra* notes 15-22 and accompanying text (definition of electioneering communications).

188. See *supra* note 150 and accompanying text.

The plaintiffs also complain that the BCRA prohibits or limits speech made by smaller political associations, such as the nonprofit corporation at issue in *MCFL*.¹⁸⁹ This argument ignores the fact that the BCRA has exempted from its electioneering regulations organizations identified in Internal Revenue Code sections 501(c)(4) and 527(e)(1),¹⁹⁰ along with the fact that regulations on general corporate campaign speech have already been affirmed in *Austin*.¹⁹¹ Finally, the plaintiffs contend that the BCRA's disclosure regulations are unconstitutionally vague and overbroad.¹⁹² Again, the BCRA subjects no pure issue advocacy advertisements to its disclosure regulations.¹⁹³ The Act will only regulate communications that refer to a clearly identified candidate, meet the \$10,000 monetary threshold, and target the relevant electorate within a specified period close to an election.¹⁹⁴ Therefore, the district court should find that the BCRA is a reasonable solution to the complexities of campaign finance disclosure and not an unconstitutional infringement on the First Amendment.

CONCLUSION

The current definition of express advocacy is unworkable. *Buckley*'s magic words test is a paper tiger, as nefarious political groups, corporations, and other organizations have avoided reasonable disclosure requirements simply by not using the magic words in their advertisements. The First Amendment provides ample protection for these groups to speak, but it does not grant absolute immunity from regulation. The BCRA upholds the First Amendment through its disclosure requirements for electioneering communications: The

189. See Plaintiffs' Second Amended Complaint for Declaratory and Injunctive Relief ¶49, *McConnell*, <http://lawschool.stanford.edu/library/campaignfinance/mcconnell-v-feccomplaint50702.pdf> (last viewed Mar. 31, 2003).

190. See BCRA, Pub. L. No. 107-155, sec. 203(b), § 316(c)(2), 2002 U.S.C.A.N. (116 Stat.) 81, 91; see also *supra* note 20 and accompanying text.

191. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 669 (1990).

192. See Plaintiffs' Second Amended Complaint for Declaratory and Injunctive Relief ¶50, *McConnell*, <http://lawschool.stanford.edu/library/campaignfinance/mcconnell-v-feccomplaint50702.pdf> (last viewed Mar. 31, 2003).

193. See *supra* notes 153-57 and accompanying text.

194. See *supra* notes 135-67 and accompanying text (discussing vagueness and overbreadth concerns).

regulations are clear, they are limited to election-related speech, and they adequately relate to governmental interests to provide informative, corruption-free campaigns. In short, a court evaluating this portion of the BCRA should hold that it withstands “exacting scrutiny” because it is narrowly tailored to meet compelling governmental interests.

