Perry v. Barlett: A Preliminary Test for Campaign Finance Reform

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Perry v. Bartlett: A Preliminary Test for Campaign Finance Reform

Prompted by the 2000 presidential election, independent issue advertisements have resurfaced as one area of concern for campaign finance reform advocates. These advertisements are designed to impact an election without endorsing or opposing a specific candidate. Many reform advocates support imposing registration and disclosure requirements on independent advocacy organizations similar to those imposed on organizations taking an explicit position on an individual candidate. While compelling arguments exist for restricting money's prevalence in the electoral system, legislative restraints on campaign financing run perilously close to infringing upon First Amendment free speech rights. In Perry v. Bartlett, the

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4. These arguments include preventing corruption in the political process and providing equal political opportunity to the entire electorate. See infra notes 38-63 and accompanying text.

United States Court of Appeals for the Fourth Circuit strictly adhered to the express advocacy test laid down by the Supreme Court in *Buckley v. Valeo*, which reinforced earlier Supreme Court case law favoring the protection of political speech. The Fourth Circuit's decision indicates that the circuit courts will view the pending legislation as unconstitutional unless the Supreme Court changes its approach to the regulation of political speech. This Recent Development argues for the re-characterization of issue advocacy advertisements as a component of a candidate's overall campaign and the establishment of an objective test for determining whether an advertisement constitutes express advocacy in order to facilitate the successful implementation of campaign finance reform.

In *Perry*, the Fourth Circuit based its reasoning on *Buckley*'s holding that although protected political expression often must be achieved through the expenditure of money, the dangers of unlimited monetary contributions warrant regulation. Although the Supreme Court has held that some regulation of political speech can pass the requisite strict scrutiny test, it has excluded many types of

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6. 231 F.3d 155 (4th Cir. 2000) (per curiam).
9. *Buckley*, 424 U.S. at 44. The Court stated that the "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression." *Id.* at 14.
10. The Court stated that "[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." *Id.* at 19. The Court also noted that campaign contributions play a significant role in political dialogue, which could be severely impacted if contribution limits were too strict. *Id.* at 21.
11. A regulation that imposes any burden on political expression must meet the strict scrutiny test to be constitutional. See *id.* at 16 (stating that exacting scrutiny, as set out by the First Amendment, is required); Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 251–52, 256 (1986) (stating that state imposed burdens on political speech must be justified by a compelling state interest).
12. In *Buckley*, the Supreme Court stated that limiting personal contributions to a candidate was only a marginal restriction on free speech. *Buckley*, 424 U.S. at 20–22. The Court noted that while contributions to a candidate indicate a "general expression of support," there is only a minimal relationship between the size of a contribution and the underlying level of support. *Id.* at 21. In its decision, the Court determined that the government's interest in preventing corruption was sufficiently compelling to justify the burdens contribution limits placed on First Amendment rights. *Id.* at 25–29; see also *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 669 (1990) (upholding the constitutionality of a statute that prohibits corporations from making contributions and expenditures regarding state elections). But see Martin H. Redish, *Free Speech and the Flawed Postulates of Campaign Finance Reform*, 3 U. PA. J. CONST. L. 783, 796–98 (2001)
political speech from regulation by using the “express advocacy” test. This test requires the use of “explicit words of advocacy of election or defeat of a candidate” in a communication before it may be regulated. The Fourth Circuit followed this bright-line test in Perry, and other courts have applied the test consistently in numerous political speech cases.

In Perry, after the Fourth Circuit determined that the constitutionality of North Carolina General Statute section 12A had not been mooted by North Carolina Right to Life v. Bartlett, the

1790 NORTH CAROLINA LAW REVIEW [Vol. 79 (arguing that campaign contributions are "a form of pure expressive activity," thus fitting "within the framework of free speech").

13. Buckley, 424 U.S. at 44; see Kathleen M. Sullivan, Political Money and Freedom of Speech, 30 U.C. DAVIS L. REV. 663, 667 (1997) (stating that Buckley was an attempt to split the difference between "two of our most powerful traditions: equality in the realm of democratic polity, and liberty in the realm of political speech").

14. Buckley, 424 U.S. at 43. Courts have referred to the “express advocacy” test as a “prophylactic definition” to give the widest safeguards to First Amendment freedoms. Federal Election Comm'n v. Christian Action Network, 110 F.3d 1049, 1052 (1997). The Supreme Court attempted to give meaning to the term “express advocacy” by listing words that potentially could qualify an advertisement as political speech worthy of regulation. Buckley, 424 U.S. at 44 n.52. Among some of the words and phrases listed by the Court were: “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” and “reject.” Id. The Ninth Circuit has stated that this list was meant as a guide for future application of the “express advocacy” test and was not intended to be exclusive. Federal Election Comm'n v. Furgatch, 807 F.2d 857, 862-63 (9th Cir. 1987) (stating that words for the purpose of determining advocacy should not be considered in isolation, but in the context of the entire communication). The court emphasized the Supreme Court's focus on literal speech and words in the text of communications. Id. The Supreme Court declined to adopt an all-inclusive rule that would permit regulation of any political speech mentioning a candidate and his or her stance on an issue because the “distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.” Buckley, 424 U.S. at 42. The Court was concerned about the difficulty in applying an interpretative test and thus opted for a bright-line test. Id. at 44. This decision effectively excluded issue advertisements from government regulation so long as they do not expressly support or oppose a candidate. Id.

15. See, e.g., Iowa Right to Life Comm., Inc. v. Williams, 187 F.3d 963, 969 (8th Cir. 1999) (stating that questions of intent or effect are irrelevant to an express advocacy analysis); Federal Election Comm'n v. Christian Coalition, 52 F. Supp. 2d 45, 61 (D.D.C. 1999) (stating that an advertisement must contain an “explicit directive” that is to be ascertained by the words used in order to be subject to regulation); Faucher v. Federal Election Comm'n, 928 F.2d 468, 472 (1st Cir. 1991) (noting that the Supreme Court intended to avoid constitutional questions by laying down an explicit test); Federal Election Comm'n v. Cent. Long Island Tax Reform Immediately Comm., 616 F.2d 45, 53 (2d Cir. 1980) (stating that the FEC's “intentions” test would nullify the Buckley decision).

16. 168 F.3d 705 (4th Cir. 1999). In North Carolina Right to Life, the court held section 14A “unconstitutionally vague and overbroad” because North Carolina's definition of a political committee included those organizations that incidentally engage in express advocacy. 168 F.3d at 713. Section 14 defined “political committees” and prohibited them from accepting monetary contributions exceeding one hundred dollars
court tested its constitutionality by applying the express advocacy test. The court strictly adhered to the test requiring "express words of advocacy" in invalidating section 12A. Section 12A stated that the intention behind advertisement expenditures was to be considered in determining whether their sponsoring organizations were subject to statutory reporting requirements. The language of the statute clearly ran afoul of the express advocacy test established in *Buckley*, and the Fourth Circuit indicated that it was not ready to alter the standard for the regulation of political speech.

The Fourth Circuit's decision not to create an exception to the express advocacy test will have implications for both the campaign finance reform movement and legislation under consideration by Congress. *Perry* sends a clear message that efforts to restrict political speech that only indirectly target candidates will not withstand judicial scrutiny under the present framework. The decision also highlights some courts' present unwillingness to abandon current case law in favor of popular reform. This trend does not bode well for supporters of the recurrent Bipartisan Campaign Finance Reform Act of 2001, which may eventually win approval in Congress only to be defeated in the courts. The bill regulates

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18. Id.
19. This statute required organizations to disclose expenditures naming a candidate or prospective candidate unless the material is "solely informational and is not intended to advocate the election or defeat of a candidate." N.C. GEN. STAT. § 163-278.12A (1999). The statute stated that it was reluctant to establish a test that would create an ambiguous standard open for interpretation. *Id.*
20. Perry, 231 F.3d at 160-62.
21. Curbing the influence of soft money and other indirect support and opposition to candidates is a top priority for campaign finance reform advocates. *See* Trevor Potter, *Buckley v. Valeo*, *Political Disclosure and the First Amendment*, 33 AKRON L. REV. 71, 78-79 (1999) (stating that issue advocacy is one of the most contentious parts of the campaign finance reform debate); Ornstein, *supra* note 2 (advocating the inclusion of issue advocacy in campaign finance reforms); Roth, *supra* note 3 (discussing the popularity of banning soft money).
23. Several versions of this bill, sponsored by Senators John McCain and Russ Feingold, have been introduced in previous Congresses. However, the bill has failed to secure passage each time. *See* Redish, *supra* note 12, at 788 nn.41-43 (discussing the history of the McCain-Feingold campaign finance reform bills); Dante Chinni, *McCain's Gambit: Sway Washington From Arkansas*, CHRISTIAN SCIENCE MONITOR, Jan. 31, 2001,
electioneering communications, which are defined as broadcast communications to members of the general electorate that clearly identify a candidate and are made within sixty days before a general election or thirty days before a primary election. The Senate remains conscious of the potential unconstitutionality of this regulation, as evidenced by the insertion of an alternative definition of electioneering communications in the bill. The bill states that in the event a court holds that pre-election candidate identification is too broad to constitute express advocacy and therefore unconstitutional, electioneering communications will be defined as any broadcast that "promotes or supports" or "attacks or opposes" a candidate for office and which has no other plausible meaning but an "exhortation to vote for or against a specific candidate."

The language in the alternative statutory definition seems to leave an interpretative role for the courts in determining whether the advertisement was intended to sway a voter’s decision, something the express advocacy test was designed to avoid.

The companion bill pending in the House of Representatives attempts to regulate issue advertisements through a similar definition of express advocacy. The House bill begins its definition of express advocacy.

at 2 (stating that each time a version of the bill was introduced, it received a majority of support, only to die because of a filibuster); Jim Drinkard, It's Strike 3 for Campaign Finance Reform if Senate Supporters Fail to Break Filibuster by Republicans, USA TODAY, Sept. 11, 1998, at 6A (detailing the difficulty for the bill in the 105th Congress); Bob Hohler, Senate Foils Campaign Finance Bills; Republican Filibuster Prevails, BOSTON GLOBE, Oct. 20, 1999, at A1 (discussing the history of defeats for campaign finance reform bills).

While supporters of the Bipartisan Campaign Finance Reform Act have recently come closer to passing the bill by winning approval in the Senate, the bill stalled in the House of Representatives, threatening to kill it once again if supporters are unable to revive it. See Campaign Reform Petition Started, WASH. POST, July 31, 2001, at A04 (discussing the efforts of campaign finance reform supporters to revive the Bipartisan Campaign Finance Reform Act through a discharge petition); Greg Miller, House Backers Move Closer to Forcing Vote on Campaign Finance Reform, L.A. TIMES, Sept. 7, 2001, at A15 (discussing efforts of House members to revive the campaign finance bill); Norman Ornstein, Reformers Bloodied But Not Bowed, L.A. TIMES, July 22, 2001, at M6 (discussing the progress of the campaign finance bill in the 107th Congress). Even if no campaign finance reform bills are enacted into law by the 107th Congress, the constitutional issues underlying the current debate will remain pertinent and potentially determinative of any eventual campaign finance reform that seeks to regulate issue advocacy.

26. Id.
27. See Faucher v. Federal Election Comm’n, 928 F.2d 468, 472 (1st Cir. 1991); Buckley v. Valeo, 424 U.S. 1, 44 (1976) (per curiam).
advocacy by mirroring the Supreme Court’s use of words and phrases designed to advocate the election or defeat of a candidate. However, express advocacy under this bill also includes advertisements “referring to one or more clearly identified candidates in a paid [radio or television] advertisement that is transmitted within 60 calendar days preceding the date of an election of the candidate.” The broadest definition of express advocacy offered in the bill includes communications that express “unmistakable and unambiguous support or opposition to one” candidate. In spite of this expansive definition, the bill does include some limitations and exceptions. For example, voter guides that offer only unbiased information in an uncoordinated manner, without any express words that could reasonably be perceived to support an individual candidate’s election or defeat, are unregulated.

Any law purporting to regulate issue advocacy advertisements using an interpretative mechanism such as the one found in pending campaign finance reform bills would probably violate the express advocacy test and be held unconstitutional under existing case law. Perry demonstrates that courts will closely scrutinize any legislation that seeks to restrict issue advertisements or broaden the definition of express advocacy, thereby burdening political speech. The express advocacy test will most likely require significant broadening or

29. Id. § 201(b)(20)(A)(i). These words must be used in a “context [that] can have no reasonable meaning other than to advocate the election or defeat of . . . candidates.” Compare § 201(b)(20)(A)(i) (using a contextual test for determining if political speech can be regulated), with Buckley, 424 U.S. at 43 (requiring words of express advocacy to permit the regulation of political speech).
31. Id. § 201(b)(20)(A)(ii).
32. Id. § 201(b)(20)(B)(i)–(iii).
33. See Briffault, supra note 2, at 1736-37 (stating that issue advocacy will likely be at the heart of any constitutional challenge to pending campaign finance legislation); Richard A. Davey, Jr., Comment, “Buckleying” the System: Is Meaningful Campaign Finance Reform Possible Under Reigning First Amendment Jurisprudence?, 34 GONZ. L. REV. 509, 523 (1998-1999) (stating that any law restricting issue advocacy will likely be struck down). As the bill was considered in Congress, members questioned the bill’s ability to withstand constitutional scrutiny. 147 CONG. REC. S3225 (2001) (statement of Sen. Nickles arguing that certain parts of the campaign finance bill will be held unconstitutional); 147 CONG. REC. S3334, S3335 (2001) (statement of Sen. Kerry predicting that the Supreme Court will not reverse itself to allow regulation of issue advocacy).
34. See Perry v. Bartlett, 231 F.3d 155, 160-62 (4th Cir. 2000) (per curiam); Gora, supra note 5, at 28 (stating that current campaign finance reform bills seeking to regulate issue advocacy are “flatly unconstitutional under settled First Amendment rules”).
elimination altogether if new campaign finance regulation is to meet the strict scrutiny test.\textsuperscript{35}

The current political climate could give rise to new and compelling arguments which will convince the Supreme Court that it is time to abandon the test applied in \textit{Perry} in order to allow more meaningful campaign finance regulation.\textsuperscript{36} Under the current framework, political contributions are characterized as speech rather than conduct or property, thereby subjecting them to the "exacting scrutiny required by the First Amendment."\textsuperscript{37} The first argument for regulating issue advocacy expenditures flows from the government's compelling interest in preventing corruption and the appearance

\begin{itemize}
\item \textsuperscript{35} See Davey, \textit{supra} note 33, at 528 (stating that reform advocates should attempt to alter the current constitutional parameters for regulating campaign financing before attempting to institute reforms).
\item \textsuperscript{36} See \textit{Perry}, 155 F.3d at 160; see \textit{Nixon v. Shrink Missouri Gov't PAC}, 528 U.S. 377, 408-09 (2000) (Kennedy, J., dissenting) (stating that the soft money system creates dangers and is dispiriting to voters). Justice Kennedy noted that Congress might be able to craft campaign finance regulation that could regulate contributions and expenditures, thus alleviating some of the problems plaguing the system. \textit{Id.} at 409-410; John C. Bonifaz et al., \textit{Challenging Buckley v. Valeo: A Legal Strategy}, 33 \textit{AKRON. L. REV.} 39, 69 (1999) (arguing that the Supreme Court has become dissatisfied with \textit{Buckley} and may be ready to proceed in a new direction if new and better articulated compelling government interests are presented to the Court); Briffault, \textit{supra} note 2, at 1730-31 (arguing that the future of the \textit{Buckley} framework is in doubt). Justice Stevens supports discarding the \textit{Buckley} framework and instead characterizing campaign contributions as property. \textit{Nixon}, 528 U.S. at 398 (Stevens, J., concurring). He argues that this approach would permit the analysis of campaign finance regulation under substantive due process principles and implies that such analysis would give the Court a greater ability to regulate the activity. \textit{Id.} at 398-99 (Stevens, J., concurring); \textit{see also} Erin Buford Vinett, Recent Development, \textit{First Amendment--Campaign Finance Reform--The Supreme Court Halts the Eighth Circuit's Invalidation of State Campaign Contribution Limits: Nixon v. Shrink Missouri Government Political Action Committee, 120 S. Ct. 897 (2000), 23 U. ARK. LITTLE ROCK L. REV. 243, 265-66 (2000) (discussing Justice Stevens's premise for campaign finance regulation). But see Davey, \textit{supra} note 33, at 523 (arguing that the Court may not be receptive to restricting issue advocacy). The case for expanding or overturning \textit{Buckley} has arguably become more persuasive in light of the alleged fundraising improprieties of former President Bill Clinton and criticism of President George W. Bush's massive campaign war chest that have raised concerns about the integrity of the democratic electoral process.
\item \textsuperscript{37} \textit{Buckley v. Valeo}, 424 U.S. 1, 16 (1976) (per curiam); \textit{FEC v. Colorado Republican Fed. Campaign Comm. (Colorado Republican II)}, 121 S. Ct. 2351, 2358 (2001). Strict scrutiny requires that any government action that burdens First Amendment rights be narrowly tailored to achieve a compelling governmental interest. Carver v. Nixon, 72 F.3d 633, 638 (8th Cir. 1995); \textit{Shrink Missouri Gov't PAC v. Manpin}, 922 F. Supp. 1413, 1420 (E.D. Mo. 1996). Since issue advocacy is characterized as speech, the government must make this demonstration in order to be consistent with the constitutional mandate. In \textit{Buckley}, the Court determined that the prevention of corruption was the sole justification for allowing regulation of campaign financing. 424 U.S. at 47-48; Richard Briffault, \textit{Campaign Finance, the Parties and the Court: A Comment on Colorado Republican Fed. Campaign Comm. v. Federal Elections Comm'n}, 14 \textit{CONST. COMMENT.} 91, 96 (1997).
\end{itemize}
thereof in the political arena. Permitting issue advocacy groups to accept unlimited contributions and then spend unlimited amounts indirectly supporting or opposing a candidate undermines the spirit of campaign finance regulation. Issue advertisements often serve the same purpose as express advertisements, yet issue advertisements are not regulated and their sponsors are unaccountable. Campaigns and issue groups can coordinate their activities without violating the law. As these groups are permitted to influence the outcome of elections through independent expenditures, the potential for corruption grows. When the activities of such groups impact elections and policy formulation, the accountability of candidates benefiting from the advocacy is diminished. This situation threatens the integrity of our


40. Corrado, supra note 39 (discussing the effects of issue advocacy); Briffault, supra note 2, at 1739–40 (stating that independent expenditures present the same danger as contributions); Briffault, supra note 37, at 98 (stating that expenditures can create the same obligation to the spender as a contribution).

41. See ELIZABETH DREW, POLITICS AND MONEY 136 (1983) (stating that there are numerous ways “independent” campaigns can collude with candidates); Joseph Lieberman, The Politics of Money and the Road to Self-Destruction, 16 YALE L. & POL’Y REV. 425, 447–48 n.63 (1997) (discussing Bob Dole’s strategy to combat his lack of presidential campaign funds through the use of issue advertisements favoring his candidacy, but stopping short of expressly advocating his election); Davey, supra note 33, at 521 (discussing President Bill Clinton’s ability to “[bend] express advocacy into issue advocacy”). Coordination can also take place by simply observing where one organization decides to advertise and then strategically planning a separate advertising effort that targets a different market or voter base. Thus, the campaign effort, united by one goal but officially uncoordinated, can better utilize its resources to elect its candidate.

42. See Lillian R. BeVier, The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis, 85 VA. L. REV. 1761, 1784–85 (1999) (stating that issue advertisements can set the agenda); Briffault, supra note 37, at 97 (noting that contributions raise the specter of corruption); Corrado, supra note 39, at 1808 (discussing issue advocacy and candidate accountability); David A. Strauss, Corruption, Equality, and Campaign Finance Reform, 94 COLUM. L. REV. 1369, 1369 (1994) (“To the extent that large contributions are given to secure a political quid pro quo from current and potential officeholders, the integrity of our system of representative government is undermined.”).
system of government because elected officials’ accountability to the people is a “central assumption of our electoral democracy.”

Currently, the public lacks the necessary information to evaluate an issue advertisement in light of the candidate it supports or opposes. Unlimited campaign contributions in the form of issue advertisements arguably buy the same access to policymaking that a direct contribution would bring, yet issue advertisements are unlimited in size and can potentially facilitate greater access. Thus, these contributors should be considered part of the campaign because they reap the benefits of electing their candidates through subsequent input on policy formulation and implementation. The more money spent, the greater the potential for corruption and impropriety, as discussed by the Buckley court. Nevertheless, the Court’s reluctance

43. First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978) (defining corruption to include undermining the people’s confidence in the democratic process); Briffault, supra note 37, at 97 (discussing the threat to the democratic system’s integrity); Corrado, supra note 39, at 1808 (discussing the harmful effects of issue advocacy).

44. Corrado, supra note 39, at 1808 (discussing the lack of disclosure requirements).

45. See Briffault, supra note 37, at 98 (raising the possibility that “a candidate who benefits from an independent committee’s support will feel an obligation . . . comparable to that created by a contribution”); Corrado, supra note 39, at 1808 (arguing that unaccountability can effect decisions in office); Sullivan, supra note 13, at 678–79 (stating that many voters perceive Congress to be controlled by the wealthy). But see FEC v. Colorado Republican Fed. Campaign Comm. (Colorado Republican II), 121 S. Ct. 2351, 2358 (2001) (quoting Buckley’s finding that the absence of pre-arrangement and coordination of expenditures reduces the danger that they may be used for improper candidate commitments).

46. This argument becomes more plausible if campaigns are construed more broadly to include efforts and expenditures outside the official organization. However, Buckley’s argument that “virtually every means of [political communication] requires the expenditure of money” discourages such a broad interpretation in order to safeguard First Amendment rights. Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam). Issue advertisements arguably constitute both contributions and expenditures, making it difficult to classify them as subsections of the campaign for the purpose of regulating them. See Briffault, supra note 37, at 98 (discussing the difficulty of classifying these campaign practices).

The Supreme Court recently noted that the simplicity of the distinction between contributions and expenditures is qualified by the use of a functional definition of contribution, rather than a formal one. Colorado Republican II, 121 S. Ct. at 2356–57. The current definition of contribution includes “expenditures made . . . in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents.” 2 U.S.C. § 441a(a)(7)(B)(i) (1994). Utilizing a functional definition of contribution would potentially bring more “expenditures” under the regulation of campaign finance laws. See Colorado Republican II, 121 S. Ct. at 2356–57.

47. Buckley, 424 U.S. at 26 (discussing the state’s interest in regulating political financing); Briffault, supra note 2, at 1741 (discussing the consideration of corruption when regulating political speech). Professor Briffault argues that the Supreme Court has "suggested that 'corruption' may be read to include the spending of large sums of money
to allow regulation of the most prominent vehicles through which this corruption can arise undermines the states' ability to address a compelling interest.

The argument for classifying issue advertisements as part of the actual campaign is undermined by the Supreme Court's rejection of a similar argument made by the Federal Election Commission. The FEC believed that party expenditures are so closely linked to candidates that any party expenditure should be presumed to be coordinated with the party's candidate, thus subjecting the party to contribution limits. However, the Supreme Court rejected this argument, finding that those expenditures were not more likely to serve or appear as instruments of corruption than other private expenditures. The Court's reluctance to presume party expenditures to be associated with their candidate's campaign further underscores the unlikelihood that courts will allow issue advertisements to be grouped with a campaign.

The Court, however, does leave the door ajar for less presumptive forms of this argument. The Court held "that a party's coordinated expenditures . . . may be restricted to minimize circumvention of contribution limits." Thus, if the courts can be persuaded to adopt a broader definition of coordination, perhaps more functional in nature, issue advertisements may become subject to campaign finance regulation.

The potential influence of money in the political arena gives rise to a second compelling argument for expanding the Buckley test: equal political opportunity for the entire electorate. The Sixth
Circuit articulated this argument in *Kruse v. City of Cincinnati*, where the court struck down a city ordinance that sought to limit money's influence in the democratic process. The court rejected the argument that the government's interest in providing a level playing field for elections was sufficiently compelling to justify state regulation burdening political speech. The court directly relied on *Buckley* in rejecting this argument, stating that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." The court refused, however, to recognize that disparities in financial political expression foster political inequality and undermine the First Amendment.

Issue advocacy groups must be included within campaign finance regulations to prevent "independent" organizations from doing the candidates' work and providing avenues for contributors to duplicate

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53. 142 F.3d 907, 918–19 (6th Cir. 1998), cert. denied, 525 U.S. 1001 (1998) (invalidating Cincinnati's limits on campaign expenditures). Although the Supreme Court declined to review the lower court's decision to enjoin the city's campaign finance regulation, the case is another example of increasing support for revisiting *Buckley* and its ban on spending limits. See id. at 918–19 (discussing the attention *Kruse*'s arguments have received by some members of the Supreme Court; see Bonifaz et al., *supra* note 36, at 51–54 (discussing the importance of *Kruse* in the continuing campaign finance debate).

54. *Kruse*, 142 F.3d at 909. The ordinance limited the amount a candidate for a city office could spend in an election cycle to three times the compensation provided for the relevant office. *Id.* While expenditures are different from contributions and not constitutionally limited, the arguments found in *Kruse* are applicable to the debate over issue advocacy regulation. *See id.*; *Buckley v. Valeo*, 424 U.S. 1, 20–23 (1976) (per curiam). The distinction between contributions and expenditures is difficult to discern because the expenditures of one person or group can serve the same purpose as a contribution to another. *See Briffault, supra* note 37, at 98–100 (discussing the difficulty in applying the contribution and expenditure distinction).

55. *Kruse*, 142 F.3d at 917–18. The city applied this argument in four ways: 1) candidates lacking access to wealth are excluded from running for office; 2) since costs prohibit some individuals from running for office, the general public is deprived of a full slate of candidates; 3) voters are deprived from hearing the positions of candidates with lesser resources; and 4) voters lacking access to wealth are drowned out by voters with such access and the influence it buys. *Id.* at 917.

56. *Id.* at 917 (quoting *Buckley*, 424 U.S. at 48–49).

their expressive rights. In order to realize the ideals of a democratic system, all participants must be assured an equal voice. Political equality serves as the foundation of our democratic system. The necessity of providing equal opportunity to communicate ideas among the public should allow the regulation of political speech to ensure this end. Campaign contribution limits on all sources would ensure that no one person or group could "speak" with a louder voice simply because he or she is wealthy. It would ensure that the capability to exercise one's First Amendment right to political speech is not a function of wealth. Wealthier individuals and organizations would no longer have an inherent advantage by being able to purchase the right to be heard. Limiting all expenditures and

58. See Briffault, supra note 2, at 1739-40 (stating that independent expenditures and direct contributions present the same dangers to the electoral system); Corrado, supra note 39 and accompanying text (arguing that express and issue advertisements serve the same purpose and achieve the same result).

59. See Bonifaz et al., supra note 36, at 60; Colloquia, Campaign Finance Reform: Law and Politics: Constitutional Implications of Campaign Finance Reform, 8 ADMIN. L.J. AM. U. 161, 173 (1994) (arguing that the wealth-based system violates the equal protection rights of less affluent citizens).

60. See Dworkin, supra note 57, at 19 (arguing the importance of political equality); Wright, supra note 57, at 611 (criticizing Buckley's equation of money and speech).

61. First Nat'l Bank v. Bellotti, 435 U.S. 765, 804 (1978) (White, J., dissenting) (arguing that speech rights may be abridged when the state chooses the "the best possible balance" between "competing First Amendment interests"). Justice White argued that the promotion of political equality required the prevention of domination by actors such as corporations when issues of importance to them were in discussion. Id. at 809 (White, J., dissenting); see also David A. Strauss, Corruption, Equality, and Campaign Finance Reform, 94 COLUM. L. REV. 1369, 1383 (1994) (arguing that the "one person, one vote" principle is harmonious with the First Amendment); Cass R. Sunstein, Political Equality and Unintended Consequences, 94 COLUM. L. REV. 1390, 1392 (1994) (arguing that "one person, one vote" promotes political equality). But see Gora, supra note 5, at 26-27 (arguing that trying to equalize political opportunity through limiting political speech is ineffective); Lowenstein, supra note 38, at 1539 (discounting the notion that campaign finance reforms can be justified by the notion of equity).

State regulation of political speech to ensure equal access is particularly necessary when the medium for the speech is limited. An example of a limited medium is media markets, which can offer only a finite amount of communications access to candidates, who must then vie for attractive time slots. When this limited resource can be monopolized by candidates or groups with more money, the exchange of ideas and the democratic process is stifled. Freezing competitors out of a limited resource effectively chills speech. See Bonifaz et al., supra note 36, at 66 (discussing the scarce nature of advertising media). However, the Sixth Circuit has rejected this argument, stating that it is impermissible to abridge the First Amendment rights of some in favor of others. Kruse, 142 F.3d at 917 (rejecting this argument as a compelling state interest). But see Red Lion Broad. Co. v. Fed. Communications Comm'n, 395 U.S. 367, 388 (1969) (stating that the government must abridge the speech rights of some for effective communication when the medium is limited); Bonifaz et al., supra note 36, at 65-68 (discussing the limited medium communication argument as a potential compelling interest for state regulation).
contributions by issue-oriented organizations promoting or opposing candidates will promote equity by leveling the playing field among participants in the political process. Although this approach would extend current regulation to a different and broader area of political speech, re-characterizing issue advocacy contributions and expenditures as something other than protected political speech would be the most effective means of effecting a change in the current law.

If the courts continue to reject these justifications for the regulation of issue advertisements, an argument can be made that their regulation could nonetheless meet the Buckley test. Because issue advocacy advertisements often support or oppose a candidate, they could be viewed as a form of express advocacy. In Federal Election Commission v. Furgatch, the Ninth Circuit took a step in this direction when it deviated slightly from the case law exemplified in Perry by noting that express words of advocacy were to be considered in the context of the entire advertisement. The court stated that “speech need not include any of the words listed in Buckley to be express advocacy.” The speech must, “when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for

62. Ortiz, supra note 57, at 901 (arguing that the influence of money causes officials to overvalue contributors' interests); Sullivan, supra note 13, at 680–81 (discussing disproportionate responsiveness to wealthier individuals). Even in Buckley, the Court recognized that more money meant more speech. Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam) (stating that reducing the amount of money that can be spent on political communication is a limit on speech). The Court's primary concern in establishing protection seemed to focus on the amount of speech while discounting concerns about equal political opportunity. See id.

63. Buckley, 424 U.S. at 67 (stating that disclosure enables the evaluation of candidates); see Bonifaz et al., supra note 36, at 60–61 (maintaining that regulation must be more than marginal or it will have no effect). However, such restrictions would probably not survive strict scrutiny under the current judicial framework. See Briffault, supra note 37, at 98 (stating that donations may create an obligation to the spender); Sullivan, supra note 13, at 680–81 (discussing disproportionate responsiveness).

64. Buckley, 424 U.S. at 44 (establishing the express advocacy test).

65. 807 F.2d 857, 863 (9th Cir. 1987) (discussing the importance of “considering speech as a whole” and the need to make inferences “from the relation of one part of speech to another”).

66. Id.; Perry v. Bartlett, 231 F.3d 155 (4th Cir. 2000) (per curiam). The Ninth Circuit's decision does not materially alter the express advocacy test followed in Perry; however, it does slightly deviate from the bright-line test. The significance of this deviation is not the existence of a circuit split, but an indication that some courts may be opening up to a contextual consideration when applying the express advocacy test.

67. Furgatch, 807 F.2d at 864.
or against a specific candidate.68 Applying the Ninth Circuit’s description of contextual consideration, the strictness of the express advocacy test is lessened, allowing for a broader determination of what constitutes political speech worthy of regulation. When this contextual framework is applied to issue advocacy communications, the indirect support or opposition to a candidate can be gleaned from the context of the information imparted to the public. While the express words “vote for John Doe” might be absent, the contextual message might establish express advocacy by containing an exhortation to vote for or against a candidate. Inquiring into the actual impact of the communication arguably avoids the nebulous question of intent and resulting constitutional questions, which the courts disdain.69

The Ninth Circuit’s slightly different approach to express advocacy has not gone unnoticed. In Federal Election Commission v. Christian Action Network, the Fourth Circuit critically analyzed Furgatch’s reasoning and acknowledged the Ninth Circuit’s consideration of contextual meaning before upholding an issue advertisement against an FEC challenge.70 Campaign finance reform legislation pending before Congress also incorporates the Furgatch test by employing contextual meaning to determine whether a communication is express advocacy, thus permitting regulation and mandatory disclosure.71

The Ninth Circuit's discussion in Furgatch presents a good starting point for formulating a new approach to campaign finance regulation. The language in Furgatch should be employed to read an objective test into Buckley’s express advocacy test to determine whether a reasonable potential voter would perceive the advertisement as opposing or supporting a candidate.72 If the voter

68. Id. The test differs from the express advocacy test laid out in Buckley because it looks to contextual content rather than explicit words. The court in Furgatch also stated that “speech is ‘express’ for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning.” Id. From this interpretation, one can argue that all subsequent courts applying the express advocacy standard of Buckley have construed the test and the court’s example of words too narrowly.

69. Faucher v. Federal Election Comm’n, 928 F.2d 468, 472 (1st Cir. 1991) (stating that the Court sought to avoid constitutional questions by establishing the bright-line test in Buckley).


72. Furgatch, 807 F.2d at 863.
would perceive the advertisement as advocating for or against a particular candidate, then it would be subject to state regulation similar to any other advertisement constituting express advocacy.\footnote{Buckley, 424 U.S. at 42.} An objective test would permit regulation of issue advertisements by evaluating the advertisement in its entire context. The test would permit a minimal attempt to contextualize the words and abide by the spirit of the rule, which is constrained by overly strict interpretations. The express advocacy test would be broadened slightly, but as long as the express words are construed no broader than necessary to achieve the state’s interest in preventing corruption in the political process, the bright-line motivations for retaining the test without modification would be safeguarded.\footnote{See Purgatch, 807 F.2d at 861 (stating that Buckley does not draw a “bright and unambiguous line”). The Ninth Circuit repeated the Supreme Court’s directive that “where First Amendment concerns are present, we must construe the words of the regulatory statute precisely and narrowly, only as far as is necessary to further the purposes.” Id.} By bringing independent issue advertisements into the regulation of political speech, money’s impact on the democratic process would be reduced and the true spirit of campaign finance reform upheld.\footnote{See Corrado, supra note 39, at 1812.} Candidates would no longer be able to rely on “shadow campaigns” supplementing their central campaign efforts or picking up the tab once they drain their coffers.\footnote{See supra note 41 and accompanying text (describing instances where issue advocacy campaigns have all but been part of formal campaigns). An expanded interpretation of “coordination” or a more functional definition of “contribution” would also help combat the supplemental campaigns. See supra notes 45–46 and accompanying text (discussing coordinated expenditures and a functionalistic approach).} The result would be a more level playing field for both the candidates and the entire electorate to discuss the issues.

While courts have shied away from varied applications of the express advocacy test, the public’s appetite for campaign finance reform and recent breakdowns in the letter and spirit of the system affords the Supreme Court the opportunity to rethink its narrow approach regarding issue advertisements. New, potentially compelling state interests present the United States Supreme Court with the tools it needs to make a clean break from the express advocacy test. The Court could also embrace campaign finance reform and remedy the mistakes courts have made in construing express advocacy too narrowly by expanding the definition or application of express advocacy.\footnote{See, e.g., Faucher v. Federal Election Comm’n, 928 F.2d 468, 472 (1st Cir. 1991) (noting that the Supreme Court intended to avoid constitutional questions by laying down
constitutional parameters, words of political advocacy will continue to receive the strict interpretation employed by the Fourth Circuit in *Perry*,\(^7\) effectively defeating any attempt at implementing true campaign finance reform.

CHRISTOPHER J. AYERS

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\(^{78}\) Perry v. Bartlett, 231 F.3d 155 (4th Cir. 2000) (per curiam).