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A More Sensible Approach to Regulating Independent Expenditures: Defending the Constitutionality of the FEC's New Express Advocacy Standard

Michael D. Leffel

INTRODUCTION

Campaign finance reformers argue that the “unholy alliance of private money and public elections” has created “a crisis of confidence in our elected officials.” The now-deceased campaign reform advocate Philip M. Stern summed up the role of money in campaigns this way: “[M]oney-power has replaced people-power as the driving force in American politics and the determinant of electoral victory.”

One form of “money-power” in elections that received a great deal of attention in the last election cycle was “independent expenditures.” Independent expenditures are funds spent by interested individuals or groups — usually in the form of television or radio advertisements or mass mailings — to support or defeat a particular candidate, but are not coordinated in any way with the candidate or her campaign organization. The Federal Election Campaign Act (“FECA” or “the

1. Ellen S. Miller & Philip M. Stern, Democratically Financed Elections, in CHANGING AMERICA: BLUEPRINTS FOR THE NEW ADMINISTRATION 759 (Mark Green et al. eds., 1992). Even elected officials have expressed concern. For example, former Member of Congress Millicent Fenwick once remarked: “In my mind, there is no question that there is a connection between these [campaign] contributions and votes. I have sought votes and members have told me they received such-and-such an amount of money from one of these groups and they could not vote with me.” MARK GREEN, WINNING BACK AMERICA 135 (1982) (quoting Rep. Millicent Fenwick (R-NJ)).


4. In addition to making independent expenditures for television advertising or mass mailings, independent expenditures can be made to support paid political staff that work in a variety of capacities to organize support for the candidate. See 2 U.S.C. § 431(17) (1994).

5. The requirement that the independent expenditure not be coordinated means that the individual or group making the expenditure can have no contact with either the candidate or her campaign. See 2 U.S.C. § 431(17) (1994) (defining “independent expenditure”). If there is coordination, then the expenditure is treated as a direct contribution.
Act”) requires individuals or groups making such expenditures to register with the Federal Election Committee (“FEC”), periodically to disclose in their reports to the FEC the expenditures they have made, and to identify themselves on the communication as the source of the electoral advocacy. The Act also prohibits corporations from making independent expenditures from their general treasury accounts. Failure to comply with the FECA’s requirements for independent expenditures may result in civil or criminal prosecution, including fines or imprisonment.

See 2 U.S.C. § 431(17) (1994). Political party committees, however, like the Democratic or Republican National Committees, are able to make some coordinated expenditures that are capped at a higher rate based on the voting-age population of the state for Senate seats or House districts, thus exceeding the usual direct contribution limits placed on individuals and Political Action Committees (“PACs”). See 2 U.S.C. 441a(d) (1994).

This Note only deals with legitimately uncoordinated independent expenditures. It probably comes as no surprise that some elected officials do illegally coordinate with groups making independent expenditures. See Eric Pianin, Ethics Panel Turns Eye To Gramm, WASH. POST, Sept. 8, 1995, at A19 (discussing Senator Packwood’s diary entry indicating that Packwood’s top aide, Elaine Franklin, “breached a law prohibiting candidates from soliciting organizations to make independent expenditures on their behalf”); David Sarasohn, Some Passages in Diary Look Familiar, PORTLAND OREGONIAN, Sept. 21, 1995, at C8 (discussing fact that Packwood’s diary indicates he had direct conversations regarding independent expenditures, and in some cases gave prior approval to advertisements, by the National Rifle Association and the Auto Dealers Association).


10. See 2 U.S.C. § 437g(d)(1)(A) (1994) (failure of a “political committee” to report expenditures can result in a fine not to exceed the greater of $25,000 or 300% of any expenditure involved in such violation, or one year in jail, or both). The Federal Election Commission, a bipartisan body created by the FECA, may also seek civil penalties for violations of the FECA. See 2 U.S.C. § 437d(a)(6) (1994). Many penalties are collected by the FEC at the administrative level and can be substantial. See August Doledrums, N.Y. TIMES, Sept. 3, 1993, at A22 (FEC ordered Senator Robert Dole to pay $100,000 in penalties as part of settlement); Robertson Must Repay Money From ’88 Race, N.Y. TIMES, Sept. 25, 1993, at A9 (FEC ordered Robertson to pay almost $22,000 in civil penalties). However, the FEC’s penalty requests are sometimes reduced or eliminated by courts. See FEC v. NRA Pol. Victory Fund, 778 F. Supp. 62, 66 (D.D.C. 1991) (FEC’s requested $415,744.72 civil penalty reduced, defendant only re-
During the 1996 election season, labor, environmental, and right-wing organizations combined to spend well over forty-six million dollars on "educating" voters about various issues. A major question confronting courts now is whether these "educational" spots are actually independent expenditures that trigger the FECA's reporting and disclosure requirements, or whether they purely advocate a particular position on an issue that, under the First Amendment, cannot be regulated.

The problem for reformers who want to limit the impact of purportedly educational spending like that by groups such as the AFL-CIO and the Christian Coalition is that, according to the Supreme Court, regulating money in political elections is akin to regulating free speech because money is so essential in modern times in enabling an individual or group to disseminate its political message. Political speech is a cru-

11. See George Church, The Balance of Power: The Republicans Hold the House, but Speaker Gingrich Will Need To Find Common Ground with Gephardt's Democrats, TIME, Nov. 18, 1996, at 53, 55 (noting that the AFL-CIO's $35 million in spending on radio and television "were instrumental in defeating . . . several G.O.P. freshmen" and that the Christian Coalition played a similar role on the right by distributing 45 million "voter guides" that consistently hammered Democrats on key issues like abortion); John H. Cushman Jr., Environmentalists Ante Up To Sway a Number of Races: Spending Millions to Promote Their Agendas, N.Y. TIMES, Oct. 23, 1996, at A13 (indicating that the Sierra Club spent close to $7.5 million in the two-year election cycle, that this "mimics closely" the approach taken by the Christian Coalition and the AFL-CIO, and that the plan appears to have had some effect even before the election took place: Congress voted overwhelmingly this summer for a few bills favored by environmental groups).

12. See U.S. CONST. amend. I; see also Buckley v. Valeo, 424 U.S. 1, 80 (1976) (per curiam) (holding that the FEC cannot regulate strict issue advocacy); Richard L. Berke, Lawsuit Says Christian Coalition Gave Illegal Help to Candidates, N.Y. TIMES, July 31, 1996, at A1 (noting that the FEC filed suit in the federal district court in the District of Columbia alleging that the Christian Coalition, "the nation's largest group of religious conservatives[,] had acted illegally to promote several Republican candidates").

cial means of checking government abuses, realizing individual self-fulfillment, and creating a safety valve for society to discuss freely grievances and proposed remedies — a means that is therefore jealously guarded under the First Amendment. The Supreme Court therefore treats the money spent as equivalent to speaking out on an issue and applies a stricter level of scrutiny to the regulation of such spending. Thus, reformers must struggle to control the insidious role of money in federal elections without discouraging the political speech that most commentators contend “form[s] the core of the free speech principle.”

In order to protect free speech and association rights, the Supreme Court in *Buckley v. Valeo* adopted an “express advocacy” standard, which provides that communication can be regulated as an independent expenditure only if it is “communication[] that in express terms advocate[s] the election or defeat of a clearly identified candidate for federal office.” The Court indicated in a footnote that this definition would limit the Act to communication containing words such as “vote for” or “defeat.” The Court determined that this narrower definition would be clear enough to allow the FEC to regulate speech that ex-

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15. See *Buckley*, 424 U.S. at 40-44, 64 (per curiam).


18. 424 U.S. at 44 (emphasis added). The original definition of “independent expenditures” in the 1974 amended version of the FECA was any uncoordinated expenditure made “relative to a clearly identified candidate.” 18 U.S.C. § 608(e)(1) (Supp. V 1975) (repealed 1976). Current FEC regulations have incorporated the *Buckley* Court’s express advocacy standard into the definition of “independent expenditures,” defining the term as any expenditure by a person *expressly advocating* the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

19. See *Buckley*, 424 U.S. at 44 n.52.
pressly advocates for or against an identified candidate in an election while not chilling political speech aimed at advocating issues — often called "issue advocacy." 20

Under the Buckley ruling, Congress is forbidden to cap the amount of money an individual or group may spend on independent expenditures. 21 Buckley, however, allows the FECA's caps on the amount of direct contributions — money or in-kind services given by an individual or group to a candidate that can be used in whatever way the candidate chooses. 22 Because of the caps on direct contributions, individuals and groups seeking to influence elections have dramatically increased the amount of money spent on independent expenditures since Buckley. 23

20. See 424 U.S. at 81-82.
21. See 424 U.S. at 51.

The role of independent expenditures has also been spurred on by today's high-dollar, television-driven congressional races. See Stephen Ansolabehere & Shanto Iyengar, Going Negative: How Political Advertisements Shrink and Polarize the Electorate 1-16 (1995); Larry J. Sabato, The Rise of Political Consultants: New Ways of Winning Elections 117 (1981) (noting that television is the predominant medium for informing voters). Serious candidates in a contested House race can expect to spend one million dollars on their campaigns and Senate candidates often spend in excess of ten million dollars. See Beth Donovan, Constitutional Issues Frame Congressional Options, 51 CONG. Q. WKLY. REP. 431, 434 (1993). Most candidates have no choice but to rely on large-dollar contributions from individuals and PACs that seek to influence politicians and elections. FECA's caps on direct contributions have made it somewhat more difficult for candidates to raise money since they must have a larger number of contributors rather than relying on a few ex-
At the same time, some courts have interpreted the "express advocacy" standard so narrowly as to allow individuals and groups essentially to evade even the FECA's reporting and disclosure requirements. In other words, not only do individuals and groups face no caps on independent expenditures, but by merely changing the wording of an advertisement that otherwise would be considered express advocacy, they are permitted by some courts to make massive expenditures without even reporting or disclosing such spending.

The First Circuit has decided that the danger of chilling important political speech requires a very narrow interpretation of the express advocacy standard. Seizing on the language of the Buckley footnote, the First Circuit adopted a strict, literal interpretation of the express advocacy standard, which looks only to the four corners of the communication to see if the "magic words," such as "vote for" or "vote against," were used. If these magic words are not included, the communication does not constitute express advocacy and thus no reporting and disclosure can be required.


24. See, e.g., Faucher v. FEC, 928 F.2d 468 (1st Cir. 1991); see also infra note 84 (discussing other cases).

25. See infra section I.B.1. In addition to making independent expenditures or direct contributions to a particular candidate, individuals and organizations can also assist candidates indirectly through contributions to state and national political parties for "party-building" activities which include general party mailings or general thematic advertising that is not specific to a particular candidate. See 2 U.S.C. § 441(a)(1)(B) (1994) (placing a $20,000 cap on individual donations to national parties in a given year); 2 U.S.C. § 441(a)(2)(B) (1994) (limiting PACs to $15,000 in contributions to national parties in a given year). In reality, this party-building money allows the state and national parties to offset expenditures that individual candidates would otherwise have to incur, such as get-out-the-vote efforts, general thematic mailings, telephone calls, and field staff. See Stern, supra note 2, at 165.

26. See Buckley, 424 U.S. at 44 n.52.

27. See Faucher, 928 F.2d at 471-72; see also infra section I.B.1 (discussing the magic words approach). The Ninth Circuit coined the phrase "magic words" in describing a strict interpretation of the express advocacy standard. See FEC v. Furgatch, 807 F.2d 857, 863 (9th Cir. 1987).

28. See 928 F.2d at 471-72.
The FEC recently adopted a more context-based approach\(^\text{29}\) that codifies an earlier Ninth Circuit decision allowing the FEC to regulate a broader spectrum of campaign-related speech.\(^\text{30}\) The FEC and the Ninth Circuit look to the communication as a whole and consider its timing and other "external factors that contribute to a complete understanding of [the] speech" to determine whether the communication is so clearly unambiguous that reasonable people could not differ as to its meaning, that is, whether the communication advocates for or against a clearly identified candidate.\(^\text{31}\) This approach, the FEC and the Ninth Circuit contend, avoids the rigidity of the "magic words" standard and therefore potentially covers a broader and more appropriate range of speech.

To appreciate the difference in these two approaches, consider two hypothetical examples of independent expenditure advertising seen during a given campaign season. In the first example, the National Rifle Association\(^\text{32}\) runs an advertisement on November 2, three days before the general election. The television screen opens with a large caption "Don't let Bill do it to us again!" against a screen-size picture of President Clinton. The advertisement makes several comments about the President's campaign tactics and ends with a rousing message: "We have a right to own guns to protect ourselves. We have an opportunity three days from now to stop Bill Clinton from taking them away from us." The second hypothetical advertisement is exactly the same, but ends instead with the message, "Vote Against Bill Clinton."

Both advertisements would be covered by the new FEC regulations because, based on their context, they unambiguously advocate the defeat of a clearly identified candidate. However, because the first advertisement does not contain any of the magic words encouraging a voter to "vote against" President Clinton, the First Circuit would rule that this advertisement fails to clearly cross the threshold that divides issue

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29. See 11 C.F.R. § 100.22 (1996); see also infra section I.B.2 (discussing the context-sensitive approach). Congress has provided the FEC with original jurisdiction over civil enforcement of FECA, see 2 U.S.C. § 437c(b)(1) (1994), and the power to initiate enforcement of the FECA. See 2 U.S.C. § 437d(a)(6) (1994). The FEC is subject to judicial review; however, courts give the FEC great deference because Congress gave the FEC authority to enforce the FECA's provisions. See FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981); Orloski v. FEC, 795 F.2d 156, 164 (D.C. Cir. 1986). Naturally, FEC decisions must be in accord with relevant court holdings. See Orloski, 795 F.2d at 166-67.

30. See Furgatch, 807 F.2d 857.

31. See 807 F.2d at 864.

32. The National Rifle Association spent $720,000 in the 1994 congressional races, which brought the Republican party control of both houses of Congress for the first time since 1946. See John J. Fialka, NRA Support for House GOP Freshmen Pays Off, But Lawmakers Worry About Reformer Image, WALL ST. J., June 20, 1995, at A20.
advocacy (here, the right to own guns) from *express* advocacy (here, advocating the defeat of candidate Clinton).\(^{33}\) Thus, the First Circuit would hold that it falls beyond the reach of the FEC's authority to regulate elections.

This Note contends that there is no justifiable distinction between advertisements like the two examples above: both should be construed as independent expenditures that can be regulated through reporting and disclosure requirements by the FEC. This Note therefore argues that the contextual approach of the new FEC regulations fully complies with *Buckley's* definition of express advocacy. The contextual approach adequately protects the First Amendment rights of the parties involved while allowing the government to meet its compelling interests in fully informing the electorate and rooting out and deterring abuse in the electoral process.

In order to demonstrate the constitutionality of the new FEC regulations, it is important to have a clear understanding of the rationale for the express advocacy standard. To this end, Part I describes the Supreme Court's development of the standard in *Buckley v. Valeo* and its progeny. It then details the resulting split between the federal circuits regarding the modern definition of "express advocacy" and the constitutionality of the FEC's new regulations. Part II argues that the new regulations comply with *Buckley* and its progeny by balancing the First Amendment rights of individuals and groups against the compelling governmental interest in regulating independent expenditures and corporate contributions in federal elections.

I. THE DEVELOPMENT OF THE EXPRESS ADVOCACY STANDARD

In 1973, in the wake of the Watergate scandal and in response to the actual and perceived corrupting influence of money in elections, Congress passed its most comprehensive attempt to regulate the role of money in federal elections by amending the FECA.\(^{34}\) In addition to capping direct contributions\(^{35}\) and independent expenditures,\(^{36}\) the amendments required candidates, individuals, and groups to disclose both di-

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33. *See* Faucher v. FEC, 928 F.2d 468, 472 (1st Cir. 1991).
35. *See supra* note 22.
rect contributions\textsuperscript{37} and independent expenditures to the FEC. For \textit{independent expenditures}, individuals or groups making such expenditures must register with the FEC and periodically disclose in their reports to the FEC the expenditures they have made.\textsuperscript{38}

The Supreme Court in \textit{Buckley} considered the constitutionality of these provisions. The Court first established that money spent in campaigns is virtually equivalent to speech and, therefore, the regulation of money in campaigns was equated with regulating speech.\textsuperscript{39} The Court also determined that the FECA regulated First Amendment associational rights through its requirements that political associations register and report their independent expenditures.\textsuperscript{40} Such reporting requirements might deter some individuals or groups from participating in an association if they knew their support would be disclosed to the public. Thus, because the FECA regulated a fundamental right,\textsuperscript{41} the Court required the governmental to show that the restrictions were narrowly tailored to further a compelling governmental interest.\textsuperscript{42}

After upholding the cap on direct contributions\textsuperscript{43} — finding that it furthered a compelling governmental interest in deterring the potential for contributors "to purchase political favors from candidates, resulting in the corruption of the political process"\textsuperscript{44} — the Court turned its attention to the FECA's regulation of independent expenditures. The

\textsuperscript{37} The reporting and disclosing requirements for \textit{direct contributions} require a candidate to periodically report the amount of money spent by the campaign and on what that money was spent. \textit{See} 2 U.S.C. §§ 432(f), 434(a), 438(a)(4) (1994). In addition, the campaign must report the name and occupation of any contributor who contributes in excess of $200 in aggregate to the campaign. \textit{See} 2 U.S.C. § 434(b) (1994).

\textsuperscript{38} \textit{See supra} note 7.

\textsuperscript{39} \textit{See supra} note 13 and accompanying text.

\textsuperscript{40} \textit{See} Buckley v. Valeo, 424 U.S. 1, 22 (1976) (per curiam); \textit{see also} Laurence H. Tribe, \textit{American Constitutional Law} § 13-31, at 1151-52 (2d ed. 1988) (detailing the associational concerns accompanying reporting requirements).

\textsuperscript{41} The Court noted that "[t]he restrictions, while neutral as to the ideas expressed, limit political expression 'at the core of our electoral process and of the First Amendment freedoms.' " 424 U.S. at 39 (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)).

\textsuperscript{42} \textit{See Buckley}, 424 U.S. at 40-44, 64; \textit{see also} Tribe, \textit{supra} note 40, § 12-2, at 791 (defining strict scrutiny review as a balancing test between a compelling governmental interest and the free speech interests, but weighted in favor of free speech to reflect its constitutional importance). In order for a statute to survive strict scrutiny review, the Court must find (1) that the act addresses a compelling governmental interest and (2) that the restrictions abridge that fundamental right only to a reasonably minimal degree as is essential to advancing that governmental interest. \textit{See Buckley}, 424 U.S. at 40-44, 64; \textit{see also} Tribe, \textit{supra} note 40, § 12-2, at 791.

\textsuperscript{43} \textit{See Buckley}, 424 U.S. at 26-27.

Court expressed concern that the independent expenditure provisions, as drafted, threatened to improperly infringe on — or chill — the exercise of First Amendment free speech rights.\textsuperscript{45} If an individual feared she would receive a criminal fine\textsuperscript{46} for speaking her mind and not reporting the expenditure to the FEC, the Court reasoned, she might refrain from exercising the very political speech that forms the core of the First Amendment.\textsuperscript{47} The Court therefore restricted the reach of the independent expenditure provisions to instances of "express advocacy."\textsuperscript{48}

This Part describes the Court's development of the express advocacy standard and how lower courts have interpreted it as they attempt to strike a balance between First Amendment rights and the compelling government interest at stake. Section I.A describes the Court's establishment of the express advocacy standard and discusses the Court's narrow construction of the FECA based on the vagueness of the original language of the Act. Section I.B presents and analyzes the different approaches taken by the federal appellate courts in applying the express advocacy standard — the standard of the new FEC regulations — and the way the new standard has been treated by the one lower federal court that has heard a case based on the new FEC regulations.

A. The Establishment of the Express Advocacy Standard

The Buckley Court's establishment of the express advocacy standard was a response to what the Court felt was the vagueness of the Act's independent expenditure provisions. This section describes the Buckley Court's concern over the amended FECA's language regulating independent expenditures and explains how the Court narrowed the application of these regulations. It also describes the Buckley Court's application of strict scrutiny review to these provisions and discusses how the Court elaborated on the express advocacy standard in \textit{FEC v. Massachusetts Citizens for Life}.\textsuperscript{49}

1. The Vagueness Problem

Although the Court had upheld the FECA's caps on direct contributions, it was particularly concerned by the FECA's language regulating independent expenditures because it applied anytime an individual or corporation spent money "relative to a clearly identified candidate,"

\textsuperscript{45} See \textit{Buckley}, 424 U.S. at 41.
\textsuperscript{46} See 2 U.S.C. § 437g(d) (1994).
\textsuperscript{47} See \textit{Buckley}, 424 U.S. at 41 n.48.
\textsuperscript{48} See 424 U.S. at 44, 81-82.
\textsuperscript{49} 479 U.S. 238 (1986).
that was not coordinated with any campaign.\textsuperscript{50} The Court believed that such a definition was excessively vague; that is, the definition did not give sufficiently clear warning of the proscribed conduct.\textsuperscript{51} A statute that is excessively vague violates due process for three principle reasons. First, vague laws risk "trap[ping] the innocent by not providing fair warning."\textsuperscript{52} Second, they "foster 'arbitrary and discriminatory application' " of the law.\textsuperscript{53} Finally, they have a chilling effect on a fundamental right, "inducing 'citizens to ' 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."}\textsuperscript{54}

In order to salvage the constitutionality of the Act,\textsuperscript{55} the Court interpreted the language regarding independent expenditures to apply only

\textsuperscript{50} See Buckley, 424 U.S. at 39-42, 80-81. The original disclosure provisions for independent expenditures covered any expenditures made "for the purpose of . . . influencing" the nomination or election of candidates to federal office. See 2 U.S.C. § 431(f) (Supp. V 1975) (amended 1980) (defining expenditure); 2 U.S.C. § 434(e) (Supp. V 1975) (amended 1980) (requiring reporting to the FEC). The original provision placing a cap on independent expenditures contained similar language. At the time of Buckley, 18 U.S.C. § 608(e)(1) prohibited any person from making "any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000." Buckley, 424 U.S. at 39 (quoting 18 U.S.C. § 608(e)(1) (Supp. IV 1974)). The Court limited the regulations' definition of expenditures spent "relative to a clearly identified candidate" to communications that "expressly advocate" for or against a clearly identified candidate. See 424 U.S. at 44. The FECA has now encompassed the Court's approach by defining an independent expenditure as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate." 2 U.S.C. § 431(17) (1994).

\textsuperscript{51} See Buckley, 424 U.S. at 41-42, 80-81. In addition to being considered under the vagueness doctrine, the independent expenditure provisions could be challenged as overbroad. Both doctrines attempt to prevent the chilling of otherwise protected speech. See International Union of Police Assns. Local 189 v. Barrett, 524 F. Supp. 760, 765 (N.D. Ga. 1981) (overbreadth and vagueness are two separate concepts that often go hand in hand); ROTUNDA ET AL., supra note 16, § 16.9 at 846; cf. Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U. PA. L. REV. 67, 110-113 (1960) (claiming that the void for vagueness and overbreadth doctrines are indistinguishable). Therefore, many of the same reasons that this Note submits to defend the new regulations from attack on vagueness grounds also apply to the overbreadth issue.

\textsuperscript{52} Buckley, 424 U.S. at 41 n.48 (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)).

\textsuperscript{53} 424 U.S. at 41 n.48 (quoting Grayved v. City of Rockford, 408 U.S. 104, 108-09 (1972)).


\textsuperscript{55} See 424 U.S. at 44; see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (discussing the Court's preference for finding a constitutionally acceptable construction of a statute over an interpretation that would make the statute unconstitutional).
when the message clearly identified a specific candidate and expressly advocated for or against that candidate. The Court added in a footnote that "[t]his construction would restrict the application of [the Act] to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.' " The Court determined that this more narrow definition would be clear enough to allow the FEC to regulate speech which expressly advocates for or against an identified candidate in an election while preventing the chilling of political speech aimed at advocating issues.

The Court's stated intention in adopting the express advocacy standard was to limit the FECA's application to only those independent expenditures which "unambiguously related to the campaign of a particular federal candidate." This approach respected "issue advocacy," which the First Amendment protects.

2. Applying Strict Scrutiny

The Buckley Court applied strict scrutiny because the FECA regulates fundamental rights, in this case both the right to free speech and the right to free association. This standard of review requires the government to show a compelling interest for the measure and that the measure is narrowly tailored to meet this compelling interest.

Having narrowed the definition of independent expenditure to protect issue advocacy and to satisfy the vagueness doctrine, the Court considered whether the government had a compelling interest in regulating independent expenditures. The Court first determined that the government lacked a compelling interest to impose a ceiling on independent expenditures that limited the amount of money any one person or group may independently spend "relative to a particular candidate." While the Court determined that the government did have an interest in imposing a ceiling on large direct campaign contributions

56. See Buckley, 424 U.S. at 41-44, 80.
57. 424 U.S. at 44 n.52 (emphasis added).
58. See 424 U.S. at 82.
59. 424 U.S. at 80.
60. See 424 U.S. at 79.
61. See 424 U.S. at 14-23; see also supra notes 13, 40-42 and accompanying text.
62. See supra note 42 and accompanying text.
63. See supra section I.A.1.
64. Buckley, 424 U.S. at 26-27, 46-48 (evaluating 18 U.S.C. § 608(e)(1) (Supp. IV 1974)). It should be noted that when a candidate (or her campaign committee) coordinates or controls the otherwise independent expenditure, it is treated by the FEC as a contribution. See 2 U.S.C. § 431(17) (1994); Buckley, 424 U.S. at 46-47.
that could lead to political corruption through the purchase of political favors, it stated that "independent advocacy . . . [did] not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."65 The Court felt the candidate’s lack of control over any aspect of an independent expenditure undermined its value, and therefore posed little threat of a quid pro quo between the candidate and the individual or group doing the spending.66

Nonetheless, the Court then recognized three valid compelling governmental interests behind the FECA’s reporting and disclosure requirements and therefore upheld them as constitutional.67 First, informing the electorate about the source of political campaign money aids voters in evaluating candidates.68 Providing information about candidates’ financial supporters and opponents allows voters to “place each candidate in the political spectrum more precisely than” they could if they were merely relying on party affiliation or the campaign advertisements paid for directly by a candidate.69 Second, by exposing independent expenditures to public scrutiny, disclosure and reporting aids in deterring corruption and avoiding the appearance of corruption.70 Third,
the reporting and disclosure requirements aid the government in gathering information to detect violations of the contribution limits.71

3. MCFL: Elaboration of the Standard

In 1986, ten years after Buckley, the Court reiterated its express advocacy standard in FEC v. Massachusetts Citizens for Life72 and indicated that it would look to the whole communication to determine if it met the definition of express advocacy — rather than simply considering whether or not the communication contained a direct message such as “Vote for Smith.”73 The mere fact that the communication in question was “less direct . . . d[id] not change its essential nature” as a communication meeting the definition of express advocacy.74

In MCFL, a nonprofit corporation had compiled a “pro-life” voting record sheet for the state and federal candidates in Massachusetts’ primary election and published this record in a “Special Edition” of the organization’s newsletter, which was distributed to the organization’s membership as well as to the general public.75 The “score sheet” identified candidates as either agreeing or disagreeing with the organization’s pro-life views and included photographs of certain pro-life candidates, “admonish[ing] that ‘[n]o pro-life candidate can win in November without your vote in September.’ ”76 On the back page of the newsletter, in large bold-faced letters, was the phrase “VOTE PRO-LIFE.”77

importance of disclosure requirements to inform the public and to enforce federal election laws). But cf. McIntyre v. Ohio Elections Commn., 115 S. Ct. 1511 (1995) (holding unconstitutional an Ohio statute that prohibited the distribution of campaign literature that does not contain the name and address of the person or campaign official issuing the literature).

71. See Buckley, 424 U.S. at 67-68; see also Goland v. United States, 903 F.2d 1247, 1251 (9th Cir. 1990).
72. 479 U.S. 238 (1986) [hereinafter MCFL].
73. See 479 U.S. at 249.
74. 479 U.S. at 249 (emphasis added). The Court also held that the communication reached beyond the corporation’s “restricted class,” which is prohibited by § 441b. See 479 U.S. at 250. A corporation may use general, i.e. unsegregated, funds to communicate a message containing express advocacy if it only goes to the corporation’s restricted class, see 2 U.S.C. § 441b(b)(2) (1994), which includes “(1) communication by the corporation to its stockholders, executive and administrative personnel, and their families; (2) voter registration by the corporation of these individuals and their families; and (3) solicitation for voluntary contributions, to the corporation’s separate, segregated fund (or PAC).” Hayward, supra note 44, at 64 n.100 (citing 2 U.S.C. § 441b(b)(2) (1988)).
75. See MCFL, 479 U.S. at 243-44.
76. 479 U.S. at 243.
77. 479 U.S. at 243.
The publication also included a disclaimer: "This special election edition does not represent an endorsement of any particular candidate."\(^7\)

Despite the disclaimer, the Court emphasized that the publication urged voters to vote for pro-life candidates and identified specific pro-life candidates with photographs.\(^7\) The fact that the publication's exhortation was "less direct than 'Vote for Smith' [did] not change its essential nature."\(^8\) The publication "provide[d] in effect an explicit directive: vote for these (named) candidates."\(^9\) Thus the publication went "beyond issue discussion to express electoral advocacy."\(^10\)

**B. The Modern Conflict Over Express Advocacy**

Despite Buckley's exhaustive 294-page treatment of the issues surrounding the FECA, the Court spent relatively little time discussing the express advocacy standard. The Court's decision in MCFL also appears to have done little to define more clearly what the Court meant by "express advocacy." Perhaps as a result, the Courts of Appeals and the FEC have differed over application of the phrase. Section I.B.1 discusses the strict interpretation of the express advocacy which looks only for the magic words or their synonyms.\(^3\) Section I.B.2 explains the new FEC regulations' context-sensitive approach, which essentially codifies the approach applied by the Ninth Circuit.\(^4\) Finally, section I.B.3 exam-

\(^7\) See 479 U.S. at 243.
\(^8\) See 479 U.S. at 249 (emphasis added).
\(^9\) See 479 U.S. at 249 (emphasis added).
\(^3\) See FEC v. Furgatch, 807 F.2d 857 (9th Cir.), cert. denied, 484 U.S. 850 (1987). Other circuits have heard cases that deal with interpreting the express advocacy standard, but it is unclear whether these courts look only for the magic words, or look more broadly to the context to find an unambiguous statement of advocacy. See, e.g., FEC v. Colorado Republican Fed. Campaign Comm., 59 F.3d 1015 (10th Cir. 1995), rev'd on other grounds, 116 S. Ct. 2309 (1996); FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 50-53 (2d Cir. 1980) [hereinafter CLATRIM] (holding an organization's mailer, containing voting records of a member of Congress and reading "never forget that since you are paying the tax bills, you are the boss. And don't ever let your Representative forget it!" did not constitute express advocacy); FEC v. Christian Action Network, 894 F. Supp. 946, 958 (W.D. Va. 1995) (holding that Buckley created a bright-line rule); FEC v. American Fed. of State, County & Mun. Employees, 471 F. Supp. 315 (D.D.C. 1979) (holding a poster depicting President Gerald Ford wearing a button reading "Pardon Me" and embracing President Richard Nixon did not constitute express advocacy). In CLATRIM, the Second Circuit based its holding on the fact that the communication before it made "no reference anywhere . . . to the congressman's party, to whether he is running for re-election, to the existence of an election or the act of voting in any election; nor is there anything approaching an unam-
ines the holding of the one federal court to hear a case involving the constitutionality of the new regulations.

1. The Magic Words Approach

The First Circuit follows a literal, or magic words, approach to Buckley's express advocacy standard, under which a court looks only to the communication itself for express terms that advocate for or against a clearly identified candidate. Absent such phrases as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject," the court will not find the communication to be express advocacy regardless of the context of the communication.

In Faucher v. FEC, the First Circuit determined that a voter guide produced and distributed by a nonprofit corporation did not constitute express advocacy. The guide in question was entitled "November Election Issue 1988!," with the subheading "Federal & State Candidate Surveys Enclosed — Take-along Issue for Election Day!" The guide included candidate and party positions on pro-life issues and indicated that a "yes" response meant the candidate or party agreed with the National Right to Life's position on the issue. The guide also contained a disclaimer, noting that the publication did not represent an endorsement of any candidate by the organization. The court held that the voter guide was not express advocacy for or against a specifically identified candidate, reasoning that Buckley had adopted a bright-line test to determine whether a communication constituted discussion of issues or discussion of candidates. The court did not discuss MCFL's language re-

85. See, e.g., Faucher, 928 F.2d at 470-72.
86. 928 F.2d at 470 (quoting Buckley v. Valeo, 424 U.S. 1, 44 & n.52 (1976) (per curiam)).
87. See 928 F.2d at 469.
88. See 928 F.2d at 471.
garding a "less direct" message of advocacy or the "essential nature" of the communication. The court cited MCFL solely for the proposition that the Supreme Court requires the express advocacy standard to be met. The words "vote for" were present in the communication in question in MCFL, even if they did not precede a candidate's name or picture, and the First Circuit apparently presumed that this meant the magic words test had been met.

The Faucher court based its reliance on the magic words test on the difficulty of interpreting the meaning and effects of words. The court reasoned that relying on how others interpret a communication to determine the communication's meaning would put a speaker "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inferences may be drawn to his intent and meaning." In political speech, insinuation has become an art form. Someone could always interpret a political message as advocating the defeat or election of a particular candidate. Hence, the court contended, any standard beyond explicit language must be unconstitutionally vague.

2. The New FEC Context-Sensitive Approach To Express Advocacy

The new FEC regulations adopt a more context-sensitive approach to determining whether a communication contains express advocacy, essentially codifying the holding of the Ninth Circuit in FEC v. Furgatch. Under the new regulations, a communication that is directed at a clearly identified candidate can constitute express advocacy in either of two ways. First, the communication is express advocacy if it contains a par-

90. See 479 U.S. at 249.
91. See Faucher, 928 F.2d at 470 (citing MCFL, 479 U.S. at 249).
92. See 928 F.2d at 471.
94. In order for a communication to qualify as express advocacy it must pass the initial hurdle of being directed at a clearly identified candidate. See 11 C.F.R. § 100.16 (1996). If the communication is not directed at a clearly identified candidate, it will not be express advocacy regardless of the context of the communication or whether it contains any of the magic words. See 11 C.F.R. § 100.16 (1996). Candidates are considered to be "clearly identified" when the communication clearly identifies the candidate by name, nickname, photograph or drawing. See 11 C.F.R. § 100.17 (1996). A candidate may also be clearly identified by an unambiguous reference to his or her status, such as "the President," "the incumbent," or "the Democratic presidential nominee." 11 C.F.R. § 100.17 (1996).
ticular phrase from a list of phrases based on the magic words in *Buckley.* Second, the communication constitutes express advocacy if,

[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, [it] could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because — (1) [t]he electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) [r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

The distinction between the new regulations and the approach of the First Circuit in *Faucher* is that the FEC does not halt the search for express advocacy after looking for the magic words. Under the new regulations, the FEC, or the court, also examines the communication as a whole and considers such factors as when and where the communication takes place.

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95. See 11 C.F.R. § 100.22(a) (1996). The list of phrases includes “phrases such as ‘vote for the President,’ ‘re-elect your Congressman,’ ‘support the Democratic nominee,’ . . . ‘Smith for Congress,’ . . . ‘defeat’ accompanied by a picture of one or more candidate(s), ‘reject the incumbent.’” 11 C.F.R. § 100.22(a) (1996). A phrase such as “‘vote Pro-Life’ or ‘vote Pro-Choice’ accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice” also constitutes express advocacy. 11 C.F.R. § 100.22(a) (1996).

96. 11 C.F.R. § 100.22(b) (1996).

Additionally, under the new approach communications that contain both issue advocacy and express electoral advocacy are treated as "express advocacy." 60 Fed. Reg. 35,292, 35,295 (1995). This approach is consistent with *Buckley,* which protected only strict issue advocacy. *See supra* notes 12, 33 and accompanying text (discussing the distinction between communications that contain strict issue advocacy and communications which also advocate the election or defeat of a particular candidate). It is also clearly warranted. Otherwise, the FECA’s requirements could easily be avoided by simply adding some minimal issue-based call to action into every independent expenditure communication while still clearly advocating for or against a candidate — having the same impact on elections and presenting the same problems that the FECA was designed to solve.

97. *See supra* text accompanying notes 85-93.

98. For example, a court might be more inclined to find express advocacy if a particular communication is made three days before the election, than if it were made three years before an election.

The FEC considered imposing a strict time period for communications that discussed a candidate's character, qualifications or accomplishments, but did not include one of the magic phrases. *See* 60 Fed. Reg. 35,292, 35,295 (1995). If such a communication was made within a set number of days before an election, and “did not encourage any type of action on any specific issue,” then the communication would be treated as express advocacy. *Id.* at 35,295. The FEC rejected this approach in part on the grounds that it “should be further limited to avoid” impinging on the First Amendment considerations involved. *Id.* at 35,294. Under the new FEC regulations there is no set time period in which certain communications are treated as express advocacy.
In *Furgatch* the Ninth Circuit rejected a strictly construed bright-line standard for express advocacy. The court applied a more context-sensitive interpretation of Buckley's express advocacy standard that asked whether the communication, "when read as a whole, and with limited reference to external events, [is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate."101

In *Furgatch*, the FEC brought suit against Harvey Furgatch for failure to report his independent expenditures and for not including a disclaimer in his advertisements during the 1980 Presidential election. Furgatch had run an advertisement in the *New York Times* and the *Boston Globe* entitled "Don't Let Him Do It" which discussed President Jimmy Carter and gave examples of how the sponsor thought Carter was "degrading the electoral process and lessening the prestige of the office" of the President. The advertisement in the *New York Times* ran one week before the general election; the *Boston Globe* ad ran three days before the election.

The Ninth Circuit found Furgatch's advertisements to be a form of express advocacy against an identified candidate, reasoning that "express advocacy" was not strictly limited to a bright-line test of whether a communication used certain key phrases. It argued that to require that the communication use some "magic words" or a perfect synonym

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One commentator, Allison Rittenhouse Hayward, rejects the contextual approach. *See* Hayward, *supra* note 44, at 86-88. Hayward proposes, instead, that if a communication is made within a five-day window prior to the election and mentions a specific candidate it automatically would be considered express advocacy. *See id.* at 86-94. She adopts the five-day period to mitigate the impact of last-minute negative independent expenditures to which the targeted side has no opportunity (or limited opportunity) to respond. *See id.* at 92-93. However, it is hard to justify a strict window approach while rejecting all contextual considerations. If we can look to the time of the communication at all, what is essential about the five-day limit? People can just as effectively run negative advertisements that can destroy a campaign six or ten days or even two weeks prior to an election.

99. *See* FEC v. Furgatch, 807 F.2d 857, 860 (9th Cir. 1987).

100. *See* 807 F.2d at 863.

101. 807 F.2d at 864. It should be noted that *Furgatch* was argued and the opinion was submitted, but not filed, prior to the Supreme Court's decision in *FEC v. MCFL*, 479 U.S. 238 (1986).

102. *See Furgatch*, 807 F.2d at 859.

103. 807 F.2d at 858 (quoting *Don't Let Him Do It*, *N.Y. Times*, Oct. 28, 1980, at A29 (advertisement)).

104. *See 807 F.2d* at 858 (referring to the advertisement that ran in the *Boston Globe* on Nov. 1, 1980).

105. *See 807 F.2d* at 864-65.

106. *See 807 F.2d* at 862-63.
of the words highlighted as examples in *Buckley* would destroy the effectiveness of the FECA.¹⁰⁷

The Ninth Circuit instead established a standard that looks to the context of the communication to determine whether it meets *Buckley's* express advocacy standard.¹⁰⁸ The court held that despite the First Circuit's rejection of anything but a bright-line test,¹⁰⁹ there was nothing in *Buckley* to suggest that the magic words test is the only way to survive the vagueness doctrine. The court reasoned that the *Buckley* express advocacy standard was intended to eliminate vague statutory language as well as to balance the important Congressional policy objectives and the First Amendment interests involved.¹¹⁰

Because traditional First Amendment doctrine recognizes "that words take part of their meaning and effect from the environment in which they are spoken," the *Furgatch* court concluded that context should be a relevant, but ancillary, consideration under the express advocacy standard for determining the meaning of the communication.¹¹¹ In other words, the Court recognized that words derive part of their meaning from the context in which they are communicated. A political advertisement may clearly advocate the election or defeat of a particular candidate despite the fact that it does not contain one of the magic words. Its meaning can be *unambiguously* derived from the context of the communication.

### 3. The New Regulations and the Courts

The issue of the constitutionality of the new FEC regulations is certain to divide the circuits. Because the regulations codify the Ninth Circuit's approach, they will certainly be constitutional there. However, as the only other court to hear the issue thus far demonstrates, courts following the magic words approach will find no room in the Constitution for the FEC's most recent interpretation of the express advocacy standard.

Recently, in *Maine Right to Life Committee, Inc. v. FEC*,¹¹² the same federal district court that initially adopted the magic words ap-

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¹⁰⁷. *See* 807 F.²d at 863.
¹⁰⁸. *See* 807 F.²d at 863-64.
¹¹⁰. *See Furgatch*, 807 F.²d at 862.
¹¹¹. 807 F.²d at 863-64.
¹¹². 914 F. Supp. 8 (D. Me. 1996) [hereinafter *MRLC*]. MRLC is a nonprofit membership corporation that advocates against abortion rights. The corporation sought a declaratory judgment that the FEC's new definition of express advocacy, designed to carry out the FECA's prohibition of corporate financial support for independent expend-
proach, later upheld by the First Circuit in *Faucher v. FEC*, held the new FEC regulations unconstitutional. The court held that, because the regulations reached communications that did not include the magic words, the regulation was invalid as not authorized by the FECA, as interpreted by the Supreme Court and the First Circuit.

Curiously, the court admitted that a communication derives part of its meaning from the context in which it is delivered. In fact, the court went as far as admitting that even *Buckley* called for some "[l]imited reference to external events" because "[a]fter all, how does one know that 'support' or 'defeat' means an election rather than an athletic contest or some other event without considering the external context of a federal election with specific candidates?"

The court also gave some indication that the regulations could survive a constitutional challenge based on vagueness. In its early analysis of the regulations, the court noted that the regulations "appear[] to be a very reasonable attempt to deal with these vagaries of language and, indeed, [are] drawn quite narrowly to deal with only the 'unmistakable' and 'unambiguous,' cases where 'reasonable minds cannot differ' on the message." The court, however, naturally followed the First Circuit "bright-line" approach, maintaining that *Buckley* drew "a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues."

II. THE CONSTITUTIONALITY OF THE FEDERAL ELECTION COMMISSION'S STANDARD

This Part argues that the new FEC regulations comply with the requirements of *Buckley* and provide the best means of enforcing FECA. Section II.A argues that the new regulations are consistent with the Supreme Court's holding in *Buckley* and its clarification in *MCFL*. Section

*See Faucher v. FEC, 743 F. Supp. 64 (D. Me. 1990), affd., 928 F.2d 468 (1st Cir. 1991).*

14. 928 F.2d 468 (1st Cir. 1991).
16. 914 F. Supp. at 11 (quoting in part 11 C.F.R. § 100.22(b) (1996)).
17. 914 F. Supp. at 11 (quoting 11 C.F.R. § 100.22(b) (1996)).
18. 914 F. Supp. at 12. The court recognized that "[t]he result is not very satisfying from a realistic communications point of view and does not give much recognition to the policy of the election statute to keep corporate money from influencing elections in this way, but it does recognize the First Amendment interest as the Court has defined it." 914 F. Supp. at 12.
II.B argues that the new approach enables the government to meet its compelling interests behind the FECA's disclosure and reporting requirements for independent expenditures, and is narrowly tailored to such ends. Finally, section II.C argues that the context-sensitive approach is consistent with the Court's treatment of other areas of First Amendment law.

A. Why the New FEC Approach Complies with the Language of Buckley and Its Progeny

This section argues that the new FEC regulations comply with the Supreme Court's holdings in Buckley and its progeny. Section II.A.1 puts forth the argument that the new regulations comply with the exact language used in Buckley and the later Supreme Court cases on this subject, as well as traditional views on interpreting the meaning of a communication. Section II.A.2 argues that the FEC regulations are a constitutional and appropriate response to Buckley's main concern regarding the independent expenditure provisions — that the original language of the Act was too vague and may be overbroad.

1. Compliance with the Buckley Language and its Directive

The new FEC regulations comply with the Court's actual language in Buckley. In order to avoid vagueness concerns, the Buckley Court limited the reach of the Act to independent expenditures that constitute express advocacy and added, in a footnote, that express advocacy includes words "such as" — implying that it is not limited to — the magic words. As the court in Furgatch noted, however, Buckley did not claim that use of these words was the only way a communication can constitute express advocacy; this "short list of words... does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate."

Additionally, the context in which the communication is made is important for the simple reason that words derive part of their meaning from the context in which they are used: "Words are not pebbles in

119. See supra section I.A (discussing the vagueness doctrine).
120. FEC v. Furgatch, 807 F.2d 857, 863 (9th Cir. 1987).
121. See 807 F.2d at 863-64; MLRC, 914 F. Supp. at 11. As Professor Sunstein has explained:

Some people think that the contextual character of meaning undermines the project of rule-following. But this is a mistake. "Bat" may mean one thing in connection with baseball and another thing in connection with a zoo, but the term, taken in its context, may well be determinate, and its meaning need not depend on a moral or political argument of any sort. The contextual character of meaning
alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used." 122 Therefore, determining whether a communication constitutes express advocacy actually requires looking, to some extent, at the context of the communication.

2. Avoiding the Trappings of the Vagueness Doctrine

The FEC's context-based approach, with its emphasis on clearly unambiguous advocacy, protects the FECA from violating the vagueness doctrine. The Buckley Court adopted an express advocacy standard so that FECA could avoid the reach of the vagueness doctrine and overbreadth problems.123 But this does not mean that the magic words included in Buckley, "or their nearly perfect synonyms"124 exhaust the possibilities for finding either express advocacy or a constitutionally acceptable requirement for disclosure and reporting of independent expenditures.125 The only relevant criterion in applying the express advocacy standard is that the independent expenditure must "unambiguously relate[] to the campaign of a particular federal candidate."126

Due process requires that criminal statutes, like the new regulations,127 "provide adequate notice to a person of ordinary intelligence warns us not to make "a fortress out of the dictionary," [Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945)], and thus to avoid mechanical reliance on dictionary definitions when the context suggests that the dictionary meaning is not apt. CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 123 (1996). 122. NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.), quoted in Shell Oil Co. v. Iowa Dept. of Rev., 488 U.S. 19, 25 n.6 (1988).
123. See Buckley v. Valeo, 424 U.S. 1, 43, 80 (1976) (per curiam). In narrowly defining express advocacy, the Court also required that a candidate be "clearly identified," that is, that "an explicit and unambiguous reference to the candidate appear as part of the communication." 424 U.S. at 43.
124. Furgatch, 807 F.2d at 863.
127. See supra note 10 and accompanying text (discussing the criminal sanctions and fines the FEC may impose for FECA violations).
that his contemplated conduct is illegal."128 When First Amendment rights are involved the bar is raised even higher, requiring an even "greater degree of specificity."129 The Buckley Court feared that a vague standard would chill speech of individuals intending to steer clear of violations because a vague definition of express advocacy would place a speaker "wholly at the mercy of the varied understanding of his hearers."130 The new regulations require that the communication "could only be interpreted by a reasonable person" as advocating the election or defeat of a specific candidate.131 This standard insists that the communication is clear, specific and fully perceptible to any reasonable person.

Some may argue that the FEC standard is itself vague, and thus the threat of litigation will deter individuals from making communications, even when the communication is ultimately found not to be in violation of the Act's requirements.132 After all, how are courts — or, more importantly, persons who wish to engage in strict issue advocacy but want to avoid making independent expenditures that would bring them within the reporting and disclosure requirements of the FECA — to determine when no reasonable person could differ as to whether the communication in question is advocating the election or defeat of a specific candidate? There are two answers to this question. First, if the communication is unambiguously electoral advocacy under the FEC regulations, a person who doubts the communication is intended as electoral advocacy must by definition be unreasonable. Second, and more important, the Supreme Court has upheld other similar standards as not impermissibly vague. For example, in obscenity cases the Court finds obscenity by asking "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."133 Any standard that requires that no reasonable minds could differ as to whether a communication is electoral advocacy is at least as unambiguous as a standard that asks simply what

128. Buckley, 424 U.S. at 77 (citing United States v. Harris, 347 U.S. 612, 617 (1954)).
129. 424 U.S. at 77 (quoting Smith v. Goguen, 415 U.S. 566, 573 (1974)).
130. 424 U.S. at 43 (quoting Thomas v. Collins, 323 U.S. 516, 535 (1945)).
131. 11 C.F.R. § 100.22(b) (1996).
132. See Maine Right to Life Committee v. FEC, 914 F. Supp. 8, 13 (D. Me. 1996) (arguing, in dicta, that because "what is issue advocacy a year before the election may become express advocacy on the eve of the election and the speaker must continually re-evaluate his or her words as the election approaches," the FEC's regulations chill free speech in violation of the First Amendment); see also Faucher v. FEC, 928 F.2d 468, 471-72 (1st Cir. 1991) (expressing vagueness concerns regarding any approach beyond a bright-line rule).
In short, the new regulations are "drawn quite narrowly to deal with only the 'unmistakable' and 'unambiguous' cases;" they are therefore essentially not vague by definition. By requiring that no reasonable minds could differ, any party of reasonable intelligence should know when they will be required to report and disclose the expenditure or, if they are a for-profit corporation, when they are restricted from making independent expenditures from their general treasury funds.

Finally, the new regulations are not unconstitutionally overbroad. In other words, the regulations do not "in attaining a permissible end, unduly . . . infringe the protected freedom" of issue advocacy. A regulation is overbroad if it reaches beyond speech that may be constitutionally regulated to cover speech or conduct which is protected by the guarantees of free speech or free association. The Court in Buckley upheld reporting and disclosure limitations on expenditures that "unambiguously relate[]" to advocacy for or against a particular candidate. By requiring that reasonable minds could not differ over the fact that the communication advocates for or against a candidate, the new standard does not bring within its sweep constitutionally protected strict issue advocacy.

134. Some might argue that the obscenity standard is narrowed by relying on contemporary community standards, see 354 U.S. at 489, and that this distinguishes the obscenity standard from the new FEC regulations. However, this argument neglects the fact that the FEC regulations encompass a community standard as well, so long as the community is made up of reasonable people. Thus, the FEC regulation arguably gives even greater protection to those wishing to engage in free speech than the obscenity standard. After all, the obscenity standard requires courts to apply the local community standards, which may have a much more encompassing view of what constitutes obscenity than do communities elsewhere in the country. The FEC regulations mean, in effect, that the potential speaker can rely on any reasonable person in the country to find that the speech was not advocating for or against an identified candidate.

135. MLRC, 914 F. Supp. at 11.

136. This argument follows the reasoning of the Ninth Circuit in FEC v. Furgatch, 807 F.2d 857, 864 (9th Cir. 1987). See also MLRC, 914 F. Supp. at 11-12 (suggesting, without reaching the issue, that the new regulations may provide an unambiguous standard); supra text accompanying notes 116-18.

137. See supra note 7 (discussing the requirements for disclosure and reporting); supra note 74 (discussing the prohibition on corporate expenditures from nonsegregated accounts).

138. For a discussion of overbreadth, see supra note 51.


141. See Buckley v. Valeo, 424 U.S. 1, 80 (1976) (per curiam); see also supra note 59 and accompanying text.

142. On the Buckley Court's concerns regarding the threat to First Amendment rights from vague statutory or regulatory language, see supra notes 52-54 and accompanying text.
B. The Ability To Meet the Compelling Governmental Interests

When courts apply strict scrutiny review to a statute or regulation that regulates a fundamental right, such as the freedom of speech or association, courts will uphold the statute or regulation only if there is a compelling governmental interest for the measure, and the measure is narrowly tailored to meet that interest. The FEC's standard satisfies each of these requirements.

1. Meeting the Compelling Governmental Interests

In Buckley, the Court recognized three compelling governmental interests behind the FECA's reporting and disclosure requirements: providing information to the public to evaluate candidates, deterring actual and apparent corruption, and gathering data for enforcement of campaign laws. In later cases, the Court recognized that the government also has a compelling governmental interest in preventing corruption and the appearance of corruption arising from for-profit corporate independent expenditures. These goals attempt to ensure an effective and fair electoral system in our republic. In order to meet these goals, the government must have a system that results in the disclosure and reporting required by the Act, as well as the perception in the general public's eye that these laws will be enforced. None of these goals is met by the magic words approach because it can be so easily evaded.

The new FEC regulations give the government the ability to further its compelling interests embodied in the independent expenditure requirements. Requiring disclosure keeps "the electorate fully informed of the sources of campaign-directed speech and the possible connections between the speaker and individual candidates." Information in the form of an anonymous communication clearly sends a different message from a communication that discloses the identity of the mes-

143. See supra note 42 and accompanying text (discussing the requirements of strict scrutiny).
144. See Goland v. United States, 903 F.2d 1247, 1251 (9th Cir. 1990) (citing Buckley, 424 U.S. at 66-68).
146. See FEC v. Furgatch, 807 F.2d 857, 862 (9th Cir. 1987) (discussing the importance of a fully informed electorate and reducing corruption).
147. Furgatch, 807 F.2d at 862. The reporting and disclosure requirements also serve a broader goal of preserving legitimate campaigns by enabling voters to make informed choices between candidates. See 807 F.2d at 862; Gardner, supra note 13, at 249-55 (criticizing Buckley's constitutional rulings on the FECA and urging a broader governmental interest in preserving electoral legitimacy).
senger.\textsuperscript{148} The Supreme Court has emphasized that this information allows the electorate to evaluate properly a candidate's ideology, interests, and likely future performance — information crucial to selecting a representative.\textsuperscript{149}

Disclosure and reporting also deter the exchange of campaign support for political favors by subjecting this support to greater scrutiny.\textsuperscript{150} Those wishing to curry favor will be deterred by the fact that "all expenditures will be scrutinized by the [FEC] and by the public for just this sort of abuse."\textsuperscript{151} Additionally, the FECA's disclosure and reporting requirements further the First Amendment goal of ensuring that the electorate has all the necessary information to properly evaluate the communication.\textsuperscript{152} Greater disclosure and reporting also means that the government is better equipped to detect and deter corruption.\textsuperscript{153}

Finally, the vast increase of such expenditures since the \textit{Buckley} ruling intensifies the need for a context-based approach.\textsuperscript{154} One reason

\begin{quote}
\textsuperscript{148} It is true that many organizations that finance independent expenditures select names that may be misleading. For example, a communication by the Auto Dealers and Drivers for Fair Trade was paid for by a foreign car dealership group. See Pianin, \textit{supra} note 5, at A19. However, the media and opposing candidates can use the reporting and disclosure requirements to obtain the true identity of the organization and relay that to the general public.

\textsuperscript{149} See \textit{Buckley} v. \textit{Valeo}, 424 U.S. 1, 66-67 (1976) (per curiam); see also \textit{Furgatch}, 807 F.2d at 862.


\textsuperscript{151} \textit{McIntyre v. Ohio Elections Commn.}, 115 S. Ct. 1511, 1523 (1995).

\textsuperscript{152} See \textit{Furgatch}, 807 F.2d at 862.

\textsuperscript{153} See 807 F.2d at 862 (holding that a more comprehensive approach is needed to ensure that the compelling interests are met).

Disclosure also allows the public a better opportunity to detect any "post-election special favors that may be given in return" for financial support during the campaign. \textit{Buckley}, 424 U.S. at 67.

The Supreme Court recently recognized that the definition of corruption can extend beyond the mere quid pro quo of special political favors for cash. In \textit{Austin v. Michigan State Chamber of Commerce}, 494 U.S. 652 (1990), the Court upheld a Michigan statute prohibiting corporations from using general treasury funds for independent expenditures in state candidate elections, despite the infringement on the corporations' political speech, because an unfair advantage may result from corporate-financed independent expenditures. The Court reached this result because "[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers." 494 U.S. at 659 (quoting \textit{Massachusetts Citizens For Life v. FEC}, 479 U.S. 238, 257 (1986)). Therefore, the Court held that a legislature may attempt to control the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660.

\textsuperscript{154} The \textit{Furgatch} court properly took note of this in 1987. See \textit{Furgatch}, 807 F.2d at 862 (noting that independent expenditures have "become more widespread in federal elections, and the need for controls more urgent").
that the Buckley Court differentiated between independent expenditures and contributions was that independent expenditures, at the time of Buckley, did "not . . . appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." 155 The fact that independent expenditures play an immensely more significant role in elections today 156 places this issue in a different light and makes the FEC's interest all the more compelling. 157

2. Narrow Tailoring

If courts applying strict scrutiny review find a compelling governmental interest for a given regulation, they next determine whether the statute or regulation in question is narrowly drawn to meet that interest. 158 There is no doubt that the "magic word" approach of the First Circuit is more narrowly tailored than the context-sensitive approach adopted by the FEC and the Ninth Circuit. However, that does not mean that the context-sensitive approach fails the narrow fit test. What the Court means by "narrowly tailored" is not that the government must choose the least-restrictive means of achieving its objective. It only means that the government's method must not be "substantially broader than necessary to achieve the government's interest." 159

With the regulation of independent expenditures, courts attempt to ensure that they do "not place burdens on the freedom of speech beyond what is strictly necessary to further the purposes of the Act." 160 At

Another argument for the context-sensitive approach is that by taking into account the timing of a communication, the new FEC approach also provides at least a small amount of protection against last-minute independent expenditures. Frequently, last-minute independent expenditures fund the most negative type of campaign advertisements, which are often only tenuously supported by the record, and can have a significant impact on the election's outcome. See Robert Brett Dunham, Note and Comment, Defoliating the Grassroots: Election Day Restrictions on Political Speech, 77 GEO. L.J. 2137, 2158 n.120 (1989); Ronald J. Ostrow, Walsh's Use of Weinberger Notes Assailed, L.A. TIMES, Nov. 4, 1992, at 4. By taking into account the timing of the communication, the public can "learn the source behind these expenditures and will . . . receive full information about a candidate's supporters and opponents." Hayward, supra note 44, at 60; see also Buckley v. Valeo, 424 U.S. 1, 66-67 (1976) (per curiam).

155. Buckley, 424 U.S. at 46.
156. See supra note 23.
158. See supra note 42 and accompanying text.
160. FEC v. Furgatch, 807 F.2d 857, 862 (9th Cir. 1987).
the same time, courts attempt to ensure that the purposes of the Act "are fully carried out, that they are not cleverly circumvented, or thwarted by a rigid construction of the terms of the Act."\footnote{161}

The new FEC approach, in contrast to the bright-line rule, provides more complete coverage of independent expenditures and allows for more effective enforcement of the FECA. The magic words interpretation of \textit{Buckley}'s express advocacy standard runs the risk of thwarting the impact of the FECA's reporting and disclosure requirements.\footnote{162} FEC officials have recognized that a magic words test allows organizations or individuals supporting a candidate to easily avoid the reach of the Act by simply avoiding key words, while communicating the same message which is unmistakably directed at electoral advocacy.\footnote{163}

A good example of the broader application of the new regulations can be seen by analyzing its application to the hypothetical NRA Clinton advertisement example used in the introduction — the one that urged people not to let "Bill Clinton do it to us again."\footnote{164} Under the literal approach, the communication does not include any of the magic words of \textit{Buckley}. Thus, the NRA would not have to report the expenditure or make a disclosure on the communication. Under the context-sensitive approach, the fact that the advertisement was only a few days away from a major presidential election, included a great deal of discussion about the campaign, and encouraged people in three days not to "let Bill Clinton do it to us again" gives context to the communica-

\footnote{161. 807 F.2d at 862.}
\footnote{162. See 807 F.2d at 862.}
\footnote{163. See Carney, \textit{supra} note 23, at 1315 (quoting FEC General Counsel Lawrence M. Noble); see also Furgatch, 807 F.2d at 863. The same could be said for proposals which apply a bright-line rule on time. See Hayward, \textit{supra} note 44, at 88-95 (suggesting a bright-line rule on time near the end of the campaign); see also 57 Fed. Reg. 33,547, 33,560 (1992) (proposed July 29, 1992) (presenting Alternative A-2 — a definition of express advocacy that the FEC considered and rejected — which advocates a time-buffer provision allowing the FEC to treat all messages mentioning a candidate as express advocacy if the communication appears within a certain number of days prior to the election). Clever campaigners simply could run advertisements just before the deadline, circumventing the rule but still having a significant impact on the election. The real problem, however, is that there is no reason to suspect that the time just before the election is any more critical to a campaign. A communication made early on in the primary, without disclosure or reporting, may hinder (or help) a candidate to such an extent that her fate is fixed. A prime example is a vicious attack early in a primary from an undisclosed source. Such an early attack may mean that a candidate is unable to raise money or gain endorsements from key people. The campaign may never fully recover. Although this may do damage to a candidate regardless of whether there is disclosure and reporting by the party responsible for the independent expenditure, if there is disclosure and reporting, financial supporters, endorsers, and the media may make a more informed decision regarding how much weight to give the communication.}
\footnote{164. See \textit{supra} notes 32-33 and accompanying text.
tion's express message: "Vote against Bill Clinton so he cannot take our weapons away." Under the new FEC regulations, the NRA would be required to place a disclosure on the advertisement and report the amount of the expenditure to the FEC.

Adopting a more flexible rule — one that gets at more of the communications having the effect, or perception, of influencing elections — better avoids corruption, and the perception of corruption, in our political process. Having access to information about who a candidate's supporters and detractors are allows the public to make a more informed decision about the candidates and their positions. Those who are avid NRA supporters might be more inclined to vote against Bill Clinton. On the other hand, voters who support gun owner's rights, but are suspect of the NRA, might be more cautious in accepting the advertisement's claims. Perhaps these people support the right to own guns in general, but agree with Clinton's views regarding restrictions on the right to own automatic assault weapons. Requiring the disclosure on the advertisement may make a great deal of difference in the minds of these voters.165

Finally, as the Court noted in Buckley, the fact that the regulations only require reporting and disclosure for individuals and groups, rather than an outright ban on such expenditures,166 means that the regulations create only a "'reasonable and minimally restrictive' effect on the exercise of First Amendment rights" while protecting issue advocacy.167

C. Consistency With Other Areas of First Amendment Law

The context-sensitive approach is consistent with the Court's treatment of various other areas of First Amendment law. For a court to require a bright-line test, and to hold that a court can never look to the context of the communication to determine if the speech can be regulated, would require invalidating a litany of similarly based First Amendment restrictions previously upheld by the Court.168 For example, "[t]he doctrines of subversive speech, 'fighting words,' libel, and speech in the workplace and in public fora illustrate that when and where speech takes place can determine its legal significance. In these

165. See Furgatch, 807 F.2d at 862.
166. But see supra note 74 (discussing the fact that corporations are prohibited from making such expenditures from nonsegregated funds based on a lower degree of First Amendment protection of corporate political speech).
168. See Furgatch, 807 F.2d at 863.
instances, context is one of the crucial factors making these kinds of speech regulable.”

Fighting words are not regulated by a bright-line rule because a more flexible approach is needed to ensure that the compelling governmental interests are met; yet, the First Amendment interests involved are still protected. The Court never simply says that certain words always will constitute fighting words. Rather, the words derive their meaning, as fighting words, from the context in which they are used. Professor Stephen Gard has pointed out that for the words to be considered “fighting words” they must “have a direct tendency to cause an immediate violent response by the average recipient,” be “uttered face-to-face to the addressee,” and be “directed to an individual.” Thus, the court must look to the context of the words to determine if the government can punish the speaker for the use of “fighting words.” A bright-line rule would not strike a proper balance between the government’s interest in ensuring public safety and the First Amendment interests at stake.

Another prime example of the Court granting the government the ability to regulate otherwise protected speech because of the context in which it arose occurred in FCC v. Pacifica Foundation, which dealt with the regulation of indecent language on the public airwaves. In Pacifica a local radio station aired, during an early weekday afternoon, a monologue by the satirist George Carlin. The monologue was part of a larger program by the radio station to discuss attitudes toward language and the Carlin piece included his well-known bit about the seven

169. Furgatch, 807 F.2d at 863. In Konigsberg v. State Bar of Cal., 366 U.S. 36 (1961), Justice Harlan, writing for the Court, also recognized that the Court has consistently found some “speech in certain contexts, [to be] outside the scope of constitutional protection.” 366 U.S. at 50 (emphasis added) (footnote and citations omitted).

170. See Furgatch, 807 F.2d at 863.
172. Id. at 536 (citing Lewis v. City of New Orleans, 408 U.S. 913 (1972) (Powell, J., concurring)).
173. Id. at 536 (citing Gooding, 405 U.S. at 518; Cohen, 403 U.S. at 15; Chaplinsky, 315 U.S. at 568).
174. See id. at 536 (arguing that these contextual factors are what courts look to in determining words’ status as “fighting words,” but arguing for abolishment of the “fighting words” doctrine as a relic of past morality). But see Gooding, 405 U.S. at 537 (Blackmun, J., dissenting) (claiming that “the Court, despite its protestations to the contrary, is merely paying lip service to Chaplinsky” and that the Court has gone too far in narrowing the application of the “fighting words” doctrine).
dirty words which "you definitely wouldn't say ever" on the public airwaves. The FCC, while not asserting that it could ban nonobscene but "indecent" language from all airwaves at all times, argued that the context was all-important and that it could therefore keep this kind of language off the airwaves in the early afternoon, when children were more likely to be in the audience. The Court upheld the FCC position, noting that while these words are entitled to some First Amendment protection, their "social value" depends on the context in which they are used. Thus, the FCC had the right to take the context of the communication into account, and the regulations were regulable only because of the context in which they were used.

These doctrines demonstrate that the Court believes context-sensitive approaches are the most effective means of balancing the compelling governmental interests against the free speech rights of individuals and groups. Under the same reasoning, a context-sensitive approach is necessary for determining when independent expenditures can be regulated. Without it, a vast number of communications that the government has a compelling interest in regulating will escape the reporting and disclosure requirements.

CONCLUSION

The Buckley Court's express advocacy standard is a positive step in that it protects fundamental First Amendment interests implicated when Congress attempts to regulate in an area as sacred as political speech. At the same time, it recognizes the reality that regulating elections helps to ensure the integrity of the American republic by providing fair elections and working to root out corruption within the political system.

If courts reject the new FEC regulations in favor of the literal approach of the First Circuit, the role of independent expenditures in our election process will no doubt continue to grow at an even more rapid pace, unabated by the checks of public disclosure and reporting. It is time for the courts to recognize that campaigning has changed. The same fears of a decrease in public confidence in the fairness of our electoral system, and in corruption from quid pro arrangements that led Congress and the Court to accept stricter regulation of direct contributions, now surround independent expenditures. Because of the importance of the freedom of speech — and its particular importance in the political arena — courts must walk a tightrope when it comes to the

176. See 438 U.S. at 731-34.
177. See 438 U.S. at 747-48 (Stevens, J.).
regulation of independent expenditures. The courts must now give the
government the ability to lasso the corruption, actual and perceived, that
comes with well-financed independent expenditure campaigns by spe-
cial interest groups.

A context-sensitive approach will certainly not be sufficient to
clean up the entire political process. But this approach can ensure that
the public gets more information regarding the funding of campaign ad-
vertisements and which special interest group is spending hundreds of
thousands of dollars to elect or defeat which candidate. This informa-
tion allows the public, and particularly the media, who can broadcast
such information to a wide audience, the ability to make better judg-
ments about the content and veracity of particular communications. It
provides the FEC and citizen “watch dog” organizations the ability to
discover corruption or expose politicians who provide special favors for
groups that have made independent expenditures for them. In short, the
FEC’s approach gives the American people important information re-
garding a candidate’s supporters or detractors — often critical informa-
tion in helping people determine who they want their representatives to
be — without overly restricting First Amendment rights.