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I. INTRODUCTION

Over the past quarter century, the movement for greater regulation of political speech and activity in the United States (commonly called campaign finance reform) has taken on something of a villain du jour approach. Typically, a new method of campaigning, or of raising campaign funds, will come to the fore; the campaign finance regulation movement will announce that this loophole, if not regulated or banned, threatens American democracy; although nothing happens, American democracy goes on; and after a few years, the regulatory movement discovers another loophole, and announces with great passion that American democracy is threatened yet again.

Thus, in the 1970s, the campaign finance reform movement, or more accurately, the campaign finance regulation movement, devoted its efforts to banning or limiting political action committees (PACs); in the 1980s, the villain du jour became independent expenditures in express support of or opposition to particular candidates; now, in the 1990s, advocates for campaign finance regulation are all but apoplectic over the threats posed by so-called soft money and issue advocacy. So it is no surprise that Mr. Simon, in this symposium, argues that "[t]he first and most urgent reform of the

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3. See, e.g., Donald J. Simon, Beyond Post-Watergate Reform: Putting an End to the Soft Money System, 24 J. LEGIS. 167, 177 (1998) ("[S]oft money . . . is undermining the core values that have long been the strength of our democracy . . . [C]herished ideals are now being abandoned by our political parties and our elected officials in service of the increasingly frantic quest for huge soft money donations from the wealthy and the powerful."); Panel Discussion: Revolutionizing Campaign Finance—An Appraisal of Proposed Reforms, 13 J.L. & POL. 163, 174-75 (1997) (comments of Donald J. Simon) ("The final key element is to eliminate soft money. This is an absolutely crucial reform . . . [I]t is an outrage."); Fred Wertheimer & Susan Weiss Manes, Campaign Finance Reform: A Key to Restoring the Health of Our Democracy, 94 COLUM. L. REV. 1126, 1156 (1994) ("No campaign finance reform will work or be publicly credible unless it shuts down the soft money system that endangers the integrity of the presidential campaign financing system and has now invaded congressional elections."). It is interesting to compare this 1994 Wertheimer article with his 1980 article, Wertheimer & Huwa, supra note 1. PACs, the discussion of which dominates the first article, are all but ignored in the second. Soft money and issue advocacy, not discussed in the first, get great attention fourteen years later.
campaign finance system is for Congress to ban soft money. 4

Any serious discussion of soft money might begin with a bit of perspective. In 1995-96, total soft money contributions to the various Democratic and Republican Party national congressional and senatorial committees were approximately $74.4 million. 5 This is less than ten percent of total spending on congressional races in 1995-96. 6 Total soft money contributions, for all campaigns, were approximately $260 million, or thirteen percent of total spending in federal races. 7 Thus soft money, for all the hysteria it seems to generate, remains a small part of total campaign funds. Moreover, that it is growing as a percentage of the total should be no surprise, given that contribution limits on so-called hard money have remained unchanged and unadjusted for inflation since 1974. This has reduced by roughly two-thirds the real dollar amount that can be contributed in the form of hard money. Naturally, so-called soft money has filled the void.

But it is not my purpose here to discuss, in detail, the policy questions surrounding soft money. My views on the wisdom of regulating political expenditures have largely been spelled out elsewhere. 8 Nor is my goal here to discuss the merits of existing constitutional doctrine in the area, or of proposed changes to that doctrine. Again, I have discussed this at rather excruciating length in prior articles. 9 Rather, I would like to use my space in this symposium to lay out a simple case: regardless of what one thinks about soft money, or what one thinks about the applicable Supreme Court precedents, a blanket ban on soft money would be, under clear, well established First Amendment doctrine, constitutionally infirm. This fact has been all but ignored by the press and in congressional debates, lending a rather surreal air to the entire discussion. Proposals are being hotly debated which, even if passed, would be struck down as unconstitutional. 10 It is time to talk a bit of First Amendment reality, and this seems
In Part II of this article I will briefly discuss the origins of soft money and the links between soft money and what is now termed "issue advocacy," that is to say, political speech that does not expressly urge a vote for or against a candidate for office. It is, I suggest, issue advocacy that is the real target of the speech regulators' proposals to ban soft money. In Part III, I will address a lengthy series of Supreme Court and lower court precedents that give sweeping First Amendment protection to issue advocacy. I will then compare some current proposals to regulate issue advocacy to laws and rules already struck down by the courts. This will show that the leading proposals now floating about Congress have, in fact, already been found to be unconstitutional. In Part IV, I will show that well established, Supreme Court precedent protects not only expenditures for issue advocacy, but contributions made to groups, such as political parties, to engage in issue advocacy. I will also outline one caveat—it may be constitutionally permissible to limit soft money contributions for a narrow range of grass-roots oriented political activity and voter turnout campaigns. However, few, I think, really want to cut off the flow of funds for such activity. This caveat aside, I conclude that under well established precedent, efforts to ban soft money contributions and expenditures for issue advocacy are, quite clearly, constitutionally infirm.

II. SOFT MONEY AND ISSUE ADVOCACY

A. The Origins of Soft Money

Advocates of greater regulation of political speech like to say that soft money is a "loophole" which was "created" by bureaucrats at the Federal Election Commission (FEC). The purpose of pointing this out, we can only assume, is to in some way discredit the idea of soft money by portraying it as something contrary to Congress' intent in creating the federal election regulatory system. In fact, this is misleading, if not simply untrue. Yes, in 1978, the FEC, by administrative ruling, held that parties could pay for party building activities such as voter registration drives, get-out-the-vote drives, bumper stickers and slate cards, with money raised by state and local parties outside of the regulatory framework of Federal Election Campaign Act (FECA).
However, in 1979, Congress specifically amended FECA to allow unrestricted contributions to be used for such party building activities, when conducted by volunteers, even though these activities might have the effect of influencing federal elections. Congress' decision to specifically sanction soft money prior to the 1980 election was a direct result of the experience of the 1976 campaign. Under the tight spending limits of the 1976 presidential election—the first conducted under such limits—Congress, the FEC, and others observed a marked decline in the level of grass-roots political activity, such as bumper stickers, slate cards, leaflets, yard signs and other traditional campaigning. Voter registration and get-out-the-vote drives also suffered, as campaigns saved their scarce funds for broadcast advertising. Thus, the 1979 Amendments specifically provided that soft money could be used for voter turnout activities and volunteer support other than broadcast, newspaper, magazine or direct mail advertising. But it is hard to imagine that any but the most extreme advocates of campaign finance reform really want to reduce the flow of funds for get-out-the-vote and voter registration drives, or even for yard signs, buttons, bumper stickers and slate cards—the items for which soft money is specifically authorized by statute. And it is, perhaps, for this reason that the question of soft money failed to generate much interest prior to the election of 1996.

B. The Links Between Soft Money and Issue Advocacy

What changed in 1996 was the first widespread use of soft money to fund issue advertising by the major political parties. Issue ads are advertisements which fall outside the contribution and expenditure limits of FECA because they stop short of expressly advocating the election or defeat of any particular candidate.

In Buckley v. Valeo, the Supreme Court held that only expenditures which explicitly advocated the election or defeat of a clearly identified candidate for office could be subject to the regulatory limits of FECA. Ads which discussed candidates and

15. CONGRESSIONAL QUARTERLY, CONGRESSIONAL CAMPAIGN FINANCES: HISTORY, FACTS, AND CONTROVERSY 50 (1992). Mr. Simon argues that "[t]he myth of soft money is that it is contributed and spent for... purposes that are unrelated to influencing federal elections." Simon, supra note 3, at 175. This is not true. It was always understood that expenditures on slate cards, for example, or get-out-the-vote drives conducted in conjunction with an election in which federal offices are up for vote, would "influence" federal elections. The point is that such expenditures were considered good things, even though, or even because, they might influence federal elections.
16. See Richard Briffault, The Federal Election Campaign Act and the 1980 Election, 84 COLUM. L. REV. 2083, 2086 (1984) (book review). The dilemma of the reformist opposition to large political contributions is seen in Congress' decision to sanction soft money contributions. "Volunteer" campaigns require large amounts of money if they are to work effectively—to supply logistical support, to pay for local storefront offices, to produce the pamphlets and slate cards distributed door-to-door, to get volunteers from one place to another, to pay for coordinators for their activities and so forth. The Eugene McCarthy campaign of 1968, which knocked incumbent Lyndon Johnson out of the presidential race, is often portrayed as a model of grass-roots activism. However, as the campaign's staff director, Curtis Gans has pointed out many times that the campaign was only possible due to huge infusions of cash from a handful of wealthy individuals. See, e.g., Hearings on Campaign Finance Before the Senate Comm. on Governmental Affairs, 105th Cong. (1997) (testimony of Curtis Gans), available in 1997 WL 603195.
issues, but did not explicitly urge the election or defeat of a candidate, could not be constitutionally subjected to regulation. For many years, this caused little commotion. But in the elections of 1992, a number of groups began to aggressively use these “issue ads” to discuss candidates and issues. For example, supporters of congressional term limits ran targeted ads in the districts of certain electorally vulnerable congressional candidates, criticizing these candidates for their opposition to term limits, but stopping short of expressly advocating their defeat at the polls.\textsuperscript{20} In what would become one of the more famous episodes, a small conservative group called the Christian Action Network (C.A.N.) ran ads critical of then candidate Bill Clinton for his stands on gay rights.\textsuperscript{21} C.A.N.’s ads are a good example of the wide latitude given for groups to discuss issues in ways that can affect federal campaigns. The ads of the Christian Action Network opened with a color shot of Bill Clinton against an American flag background. A narrator then read the following text,

\begin{quote}
Bill Clinton’s vision for America includes job quotas for homosexuals, giving homosexuals special civil rights, allowing homosexuals in the armed forces. Al Gore supports homosexual couples adopting children and becoming foster parents. Is this your vision for a better America? For more information on traditional family values, contact the Christian Action Network.\textsuperscript{22}
\end{quote}

As the narrator spoke, the screen dissolved into a black and white photo negative, darkening Clinton’s eyes and mouth and giving him a “sinister” look, while background music turned deep and ominous.\textsuperscript{23} Despite the lack of express words of advocacy or defeat, such issue ads by C.A.N. and other groups may have influenced the vote in some 1992 and 1994 federal elections, especially at the congressional level.\textsuperscript{24}

In 1996, issue ads were used extensively by groups as diverse as the AFL-CIO, the Sierra Club, Handgun Control, the National Education Association, the National Abortion Rights Action League, Citizen Action, the National Rifle Association and the Christian Coalition.\textsuperscript{25} However, what particularly drew the ire of those who favor campaign finance regulation is that the political parties themselves began to run issue ads. Most prominent was President Clinton’s multi-million dollar campaign of issue advocacy begun in the fall of 1995.\textsuperscript{26} The ads touted the President’s achievements in office, but did not specifically urge people to vote for Clinton. On at least one occasion President Clinton noted the ads’ effectiveness in reversing his standing in the early public opinion polls on the 1996 presidential race.\textsuperscript{27} The Republicans made similar use of issue ads, especially in the spring of 1996, after candidate Bob Dole had reached the federal spending limit for the primaries. It was no secret that the ads were intended to keep Dole’s campaign visible until after his formal nomination at the GOP convention, which would cause the release of general election funds from the Treasury. As Dole himself quipped of one such ad, “It never says that I’m running for President,

\begin{itemize}
\item \textsuperscript{22} Christian Action Network, 894 F. Supp. at 949 n.4.
\item \textsuperscript{23} Id. at 948.
\item \textsuperscript{24} See Jacobson, supra note 20, at 27.
\item \textsuperscript{25} See Robert Dreyfuss, Harder than Soft Money, AM. PROSPECT, Jan.-Feb. 1998, at 30, 32-34.
\item \textsuperscript{26} See Mitchell, supra note 18, at A1.
\item \textsuperscript{27} See Susan Schmidt, A Backstage Look at Fund-Raising: Clinton Is Shown Adept and Candid in Pursuit of Big Money Donors, WASH. POST, Oct. 18, 1997, at A8.
\end{itemize}
though I hope that's fairly obvious, since I'm the only one in the pictures. 28

These ads, because they did not expressly advocate the election or defeat of a candidate, were outside the regulatory scope of FECA, as limited by the First Amendment through the Buckley decision. Therefore, the parties were able to fund these ads with contributions raised outside of the FECA limits on the sizes and sources of contributions. These contributions, for issue ads, were also dubbed "soft money" contributions.

Thus, soft money has come to have two meanings. On the one hand, it consists of unregulated contributions to state and local parties, provided for by 2 U.S.C. § 431, which may be used for grass-roots, volunteer activities that specifically advocate the election of federal candidates, such as get-out-the-vote drives, bumper stickers, and yard signs, but which may not be used for broadcast purposes or mass advertising. 29

At the same time, soft money is used for issue ads, which do not specifically advocate the election of candidates for federal office, though they may have the effect, intended or otherwise, of influencing voter perceptions of federal candidates, and thus may indirectly influence election outcomes.

To campaign finance regulatory enthusiasts, such ads are not issue ads at all, but rather so-called issue ads, sham issue ads, phony issue ads or campaign ads masquerading as issue ads. 30 They argue that the ads are intended to influence federal elections, and so both the ads themselves and the contributions used to fund them may be regulated under the Buckley framework. In fact, we have been down this road before, and the advocates of regulation are dramatically wrong.

III. CONSTITUTIONAL PROTECTION OF ISSUE ADVOCACY

A. Buckley v. Valeo and Its Progeny

In Buckley v. Valeo, the Supreme Court, finding that restrictions on political contributions and spending burdened First Amendment rights, 31 held that only the compelling state interest in preventing quid pro quo corruption of officeholders and candidates could justify such regulation. 32 The First Amendment right to discuss political issues could only be limited where there existed quid pro quo corruption, or the appearance of such corruption.

29. 2 U.S.C. § 431 (1994). Candidates for federal office, however, can help the state and local parties raise the money, and national parties can serve as the agent for the local parties in collecting the contributions. Briffault, supra note 16, at 2086-87.
32. Id. at 26-27 (stating quid pro quo corruption and appearance of such corruption is sufficiently compelling to justify regulation); id. at 48-49 (stating equality interests insufficient to justify regulation).
Many of today's supporters of regulating "issue advocacy" argue that such regulation meets the Buckley test of combating quid pro quo corruption. This is wrong. An often overlooked feature of Buckley v. Valeo is that the decision dealt directly with the question of regulating what we now call issue advocacy. It seems to have been forgotten that in the 1974 FECA Amendments Congress sought to limit issue ads, just as many do now. After the 1974 Amendments were enacted, 18 U.S.C. § 608(e)(1) provided that "no person may make 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 $1000." In other words, expenditures that mentioned a candidate would be defined as "contributions" to a candidate's campaign. The Court noted that "the plain effect of Section 608(e)(1) is to prohibit all individuals, who are neither candidates nor owners of institutional press facilities, from voicing their views." Because such expenditures are made independently of a candidate's campaign, the Court held that such expenditures do not pose the same danger of quid pro quo corruption as campaign contributions. Therefore, such a broad restriction on independent expenditures was held to be constitutionally impermissible.

In addition to upholding the people's rights to make unlimited expenditures independently of a candidate's campaign, the Court also held that "[t]he use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech," i.e. between campaign contributions, whose size can be regulated, and independent expenditures, which cannot be regulated because they do not pose the same threat of corruption. The Court then rejected the notion that this vagueness problem could be saved by looking at other manifestations of the speaker's intent in an effort to determine if the ads were intended to affect federal elections, or had some other purpose. The use of subjective manifestations of intent would do nothing to take away the chilling effect of such regulation.

"[W]hether words intended and designed to fall short of invitation would miss that mark is a question of both intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be misunderstood by some . . . . In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.

Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." Thus, the Court correctly concluded, "[C]onstitutional difficulties can be avoided only by reading Section 608(e)(1) as limited to communications that include explicit words  


34. Buckley, 424 U.S. at 40.

35. Id. at 46.

36. Id. at 41.

37. Id. at '43 (quoting Thomas v. Collins, 323 U.S. 516 (1945)).
of advocacy of election or defeat of a clearly identified candidate for federal office.\textsuperscript{38} Therefore, the Court limited the application of Section 608(e)(1) 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,’ [and] ‘reject.’”\textsuperscript{39} Ads which did not use such explicit language were exempt from regulation as campaign contributions. Nor was \textit{Buckley} a close decision on this point—at least eight, and possibly all nine, of the justices agreed on this issue.\textsuperscript{40}

The Court’s narrow reading of Section 608(e)(1) is eminently sensible. Political speech, after all, is at the core of the First Amendment, a simple fact long accepted by the Court.\textsuperscript{41} All discussion of public issues has the potential to influence federal elections, simply by affecting how listeners think about the issues that are supported or opposed by particular candidates. The discussion of issues, in turn, is routinely tied up in the discussion of candidates for office. Indeed, the purpose of discussing issues is often, if not usually, to influence who will be elected to office. Although aggressive issue ads targeted at specific campaigns are often portrayed as a new threat to the integrity of the campaign finance system not addressed in \textit{Buckley}, in fact the \textit{Buckley} decision was well aware that discussions of issues could be intentionally used to influence election outcomes.

\textit{[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental action. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest . . . .}\textsuperscript{42}

Nor was the Court oblivious to the fact that its ruling would open a major loophole in the law. One reason that the Court, in \textit{Buckley}, struck down an expenditure limit on independent express advocacy was because it recognized that issue advocacy could and would be used to effectively influence elections. Having placed issue advocacy within the protections of the First Amendment, the Court realized that a ban on expenditures for independent express advocacy would serve little purpose: “It would naively under-

\textsuperscript{38} \textit{Buckley}, 424 U.S. at 44.
\textsuperscript{39} \textit{Id.} at 43-44 & 44 n.52.
\textsuperscript{40} Justice White dissenting from the Court’s holding striking down section 608(e)’s limit on independent expenditures. \textit{Id.} at 259 (White, J., concuring in part and dissenting in part). However, White does not address that portion of the Court’s opinion interpreting 608(e) as applying, in any case, only to “express advocacy,” instead focusing solely on whether Congress can limit expenditures generally. All of his discussion seems to focus on ads expressly supporting a candidate, and is not inconsistent with the majority’s holding on the issue advocacy question. \textit{Id.} at 259-65. It is interesting to note that this portion of White’s opinion, in which he would have upheld expenditure limits, fails to cite a single case in support of his position. \textit{Id.} This observation was brought to my attention by Alan Morrison, \textit{Watch What You Wish For: The Perils of Reversing Buckley v. Valeo}, AM. PROSPECT, Jan.-Feb. 1998, at 38, 41.
\textsuperscript{41} See, \textit{e.g.}, Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) (“It can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to campaigns for political office.”); Mills v. Alabama, 384 U.S. 214, 218 (1966) (“There is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”). Though many have suggested that the First Amendment has other purposes, \textit{see, e.g.}, \textsc{Laurence H. Tribe}, \textsc{American Constitutional Law}, 785-89 (2d ed. 1988), I know of no one arguing that political discussion is not protected by the First Amendment.
\textsuperscript{42} \textit{Buckley}, 424 U.S. at 42.
estimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefitted the candidate’s campaign.” Therefore, the court also struck down expenditure limits on express advocacy.

In short, the Court held that although issue ads might affect elections, intentionally or unintentionally, this alone is not a sufficient basis to justify the chilling effect that the regulation of issue ads would have on political speech.

In the years since Buckley was decided, both the Supreme Court and the lower courts have, time and again, reaffirmed both the reasoning and holding of that decision as it pertains to issue advocacy, including the necessity of requiring express words of advocacy before any regulation of a communication is constitutionally permissible.

In fact, so clear is the constitutional precedent in this area that the Court of Appeals for the Fourth Circuit recently took the extraordinary step of ordering the FEC to pay the legal fees incurred by the Christian Action Network to defend itself from an FEC lawsuit. The FEC had attempted to fine the Christian Action Network for issue advertising, arguing that its ads constituted regulated campaign ads even though they did not include words of express advocacy as defined in Buckley. In a stinging rebuke

43. Id. at 45.
44. Id.

Furthermore, even Federal Election Commission v. Furgatch, 807 F.2d 857 (9th Cir. 1987), a case often cited by proponents of greater regulation, supports Buckley’s narrow definition of express advocacy. See infra p. 188.

It is worth noting that even before Buckley was decided, the Second Circuit had held that issue advocacy could not be made subject to campaign finance disclosure requirements passed as part of FECA in 1971. United States v. National Comm. for Impeachment, 469 F.2d 1135 (2d Cir. 1972).


47. See supra text accompanying note 39.
to the FEC, the Fourth Circuit concluded, "In the face of the unequivocal Supreme Court and other authority discussed, an argument such as that made by the FEC in this case, that 'no words of advocacy are necessary to expressly advocate the election of a candidate,' simply cannot be advanced in good faith . . . . [T]he First Amendment forbids the regulation of our political speech under such indeterminate standards."48

Nevertheless, a handful of speech regulation proponents continue to argue that a more expansive definition of "express advocacy" is constitutional, pointing to the Ninth Circuit's 1987 decision in Federal Election Commission v. Furgatch.49 But on examination, Furgatch is, in fact, further support for strict constitutional limits on the regulation of issue ads. The case revolved around newspaper ads placed by one Harvey Furgatch, and run three days before the 1980 presidential election. The ads pointed out that President Carter was running for re-election, attacked Carter's behavior in office, though not his position on any particular issue, and concluded, "it is an attempt to hide his own record, or lack of it. If he succeeds, the country will be burdened with four more years of incoherencies, ineptness, and illusion, as he leaves a legacy of low-level campaigning. DON'T LET HIM DO IT."50 The Ninth Circuit held that the ad constituted express advocacy, and reversed the district court's finding in favor of Furgatch. For those who would like to further regulate issue advocacy, Furgatch is the FEC's lone victory in an otherwise unbroken string of defeats. But is it really a victory for the regulators at all? If one actually reads the decision, I think that it, quite obviously, is not.

First, Furgatch was decided on January 9, 1987, just a few days after the Supreme Court's decision in Federal Election Commission v. Massachusetts Citizens for Life, Inc.51 had reaffirmed the bright-line, express advocacy rule of Buckley, yet Furgatch made no mention of Massachusetts Citizens for Life.52 For this reason, it has been suggested that Furgatch, to the extent anything in it might be interpreted as supporting a contextual approach to determining if an advertisement is express advocacy, was wrong from the start.53 But I think it is more clear that Furgatch does not support a contextual approach to determining whether speech constitutes express advocacy, but simply reaffirms the outermost boundaries of Buckley's bright line express advocacy test. Furgatch begins with the common-sense observation that the famous words of Buckley's footnote 52 are not the only conceivable words of express advocacy.54 For example, footnote 52 does not specifically include such phrases as "Send Smith to Congress," or "Next Tuesday, let's put an end to Smith's career in Congress." Nor does it include the words used by Mr. Furgatch, "DON'T LET HIM DO IT." The court of appeals held that these words could constitute express advocacy, although it agreed with the district court that it was "a very close call."55 Furthermore, the court noted that the advertisement did not attack any of Carter's stands on

49. Federal Election Comm'n v. Furgatch, 807 F.2d 857 (9th Cir. 1987).
50. Id. at 858.
53. Id.
54. Furgatch, 807 F.2d at 860; see Buckley, 424 U.S. at 43-44, 44 n.52.
55. Furgatch, 807 F.2d at 861.
"issues," but rather attacked Carter's "personal qualities." The court then suggested that the express advocacy rule consisted of three components.

First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.

The Fourth Circuit, analyzing the case in Federal Election Commission v. Christian Action Network, correctly summarized the holding of Furgatch as follows:

Indeed, the simple holding of Furgatch was that, in those instances where political communications do include an explicit directive to voters to take some course of action, but that course of action is unclear, "context"—including the timing of the communication in relation to the events of the day—may be considered in determining whether the action urged is the election or defeat of a particular candidate for public office.

In the case of Furgatch, the words, "DON'T LET HIM DO IT" could only be construed as express advocacy because, other than vote against Carter, there was nothing else the listener could do to prevent four more years.

Even the FEC has recognized that Furgatch conforms to the narrow, bright-line express advocacy rule of Buckley, arguing to the Supreme Court that Furgatch is consistent with Buckley and Massachusetts Citizens for Life because the ads in Furgatch "explicitly exhorted" voters to defeat President Carter. The FEC has also admitted that any broader language appearing in the Furgatch opinion was mere dicta. Thus, far from suggesting that a broad definition of express advocacy could withstand a First Amendment challenge, Furgatch fits in to a long string of precedent, itself marking the outer limits of express advocacy. As such, it illustrates just how narrow the express advocacy exception to the First Amendment is.

Despite this impressive, unbroken line of judicial opinion, there are those who insist that issue ads can be regulated in accordance with First Amendment principles. However, an examination of their proposals indicates that they would be quickly stricken by the courts on constitutional grounds.

56. Id. at 865.
57. Id. at 864.
59. Id. at 1054.
60. See Christian Action Network, 110 F.3d at 1063 (describing arguments in FEC's Brief in Opposition to Certiorari, Furgatch v. Federal Election Comm'n, 484 U.S. 850 (1987) (No. 95-2600)).
61. Id. at 1055 n.6, 1063 (citing FEC's Brief in Opposition to Certiorari at 9, Furgatch v. Federal Election Comm'n, 484 U.S. 850 (1987) (No. 95-2600)).
62. Given the overwhelming weight of authority contra a broader reading of the definition of express advocacy, I think that any interpretation of Furgatch as providing broader authority to regulate issue advocacy must be accompanied by the conclusion that, in that case, Furgatch is simply not good law. See supra note 45.
B. Proposals to Regulate Issue Advocacy

Buckley, recall, dealt with a statute that purported to limit any expenditure "relative to a clearly identified candidate." In addition to holding that such a standard could only apply to "communications that in express terms advocate the election or defeat of a clearly identified candidate," the Supreme Court also held that whether a communication was permissible could not hinge on "intent and ... effect." It was vital, said the Court, that the speaker not be put "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning."

Consider, also, the 1995 FEC rules struck down as unconstitutional in Maine Right to Life Committee v. Federal Election Commission. Those rules attempted to define "expressly advocating" as "any communication that . . . (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)." These rules were struck down as unconstitutional under Buckley because they did not provide a bright enough line to protect speech, with the court noting that such speech could not be restricted "even at the risk that it is used to elect or defeat a candidate."

Now compare these rulings, and the language struck down as unconstitutional, to current proposals to regulate issue advocacy. The most discussed campaign finance proposal in the 105th Congress is the so-called McCain-Feingold Bill. McCain-Feingold attempts to limit issue advocacy, by redefining "express advocacy" as "a communication that advocates the election or defeat of a candidate by . . . (iii) expressing unmistakable and unambiguous support for or opposition to 1 or more clearly identified candidates when taken as a whole and with limited reference to external events, such as proximity to an election." The key language of the bill, "when taken as a whole and with limited reference to external events, such as the proximity to an election," is identical to that struck down in Maine Right to Life Committee. And its approach—that of defining express advocacy through external events and the perceptions of others, is precisely that rejected by Buckley. The major difference between the bill and those FEC rules already struck down is the substitution of the phrase "expressing unmistakable and unambiguous support for or opposition to one or more clearly identified candidates," for the FEC standard "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates." Legally, this is no difference at all, as only an "unmistakable and unambiguous" statement could "only" be interpreted in one way be a reasonable per-

63. Buckley, 424 U.S. at 39.
64. Id. at 44.
65. Id. at 43 (quoting United States v. Auto Workers, 352 U.S. 567, 595-96 (1957)).
66. Buckley, 424 U.S. at 43.
68. 11 CFR § 100.22 (1997).
71. Id. § 201(b).
72. Id.
son. The second difference between the two proposals is McCain-Feingold's substitution of the phrase "support or opposition" for the FEC's "advocacy of election or defeat" of a candidate. Here the McCain-Feingold language is, in fact, more vague than the stricken FEC standard, as support or opposition does not necessarily correlate with advocacy of election or defeat.\(^3\)

The House of Representatives companion bill to McCain-Feingold, Shays-Meehan,\(^4\) contains similar language, except it allows even more ambiguity. Specifically, it would define express advocacy as "a communication . . . that refers to a clearly identified candidate, that a reasonable person would understand as advocating the election or defeat of the candidate, and that is made within 30 days before the date of a primary election . . . or 60 days before a general election."\(^5\)

This formulation places even more emphasis on the interpretation of the actual comments by the listener, because it does not require that the interpretation be the "only" reasonable interpretation, as did the stricken FEC rule. Even more remarkable, however, is the alternative definition of express advocacy set forth in Shays-Meehan. This alternative defines express advocacy as a communication

that a reasonable person would understand as advocating the election or defeat of the candidate, and that is made before the date that is 30 days before the date of a primary election, or 60 days before a general election, and that is made for the purpose of advocating the election or defeat of a candidate, as shown by one or more factors such as a statement or action by the person making the communication, or the use by the person making the communication of polling, demographic, or other similar data relating to a candidate's campaign or election.\(^6\)

This formulation maintains the vagueness of the first formulation. Furthermore, it allows, indeed compels, the government to examine past statements by the speaker to determine if language which otherwise would clearly be unregulated "issue advocacy" might reasonably be interpreted as "express advocacy," based on the listener's interpretation of past statements and acts by the speaker. Such a standard is quite clearly incompatible with Buckley, Massachusetts Citizens for Life, and the large, unanimous body of law coming out of lower federal courts. In essence, any organization seeking to comment on public issues would have to expose itself to the threat of a government agency—the FEC—mawing through its history, records, internal memoranda, and donor lists to determine if its purpose was to influence an election. Such a standard would chill speech in a manner incompatible with the First Amendment.\(^7\)

The other new aspect to the Shays-Meehan standard is its effort to define "express advocacy" with reference to the time between the advocacy in question and an

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\(^3\) It is of course not uncommon for speakers to express opposition to a candidate, at least on some issues, while urging the candidate's election as the "lesser of two evils."

\(^4\) H.R. 493, 105th Cong. (1997). The bill is commonly referred to as the Shays-Meehan Bill, after its primary sponsors. During the session, the bill was split into two bills and reintroduced as H.R. 1776, 105th Cong. (1997) and H.R. 1777, 105th Cong. (1997). My references will be to the original bill.

\(^5\) H.R. 493, 105th Cong. § 251(b) (1997).

\(^6\) Id.

\(^7\) The State of Wisconsin's effort to limit ads based on a five part test, including (1) intent, (2) content, (3) manner of distribution, (4) patterns and frequency of distribution and (5) value of material, was recently struck down as unconstitutionally vague by a Wisconsin circuit court. Elections Bd. v. Wisconsin Mfrs. and Comm'n, No. 97-CV-1729 (Wis. Cir. Ct. Jan. 16, 1998) (on file with author).
election. The intent of the language appears to be to make it easier to find "express advocacy" if an issue is addressed closer to an election. The theory, it seems, is that issues ought not be discussed close to an election. Again, one can only wonder if the drafters have ever actually read Buckley. There the Court stated, in striking down the limits on issue advocacy, "Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." Or, as Ira Glasser of the American Civil Liberties Union points out, "[I]t's during an election campaign that people are paying attention to issues." It is hard to imagine, then, the courts' upholding a standard that would provide less protection to speech made close to an election than it would to speech made further from an election. As Buckley makes clear, the First Amendment right to discuss political issues is most important close to date of an election, when public interest is highest. Thus, if anything, restrictions on issue advocacy should receive higher, not lower, scrutiny when the advocacy occurs close to the date of an election.

The Shays-Meehan approach is carried to its absurd conclusion in the substituted McCain-Feingold Bill. In addition to the afore-quoted restrictions on issue advocacy, the bill would also limit all advocacy referring to 1 or more clearly identified candidates in a paid advertisement that is broadcast by a radio broadcast station or a television broadcast station within 60 calendar days preceding the date of an election of the candidate and that appears in the State in which the election is occurring. This formulation does away with vagueness problems by adopting a bright line rule. That is, any broadcast political communication mentioning any candidate is restricted if made within sixty days of an election. However, it solves this vagueness problem by adopting a truly silly and blatantly unconstitutional rule: Issues are often debated in Congress within sixty days of an election. For example, in the fall of 1996 Congress debated a hotly contested proposal to ban partial-birth abortions within sixty days of the fall congressional elections. Substantial grass-roots lobbying took place on both sides of the issue. Under the proposed McCain-Feingold rule, groups running ads urging voters to call their representatives about the issue would have to pay for such ads with hard money, drastically reducing their ability to communicate. The absurd sweep of the proposal can be seen in a simple hypothetical: suppose that in September of 1998, Congress is preparing to adjourn without a vote on the McCain-Feingold campaign finance bill. A special interest group—say Common Cause or Public Citi-

78. See, e.g., Hearing on the First Amendment and Restrictions on Issue Advocacy Before the Subcomm. on the Constitution of the House Judiciary Comm., 105th Cong. (1997) (testimony of E. Joshua Rosenkranz) (on file with author) (arguing that certain ads should be considered express advocacy because they were "targeted to the days shortly before the election").
79. Buckley, 424 U.S. at 42.
80. Dreyfuss, supra note 25, at 37 (quoting Ira Glasser of the American Civil Liberties Union).
82. See supra note 71 and accompanying text.
84. An even longer ninety day limit on issue ads is being proposed by some activists and scholars. See Norman Ornstein, Forget Sweeping Reform: Here Are 5 Realistic Changes, ROLL CALL, Jan. 9, 1997, at 18.
zen—identifies several congressmen as key swing votes, including at least one in Arizona and one in Wisconsin. The group seeks to run radio ads in those representatives’ districts, asking voters to contact their representative and urge him to support a vote on the bill. The ads say, “Isn’t it time Congress acted to clean up elections? Senators John McCain and Russ Feingold have proposed legislation that would do just that. Call Congressman X, and tell him to support a vote on McCain-Feingold.” These ads would, if the language proposed in the McCain-Feingold Substitute Bill were enacted, be barred unless paid for as campaign contributions, as both Senators McCain and Feingold will be candidates for election in the states in question, and the ad refers to each by name. Indeed, merely the mention of the McCain-Feingold Bill, with no other mention of the Senators, would arguably violate the restrictions proposed by the McCain-Feingold Bill, as it would include reference to two clearly identified candidates. To the extent one might argue that this would not be covered by the bill, it would only be because one interpreted the reference to McCain-Feingold as not referring to candidates John McCain and Russ Feingold. To do that, however, would be to reintroduce the very vagueness concerns that the standard seeks to avoid.\footnote{86}

Fortunately, such nonsense would surely fail constitutional scrutiny. First, such a law is not narrowly tailored to prevent corruption—it applies to advertisements, such as my above hypothetical, which pose no serious threat of corruption. True, groups could still run ads, paid for under hard money limits. But this overlooks the fact that the prevention of quid pro quo corruption is the only government interest recognized in \textit{Buckley} and its progeny as sufficient to support any restrictions, not only on the airing of ads, but on contributions used to pay for those ads.\footnote{87} The very point of \textit{Buckley}’s bright line test is that political speech which does not pose a clear threat of quid pro quo corruption cannot be regulated.\footnote{88} And issue advocacy does not pose a sufficiently dangerous threat to justify the burdens that its regulation would impose on First Amendment rights. Or, in \textit{Buckley}’s own language, contributions may only be limited for speech “advocating the election or defeat of a candidate.”\footnote{89} Indeed, we have been down this road not only in \textit{Buckley}, but also in earlier decisions. In \textit{Mills v. Alabama},\footnote{90} the Supreme Court struck down an Alabama law prohibiting campaign activity on election day. The statute applied only to “electioneering to solicit votes” done on election day. The sixty day limit proposed in McCain-Feingold is far broader in scope. It would limit speech for a period sixty times longer than the ban at issue in \textit{Mills}. And whereas the law at issue in \textit{Mills} applied only to “electioneering to solicit votes,” i.e. express advocacy, the proposed McCain-Feingold ban would apply to all ads even mentioning a candidate. The proposal for a blanket ban is quite clearly unconstitution-\textit{al}.\footnote{91}

\begin{itemize}
\item \footnote{86}{It is worth noting that legislation is commonly referred to by its primary sponsor(s): the Humphrey-Hawkins Bill, the Taft-Hartley Act, the Sherman Antitrust Act, the Landrum-Griffin Act, the Gramm-Rudman-Hollings Act, and the Hyde Amendment, to name a few. Even presidents, who do not actually sponsor legislation, have their names tied to issues: the Reagan Budget, the Clinton Health Plan, etc. To discuss issues without discussing candidates is, in many cases, all but impossible.}
\item \footnote{87}{\textit{Buckley}, 424 U.S. at 48-49.}
\item \footnote{88}{Id. at 42.}
\item \footnote{89}{Id.}
\item \footnote{90}{\textit{Mills v. Alabama}, 384 U.S. 214 (1966).}
\item \footnote{91}{See J. Skelly Wright, \textit{Politics and the Constitution: Is Money Speech?}, 85 YALE L.J. 1001, 1008 (1976) (citing \textit{Mills} to argue that a statute “banning all political advertisements in newspapers during the week preceding an election . . . should be struck down”). Wright’s view is interesting}
In short, these efforts to find loopholes in the First Amendment with which to ban issue ads have already been tried, addressed by the Supreme Court, and found wanting. Furthermore, the futility of these efforts can be seen by merely considering the end result if the proposals were to be upheld. Suppose, for example, that all ads were limited in the last sixty days before an election. The Democrats began running issue ads promoting Bill Clinton in the fall of 1995, more than a year before the election. The Republicans went on the air with issue ads favoring Dole in the spring of 1996, roughly 180 days prior to the election. Indeed, the most likely effect of a “close to election day” ban would be simply to make the campaign longer by pushing issue ads earlier into the election cycle. Furthermore, because the electorate is not paying as much attention at these earlier dates, the issue ad campaigns could well become more expensive as advertisers run more and more sensational ads to gain attention.

Or suppose that the standard found in section 201(b)(20)(A)(iii) of the substitute bill, defining express advocacy as ads “expressing unmistakable and unambiguous support for or opposition to 1 or more clearly identified candidates when taken as a whole and with limited reference to external events,” were somehow upheld by the courts as falling within the definition of “express advocacy,” as interpreted in Furgatch. Would issue ads be limited? Of course not. For it would take virtually no imagination to see how to rewrite the type of ad at issue in Furgatch to avoid the ambiguity of the action requested and so escape the broader reference to “external events.” For example, Mr. Furgatch, instead of concluding his ad with the sentence, “Don’t let him do it,” might have added, “Call this paper: tell it you want Jimmy Carter’s record exposed.” Adding this one line would put the ad squarely back into the realm of issue advocacy. For those who perceive issue advocacy as something that must be regulated in a democracy, one suspects that this game is hardly worth the candle.

Others have suggested that limits on issue advocacy might be upheld if they applied only within a specific time frame, only to large expenditures, only to communications mentioning specific candidates by name, included a reasonable person standard, and included no criminal penalties. But this is most certainly wrong. The clos-

because as a judge on the United States court of appeals he had voted to uphold the FECA limits on issue advocacy. Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975), rev’d, 424 U.S. 1 (1976). Yet even Wright thought it blatantly obvious that a statute limiting all political ads “would of course lose.” Wright, supra at 1008. One suspects that even Judge Wright, an ardent Buckley critic for the rest of his life, would, were he alive, be rather stunned at the idea of limiting all broadcast ads mentioning a candidate by name for a full sixty days before an election.

92. See Mitchell, supra note 18.
93. See Clymer, supra note 18.
94. In fact, the language is similar to that used by the Court of Appeals in Furgatch, and appears to be written in the hope that it might therefore be found constitutional. See Furgatch, 807 F.2d at 864 (“We conclude that speech need not include any of the words listed in Buckley to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.”). As previously noted, the holding in Furgatch stands as the outermost limit for a constitutionally acceptable definition of express advocacy. Supra text accompanying note 55.
er to the election that those time constraints would apply, the greater the speaker's interest in speaking, and even narrow time constraints would run contra Mills v. Alabama. The mention of a candidate's name is hardly a limiting factor. Rational discussion of issues often compels discussion of candidates, and Buckley recognized this as a reason why the definition of express advocacy must be kept as narrow as possible, not as a reason for broadening the definition. Mere mention of a candidate's name does not engender quid pro quo corruption. The reasonable person standard, meanwhile, is precisely what Buckley sought to avoid by creating a bright-line test requiring limited words of express advocacy. Combining three unconstitutional features into one rule does not make that rule constitutional.

The various proposals aimed at limiting issue advocacy are, under well established First Amendment doctrine, unconstitutional. This is not something which is in doubt.

C. Political Parties Have a Constitutional Right to Engage in Issue Advocacy

Even if issue advocacy must be left unrestricted for other entities, some regulatory advocates may still wonder if it cannot be banned for political parties. Political parties, after all, always have, as an ultimate goal, the election of their members to office. So perhaps, one might argue, all party advocacy can be considered "express" advocacy. This may be a superficially appealing argument, but again, it relies on an incorrect analysis and, more importantly, is directly contradicted by precedent.

First, parties are not always primarily interested in electing candidates, at least not any particular candidates. This is most obvious in the context of minor parties, which often exist for the primary purpose of spreading their philosophy, not electing candidates. However, even larger parties regularly run candidates for office when they know that those candidates are very unlikely to win, and the primary purpose of party campaign activity is to strengthen the vote for other candidates on the ballot or to strengthen the party's position for future campaigns.

But going through this type of analysis threatens to make the issue needlessly complex, because once again specific Supreme Court precedent is available to guide us. That precedent makes clear that political parties have the same rights to engage in issue advocacy as other entities. In Colorado Federal Republican Campaign Committee v. Federal Election Commission, the Republican party had run a series of advertisements critical of the Democratic nominee for a United States Senate seat from Colorado. At the time that the ads ran, the Republican nominee had not been determined, and three candidates were actively seeking that nomination. The Court rejected the FEC's position that a political party could not make expenditures independently of a candidate's campaign. The Court held that the facts quite clearly showed that the defendant Republican Party's expenditures in the race were independent of any candidate's campaign, and so could not be limited as contributions to the candidate's cam-

98. Because the expenditures expressly urged opposition to the Democratic nominee, the ads were express advocacy, not issue advocacy. Id. Given the greater First Amendment protection given to issue advocacy over express advocacy, that fact merely underscores the holding of the case.
paign. If a political party can conduct express advocacy campaigns independently of its candidates, surely it can conduct an issue ad campaign independently of its candidates. *Colorado Republican Federal Campaign Committee* confirms that political parties' rights under the First Amendment are equal to those of other groups and entities: "The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." In reaching this conclusion, the Court was not breaking new ground, but again merely following established law granting parties the right to speak on political issues. As in *Buckley*, the decision was not close. Because parties have the same rights as other groups to spend money independently of a candidate's campaign, and because "issue advocacy," by definition, is not subject to the limits of FECA, *Colorado Federal Republican Campaign Committee* removes any doubt about the right of political parties to engage in issue advocacy.

IV. CONSTITUTIONAL PROTECTION FOR SOFT MONEY CONTRIBUTIONS TO ISSUE ADVOCACY

A. Case Law

Issue advocacy is firmly protected by the First Amendment. Few issues of constitutional law are more firmly rooted. Political parties are equally entitled to this protection, so that their spending on issue advocacy cannot be restrained. However, might it not be possible to limit the size of contributions made to a party for issue advocacy? Again, the answer under existing precedent is no. 

*Buckley* held that only corruption, or the appearance of corruption, were sufficiently strong government interests to justify the First Amendment infringements of limiting contributions. By corruption, the Court meant the attempt "to secure a political quid pro quo from current and potential officeholders." Thus, only contributions which could lead to a quid pro quo could be subjected to limits. For this reason, *Buckley* held that only contributions for direct use in federal elections could be limited. By definition, contributions to support issue advocacy are not considered campaign contributions. Soft money contributions are made to political parties, not to

99. *Id.* at 2316.
100. See *Eu v. San Francisco County Dem. Cent. Comm.*, 489 U.S. 214 (1989) (striking down a state law prohibiting party officials from making primary endorsements); *Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990) (striking down state law banning party endorsements in non-partisan races); *rev'd on other grounds*, 501 U.S. 312 (1991); *see also Tashjian v. Republican Party*, 479 U.S. 208 (1986) (upholding party's right to hold open primary in violation of state law); *Democratic Party v. LaFollette*, 450 U.S. 107 (1981) (upholding right of political party to seat delegates at convention when seating those delegates would violate state law, because the delegates had not pledged to support the winner of the state primary); *Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996) (stating that a political party has a right to define its membership and views by excluding a candidate from primary ballot).

103. *Id.*
104. *Id.* at 23-38. It is worth noting that the Court upheld limits on candidate contributions in part because persons would be left "free to engage in independent political expression." *Id.* at 28.
105. They may, of course, affect federal elections indirectly. As we have seen, the Court, in
candidates. A party’s use of that soft money for issue ads involves no direct contribution to a federal election.\textsuperscript{106}

Speech regulation advocates now attempt to argue, however, that limits may be allowed to combat what they dub “conduit corruption.”\textsuperscript{107} The argument is that large donations to parties corrupt the parties, which then put pressure on officeholders to make decisions favorable to donors.\textsuperscript{108} In short, the party is both the bagman and the enforcer in a quid pro quo arrangement.

But what does it mean to say that a party is corrupted? Political parties do not make governmental decisions; rather, those decisions are made by officeholders who usually (though not always) are members of a political party. These officeholders may simultaneously be members of the American Civil Liberties Union, the American Association of Retired Persons, the Sierra Club, Common Cause, and any number of other groups. To suggest that contributions to a political party for issue advocacy may be limited because officeholders may feel an obligation to the party would be to undercut the entire rationale behind \textit{Buckley} and its progeny.\textsuperscript{109} For just as surely, officeholders may feel obliged to any individual or group which conducts an issue advocacy campaign which has the effect of turning the public in favor of those issues supported by the office-holder/candidate, or against the issues supported by the office-holder/candidate’s opponent. So “conduit corruption” turns out not to be a new theory at all; but merely the same theory of corruption behind the original 1974 ban on issue advocacy struck down in \textit{Buckley}. Can the discussion of issues be considered campaign contributions, subject to limitation and regulation, if it mentions a candidate or otherwise has the potential to affect the outcome of a federal election? This the Court has considered, and responded with a resounding no.

Nevertheless, a large and prestigious group of scholars has recently argued that soft money contributions can be banned to prevent the “corruption” caused by large corporate contributions.\textsuperscript{110} These scholars state that “the most relevant Supreme Court decision is . . . \textit{Austin v. Michigan Chamber of Commerce}, in which the Supreme Court held that corporations can be walled off from the electoral process by forbidding both contributions and independent expenditures from general corporate treasuries.”\textsuperscript{111} Indeed, \textit{Austin} is the only case cited in support of their position that soft money may be banned. This assertion reads far too much into \textit{Austin}. \textit{Austin’s} holding comes in the context of express advocacy, that is to say, a corporate advertisement that very clearly urged voters, in large bold type, to “Elect Richard Bandstra.”\textsuperscript{112} Although \textit{Austin} upheld the state ban on express advocacy made from corporate treasuries, the

\textit{Buckley}, recognized that possibility and still struck down the limits on issue advocacy. See supra text accompanying note 42.

\textsuperscript{106} This is true even if the organization’s intent is ultimately to elect officeholders of a certain party. See Federal Election Comm’n v. GOPAC, Inc., 917 F. Supp. 851 (D.D.C. 1996).


\textsuperscript{108} Id. at 114-15.

\textsuperscript{109} See supra note 45.

\textsuperscript{110} Dworkin & Neuborne, supra note 10.

\textsuperscript{111} Id. at 3 (referring to \textit{Austin v. Michigan Chamber of Commerce}, 494 U.S. 652, 657-61 (1990)).

\textsuperscript{112} Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 714 (appendix to opinion of Kennedy, J., dissenting) (reprint of advertisement in question).
Court has flatly rejected a ban on issue advocacy paid for from general corporate treasuries. In *First National Bank v. Bellotti*, *supra* the Court struck down a ban on corporate issue advocacy regarding a voter referendum. The Court wrote that when public issues are being discussed, "the inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual." In *Austin*, the Court perceived the danger of corruption from large corporate sums in candidate races. But in *Bellotti*, it rejected the notion that corporations can corrupt the discussion of public issues, stating "the risk of corruption perceived in cases involving candidate elections simply is not present." It should be noted that the issue advocacy of the corporations in *Bellotti* pertained to a referendum appearing on the November 1976 ballot, along with numerous races for federal office. Thus, commentary on the ballot issue certainly had the potential to affect federal races. But the Court emphasized "the fact that advocacy may persuade the electorate is hardly a reason to suppress it." Driving the point home, just three years later the Court struck down a limit on the size of contributions, including corporate contributions, to a group engaged in issue advocacy related to a ballot measure. In *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, the Court held, "Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate's committees there is no significant state or public interest in curtailing debate and discussion of a ballot measure." Discussion of a ballot measure is, of course, issue advocacy, and by affecting the electorate's view of candidates who support or oppose the issue, and by altering voter turn-out, such discussion can certainly influence federal races. Indeed, campaigns on ballot issues often feature, in their advertising, endorsements from popular candidates for federal office.

If contributions relative to a specific ballot proposal may not be limited, neither may limits be placed on contributions to discuss issues generally. Nor does the fact that measures were actually on the ballot in *Bellotti* and *Citizens Against Rent Control* change this analysis. First Amendment protection cannot attach only when a measure is actually before the voters, and indeed the Supreme Court has held that efforts to place a measure on the ballot receive full First Amendment protection. *Austin*, then, says nothing more than narrow limits on a corporation's express advocacy may be allowed. *Bellotti*, however, reaffirms that issue advocacy from corporate treasuries is protected, while *Citizens Against Rent Control* emphasizes that not only is direct corporate issue advocacy protected, but corporate contributions to others to engage in issue advocacy may not be limited in size.

114. Id. at 777.
115. Id. at 790 (citations omitted).
116. Id.
118. *Citizens Against Rent Control/Coalition for Fair Housing*, 454 U.S. at 299; see also C&C Plywood Corp. v. Hanson, 583 F.2d 421 (9th Cir. 1978) (striking down on First Amendment grounds a statute prohibiting corporate contributions to groups supporting or opposing ballot measures).
Thus, clear Supreme Court precedent instructs us that not only is party spending on issue advocacy protected, but so are donations, including corporate donations, to parties to engage in that advocacy.

B. A Caveat

To the extent that soft money is used for issue advocacy, it cannot be limited without an enormous change in several related lines of First Amendment jurisprudence.\(^2\) It may be possible, however, to limit soft money expenditures for express advocacy. Recall that “soft money” under the 1979 FECA Amendments is money raised by state parties for various volunteer oriented, party building activities.\(^1\) Parties may use this soft money to pay for express advocacy in the form of “campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids and yard signs) used . . . in connection with volunteer activities on behalf of nominees of such party,” provided that such payments are not used for broadcast, newspaper, billboard, or direct mail ads.\(^2\) Because these activities involve express advocacy on behalf of named candidates, rather than issue advocacy, they probably could, within the Buckley framework, be banned.\(^3\) Soft money raised by state and local parties can also be used to pay for “voter registration and get-out-the-vote activities conducted by such [state or local parties] on behalf of nominees of such party for President and Vice-President.”\(^4\) It may be possible to ban soft money for these registration and get-out-the-vote activities as well. I say may, because it may be hard to classify a voter registration or get-out-the-vote drive as “express advocacy,” if it is done without any urging to vote in a specific manner.\(^5\)

The question, however, is whether or not anyone really thinks that spending on voter registration, get-out-the-vote drives, and volunteer, grass-roots politicking is the problem. A common complaint among campaign finance regulation supporters is that the United States has low voter turnout.\(^6\) Surely only a handful of campaign finance extremists would want to reduce the amount of money spent on voter registration and get-out-the-vote drives.\(^7\) Another common complaint is that the campaign finance

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120. It may be worth noting here that overturning Buckley’s holdings on issue advocacy and expenditure limits would place a host of Supreme Court decisions, both pre and post-Buckley, at risk. See Morrison supra note 40.


123. This is the only part of the soft money equation where the Dworkin-Neuborne letter has any significance, as its analysis is based entirely on the express advocacy case of Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990). See discussion supra note 10 and text accompanying notes 110-11. Their analysis is probably correct on this narrow point.


125. For example, a get-out-the-vote phone bank by a local Democratic party, that targeted union households and registered Democrats, would not seem to be express advocacy if the caller simply stated, “Good morning, Mr. Jones. I’m calling to urge you to vote today.” However, a caller stating, “Good morning, Mr. Jones. I’m calling for the Oozamalak County Democratic Party. We hope that you’ll get out and vote for our Democratic candidates today” would be express advocacy.

126. This is usually coupled with the totally unproven assertion that this is due to our campaign finance system. See, e.g., Simon, supra note 3, at 174; Robert Kuttner, Rescuing Democracy from Speech, AM. PROSPECT, Jan.-Feb. 1998, at 10, 11.

127. See Hearings on Campaign Finance Before the Senate Comm. on Governmental Affairs, 105th Cong. (1997) (testimony of Curtis Gans), available in 1997 WL 603195. Gans, who is Director of the
system is somehow destroying grass-roots politics. Given this, it makes little sense to dry up the source of funds for buttons, pins, slate cards, fliers, yard signs and other volunteer support activities.

So it may indeed be possible to plug a small portion of the soft money "loop-hole," but who really wants to do so? The sudden rage to ban or sharply limit soft money stems, I think, almost entirely from the use of soft money to fund issue ads in the 1996 elections. Do any but the most extreme advocates of regulation really want to cut the funds available to support grass-roots, volunteer activities, or voter registration and turn-out activities? I think not. The only soft money contributions that can constitutionally be banned are those used to fund campaign activities of the type which, I think, most observers would say we should have more.

V. CONCLUSION

The protection of political speech is at the core of the First Amendment—as the Supreme Court has put it, "[T]here is practically universal agreement that a major purpose of the [First] Amendment was to protect the free discussion of governmental affairs . . . [o]f course includ[ing] discussions of candidates." Legislation to reform the campaign finance system is not proposed in a constitutional vacuum. There are well established First Amendment precedents that deal with most efforts to regulate political speech. Although frustrating to some, given the purpose of the First Amendment it is not surprising that these precedents largely tie the hands of Congress when it comes to regulating the political discussion of the American people.

Though I would disagree, one may think that the speech of the citizenry should be more heavily regulated. And one may also think that various Supreme Court precedents are wrong, although for the most part, I do not. But regardless of what anyone may think about the merits of the policy or these judicial decisions, the debate would benefit greatly if we quit acting as if these precedents do not exist.

For the last twenty years campaign finance reform has been obsessed with plugging loopholes. If there is one unmistakable message from the courts, it is that the First Amendment is not a loophole. A ban on soft money contributions, at least on those soft money contributions used to fund party-run, televised issue ads, is unconstitutional. That's the hard reality about soft money.