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# CAMPAIGN FINANCE REFORM, ELECTIONEERING COMMUNICATIONS, AND THE FIRST AMENDMENT: RESUSCITATING THE THIRD EXCEPTION

DANIEL B. ROTH\*

## INTRODUCTION

In August 2004, Wisconsin Right to Life (WRL), a 501(c)(3) organization,<sup>1</sup> sought to air television and radio advertisements urging the citizens of Wisconsin to call their senators and tell them to vote to end the Democratic Party's filibuster of judicial nominees.<sup>2</sup> Unfortunately, the Federal Election Commission (FEC) determined that the advertisement was an "electioneering communication" under the Bipartisan Campaign Reform Act (BCRA) and prevented WRL from airing the advertisement because the blackout period for "electioneering communications" had begun.<sup>3</sup> WRL sought an injunction that would have allowed the advertisements to air, but a

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\* J.D. Candidate, May 2006. The author would like to thank his family for the love and support they give him everyday and four of the best friends a fellow law student could ever have, Chuck, Joe, Michael, and Nick, for just being there.

1. A 501(c)(3) organization is named for the section of the Internal Revenue Code (IRC) under which it is organized. The section provides that nonprofit organizations created for a specific purpose can be tax exempt, provided they follow certain regulations, including a prohibition on participation in "any political campaign on behalf of (or in opposition to) any candidate for public office." I.R.C. § 501 (2000).

2. Michael Janofsky, *Group Plans to Challenge Law on Blackout Period for Ads*, N.Y. TIMES, July 28, 2004, at P6. While portions of this advertisement will be referred to later, the transcript of one of WRL's ads is as follows:

Pastor: And who gives this woman to be married to this man?

Bride's Father: Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now, you put the drywall up. . .

Voice-over: Sometimes it's just not fair to delay an important decision. But in Washington it's happening. A group of senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve. Yes, it's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

Bride's Father: Then you get your joint compound and your joint tape and put the tape over . . .

Voice-over: Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

George Will, *Speech Crime in Wisconsin*, NEWSWEEK, Aug. 16, 2004, at 72.

3. *Id.*

three-judge panel denied the request.<sup>4</sup> WRL next appealed to the United States Court of Appeals for the D.C. Circuit, which determined that it lacked jurisdiction over the matter.<sup>5</sup> WRL then asked Chief Justice Rehnquist for an injunction which, in an opinion in chambers, he denied.<sup>6</sup> In addition, the Court's ruling in *McConnell v. FEC* probably means that WRL would lose a Supreme Court appeal, even if the Court granted a writ of certiorari.<sup>7</sup>

In passing the BCRA, Congress limited the periods in which political groups may advertise their cause and urged like-minded citizens to contact their congressmen. The purpose of the law was to stop advertisements that only appeared to rally support for an issue, while, in fact, actively campaigning for or against the incumbent.<sup>8</sup> By doing so, Congress has thrown the baby out with the bath water.<sup>9</sup>

This comment proposes a narrowly-tailored exception to the BCRA that would differentiate between those advertisements that truly seek to rally support for an issue and those that do so as a mere pretext to campaign against a candidate. Part I provides a brief history of campaign finance reform and a discussion of the BCRA within the context of its creation of "electioneering communication," how the FEC has chosen to enforce the ban on "electioneering communications," and the Supreme Court's finding that the rule is constitutional. Part II features an analysis of the Supreme Court's shift in First Amendment analysis from *Buckley v. Valeo* to *McConnell* and an analysis of the proposed and rejected exception to "electioneering communications" for true issue advertisements. Part III proposes a narrowly-tailored exception to "electioneering communications" for true issue advertisements and illustrates its potential effectiveness.

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4. *Judges Refuse to Lift BCRA Ad Blackout for 'Grassroots' Lobbying*, POL. FIN., THE NEWSL., Aug. 2004.

5. *Wis. Right to Life v. Fed. Election Comm'n*, No. 04-5292, 2004 U.S. App. LEXIS 18795 (D.C. Cir. Sept. 1, 2004).

6. *Wis. Right to Life v. Fed. Election Comm'n*, 125 S. Ct. 2 (2004) (opinion in chambers) (Rehnquist, Cir. J.).

7. *Id.*

8. *Electioneering Communications*, 67 Fed. Reg. 65,190, 65,201 (Oct. 23, 2002).

9. The "fake" issue advertisement that commentators reference most frequently was an advertisement that attacked Rep. Bill Yellowtail's personal life. The transcript of the advertisement is as follows:

Who is Bill Yellowtail? He preaches family values, but he took a swing at his wife. Yellowtail's explanation? He "only slapped her," but her nose was broken. He talks law and order, but is himself a convicted criminal. And though he talks about protecting children, Yellowtail failed to make his own child support payments, then voted against child support enforcement. Call Bill Yellowtail and tell him we don't approve of his wrongful behavior. Call (406) 443-3620.

Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1751 (1999). This advertisement was seen as such a prime example of the failure of the system that, although quoted slightly differently, it appears in both a Senate Report on campaign finance abuses and the Supreme Court decision in *McConnell v. FEC*. S. REP. NO. 105-167, vol. 5, at 6305 (1998); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 194 n.78 (2003) (quoting the same Senate report).

## I. A BRIEF HISTORY OF CAMPAIGN REGULATION

### A. Early Attempts At Reform

Congress first attempted to regulate campaign financing by passing the Tillman Act of 1907.<sup>10</sup> The Tillman Act intended to completely prohibit federal election activity by corporations.<sup>11</sup> Congress next passed the Federal Corrupt Practices Act of 1925 (FCPA).<sup>12</sup> This Act comprehensively regulated federal elections through candidates and their campaigns.<sup>13</sup> The next act of Congress affecting campaign financing was the Taft-Hartley Act,<sup>14</sup> which permanently extended the prohibitions of FCPA to labor unions.<sup>15</sup> Taft-Hartley was the last regulation of campaign finance before the Federal Election Campaign Act of 1971 (FECA).<sup>16</sup> FECA expanded the regulations to include political organizations.<sup>17</sup>

In 1974, Congress amended FECA<sup>18</sup> and, in doing so, directly regulated speech for the first time. It did so in Section 101 by providing that no person could independently (i.e. without the knowledge or request of a candidate) spend more than \$1,000 during the course of a year to seek either the election or defeat of a “clearly identified candidate.”<sup>19</sup> A laundry list of plaintiffs<sup>20</sup> challenged FECA and its 1974 amendments in *Buckley v. Valeo*.<sup>21</sup>

10. Tillman Act of 1907, ch. 420, 34 Stat. 864 (1907) (repealed 1971).

11. *Id.* at 864-65. See Robert L. Kerr, *Subordinating the Economic to the Political: The Evolution of the Corporate Speech Doctrine*, 10 COMM. L. & POL'Y 63, 68-89 (2005) (discussing the history of the regulation of corporate political speech).

12. Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1070 (1925) (repealed 1971).

13. *Id.*

14. Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (1947) (repealed 1971).

15. *Id.* at 159-60.

16. Federal Elections Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat 3 (1972) (codified as amended in scattered sections of titles 2, 18, 28, 42, and 47 of the U.S. Code).

17. *Id.* at 11-16.

18. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended in scattered sections of titles 2, 18, 28, 42, and 47 of the U.S. Code).

19. *Id.* at 1265. The text of the amendment provides:

(e)(1) No person may make any expenditure (other than an expenditure made by or on behalf of a candidate within the meaning of subsection (c)(2)(B)) 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.

*Id.* The section goes on to state that one may clearly identify a candidate by mentioning the name of the candidate, showing a picture or drawing of the candidate, or using an “unambiguous reference” that makes the identity of the candidate obvious. *Id.* For a more in-depth discussion of FECA and its 1974 amendments, see Bryan R. Whittaker, Note, *A Legislative Strategy Conditioned on Corruption: Regulating Campaign Financing after McConnell v. FEC*, 79 IND. L.J. 1063 (2004) (discussing the social and political events that led up to FECA and its 1974 amendments).

20. The Supreme Court took the time to list some of them in the decision:

Plaintiffs included a candidate for the Presidency of the United States, a United States Senator who is a candidate for re-election, a potential contributor, the

### B. Buckley v. Valeo and its aftermath

*Buckley v. Valeo* was a landmark decision in which the Supreme Court held that spending money could, in certain circumstances, qualify for the same protection as speech.<sup>22</sup> The Court found that, although Congress's interest in preventing the appearance of corruption was sufficient to allow restrictions on contributions,<sup>23</sup> there was no rational relation between that interest and restrictions on expenditures.<sup>24</sup>

With this holding, the Court invalidated the prohibition of substantial independent expenditures.<sup>25</sup> However, before engaging in the balancing test that it used to determine the outcome, the Court, in dicta, discussed whether a restriction worded similarly to the one present in Section 101 of the amendment<sup>26</sup> could be constitutional.<sup>27</sup> The Court said that the phrase "relative to" contained within Section 101, and not defined in the Act, was too vague unless "relative to" meant "advocating the election or defeat of" based upon the wording of the section.<sup>28</sup> The Court then determined that the section was still too vague, as there was no means to determine what constituted "advocacy."<sup>29</sup> The Court then decided that, in order to appropriately protect First Amendment rights, precedent required the advocacy to be express.<sup>30</sup> In a footnote, the Court listed the following words of express advocacy: "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'"<sup>31</sup> The Court ruled that whenever advocacy was not express, it was issue advocacy and

Committee for a Constitutional Presidency – McCarthy '76, the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party, the New York Civil Liberties Union, Inc., the American Conservative Union, the Conservative Victory Fund, and Human Events, Inc.

*Buckley v. Valeo*, 424 U.S. 1, 8 (1976).

21. *Id.*

22. The Court in *Buckley* found that any money spent in the form of either contributions (money given directly to parties) or expenditures (money spent in furtherance of the election of a candidate but without his knowledge or cooperation) are an exercise of First Amendment rights. *Id.* at 14-23. See Whittaker, *supra* note 19, at 1067-75 (discussing, at length, *Buckley*'s holding that money could be speech). See also Raleigh Hannah Levine, *The (Un)Informed Electorate: Insights into the Supreme Court's Electoral Speech Cases*, 54 CASE W. RES. L. REV. 225, 262-69 (2003) (suggesting Supreme Court decisions regarding political speech fall into the framework of whether the Court believes the population to be either well or poorly informed).

23. The Court found that contributions only invoked freedom of association, for which regulation is justified on the government's showing that it has a significant and important interest in regulation. *Buckley*, 424 U.S. at 24-25.

24. In regard to expenditures, the Court found that freedom of speech directly came into play because the law restricted ads, pamphlets, and similar items, and therefore, the government had a higher burden to meet in order to justify regulation. *Id.* at 44-51.

25. *Buckley*, 424 U.S. at 51.

26. See *supra* text accompanying note 19 (quoting the wording of the act).

27. *Buckley*, 424 U.S. at 39-44.

28. *Id.* at 41-42.

29. *Id.* at 42-43.

30. *Id.* at 43-44.

31. *Id.* at 44 n.52.

subject to First Amendment protection.<sup>32</sup> This same logic was applied to the definition of “expenditure,”<sup>33</sup> which then required that an “expenditure” amount to “express advocacy.”<sup>34</sup>

After the Supreme Court ruled on FECA and its amendments, Congress amended it one more time in 1976.<sup>35</sup> The 1976 amendments included a recodification of Taft-Hartley’s provision banning election related activities by corporations and unions and placed this regulation at 2 U.S.C. 441(b).<sup>36</sup>

2 U.S.C. 441(b) faced a constitutional challenge in *FEC v. Mass. Citizens for Life*.<sup>37</sup> Massachusetts Citizens for Life, Inc. (MCFL) was a nonprofit corporation organized under Massachusetts law.<sup>38</sup> MCFL produced a newsletter that listed all of the candidates in the Massachusetts primary election of 1978 and indicated whether they were pro-life.<sup>39</sup> The FEC saw this action as a violation of 2 U.S.C. 441(b) and sued for civil damages, as provided under FECA.<sup>40</sup> The Supreme Court found that, within the Act, political activity meant advocacy. In doing so, the Court relied on *Buckley*’s requirement that the statement must amount to express advocacy.<sup>41</sup> The Court went on to formally adopt the words in *Buckley*’s footnote fifty-two as a test for express advocacy, but also allowed for further examination if the communication did not contain those words.<sup>42</sup> The Court, however, found that FECA could not apply to MCFL, primarily because it was a

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32. *Id.* at 39-44.

33. FECA defined expenditure as any attempt to influence the outcome of an election through the use of money or other valuable objects. Pub. L. No. 92-225, 86 Stat at 12.

34. *Buckley*, 424 U.S. at 78-80. For an additional discussion of *Buckley* and its holdings concerning expenditures, see Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U PA. L. REV. 31, 35-39 (2004) (discussing the holding of *Buckley*); Scott Holleman, *Regulating the Mother’s Milk of Politics: Why Washington’s Campaign Finance Law Constitutionally Prohibits State Parties From Spending Soft Money on Issue Ads*, 80 WASH. L. REV. 191, 194-202 (2005) (discussing *Buckley*’s holdings with regard to contributions and expenditures); Cecil C. Kuhne, III, *Restricting Political Campaign Speech: The Uneasy Legacy of McConnell v. FEC*, 32 CAP. U. L. REV. 839, 842-45 (discussing *Buckley*); Robert F. Bauer, *When “The Pols Make the Calls”: McConnell’s Theory of Judicial Deference in the Twilight of Buckley*, 153 U. PA. L. REV. 5, 6-9 (2004) (discussing *Buckley*).

35. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976) (codified as amended scattered throughout titles 2, 18, 28, 42, and 47 of the U.S. Code).

36. *Id.* at 490.

37. *Mass. Citizens for Life v. Fed. Election Comm’n*, 479 U.S. 238 (1986).

38. *Id.* at 241.

39. *Id.* at 243-44.

40. *Id.* at 244-45.

41. *Id.* at 248-50.

42. *Id.* See James Bopp, Jr. & Richard E. Coleson, *The First Amendment is Still Not a Loophole: Examining McConnell’s Exception to Buckley’s General Rule Protecting Issue Advocacy*, 31 N. KY. L. REV. 289, 291-96 (2004) (discussing the relation between the “express advocacy” of *Buckley* and *MCFL*’s expenditure requirements). See also Andrew Pratt, Comment, *The End of Sham Issue Advocacy: The Case to Uphold Electioneering Communications in the Bipartisan Campaign Reform Act of 2002*, 87 MINN. L. REV. 1663, 1669-71 (2003) (discussing *MCFL*’s application of the express advocacy test).

nonprofit corporation and therefore fell outside the intent of the statute.<sup>43</sup> Over time, the courts strictly adhered to the words of *Buckley*, which resulted in the “magic words” doctrine.<sup>44</sup> This doctrine stands for the idea that footnote fifty-two in *Buckley* lists the “magic words” that serve to distinguish “express advocacy,” which Congress may restrict, from “issue advocacy,” which receives First Amendment protection.<sup>45</sup>

### C. Modern Calls For Change

Because the “magic words” doctrine allowed the most vicious advocacy advertisements to be classified as issue advertisements,<sup>46</sup> Congress felt changes needed to be made. The end result was the BCRA.<sup>47</sup> A central provision of the BCRA created the term “electioneering communication,” which is any television or radio advertisement that clearly makes reference to a candidate or candidates for federal office (i.e. something as simple as “your Congressman” or “the Democratic candidate for Senate”) in the viewing area

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43. *Mass. Citizens for Life*, at 263-65. The court outlines a three-part test to analyze FECA’s ban on express advocacy. *Id.* The first part is whether the corporation was established to promote political ideas and not for the purposes of engaging in business activities. *Id.* Second, the corporation has no shareholders or other persons who “have a claim on its assets or earnings.” *Id.* Third, the corporation was not established by a business or union and actively engages in a policy of not accepting donations from those groups. *Id.* at 264. See Bauer, *supra* note 34, at 10 (discussing the *MCFL* Court’s decision to carve out an exception and how there was clearly no Congressional intent to provide such an exception).

44. See Scott E. Thomas & Jeffery H. Bowman, *Is Soft Money Here to Stay Under the “Magic Words” Doctrine*, 10 STAN. L. & POL’Y REV. 33 (1998) (discussing the “magic words” doctrine, its historical development, and how its application serves as a loophole in campaign finance reform); Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELECTION L. J. 147, 155 (2004) (discussing the magic words doctrine).

45. Thomas, *supra* note 44 at 34.

46. In 1998, only four percent of ads used *Buckley*’s “magic words,” and yet in the final two months of the 2000 election, ninety-five percent of political ads mentioned a candidate for office and ninety-four percent of those either attacked or supported that candidate. 147 CONG. REC. S2433, S2458 (daily ed. Mar. 19, 2001) (statement of Sen. Snowe). See Craig Holman, *The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-Profit Groups in Federal Elections*, 31 N. KY. L. REV. 243, 250-54 (discussing “sham issue ads” and giving statistics regarding their frequency in the 2000 election). See also Briffault, *supra* note 9, at 1751-56, (discussing the prevalence of “sham issue ads,” which are advocacy ads that look like issue ads); Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contribution and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265, 276-83 (2000) (discussing the ease with which groups can avoid the restrictions of express advocacy by the creation of “sham issue ads”); Pratt, *supra* note 42, at 1675-78 (discussing and providing examples of sham issue ads). Furthermore, in the 2000 Republican Presidential Primary, Sen. John McCain, co-author of the BCRA, was the victim of a highly publicized sham issue ad, paid for by Bush supporters, attacking McCain’s environmental record while promoting then-Governor George W. Bush’s record on the same subject. Richard Perez-Pena, *The 2000 Campaign: The Ad Campaign; Air of Mystery Clouds Shot at McCain*, N.Y. TIMES, Mar. 3, 2000, at A15.

47. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of titles 2, 18, 28, 36, and 47).

of the station where the advertisement is broadcast.<sup>48</sup> Additionally, an advertisement is only an “electioneering communication” if it is broadcast “60 days before a general, specific, or runoff election” or “30 days before a primary or preference election.”<sup>49</sup> Foreseeing constitutional challenges and a potential invalidation of “electioneering communication,” BCRA provides a second definition. It is any television or radio advertisement that, regardless of express advocacy, promotes, supports, attacks, or opposes a candidate, and cannot be construed in any manner other than to urge the public to vote for or against a candidate.<sup>50</sup> This definition includes no time restriction.<sup>51</sup> The BCRA also provides several exceptions to “electioneering communications,” including a delegation of power to the FEC that allows the FEC to create its own exemptions, so long as those exemptions do not exempt advertisements that “promote, support, attack, or oppose a Federal candidate.”<sup>52</sup> With regard to “electioneering communications,” the BCRA bans any “electioneering communication” that corporate or union funds pay for, either directly or through non-profit organizations that accept donations from them.<sup>53</sup>

The FEC did create several exceptions. The most notable was the exemption of 501(c)(3) corporations,<sup>54</sup> in addition to the BCRA’s exemption

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48. 2 U.S.C. § 434(f)(3)(A)(i) (2000); 11 C.F.R. § 100.29 (2004) (general definitions for the Federal Election Commission). The term “electioneering communication” was meant to expand the Supreme Court’s definition of express advocacy. 147 CONG. REC. S3022, S3036 (daily ed. Mar. 28, 2001) (statement of Sen. McCain); Electioneering Communications, 67 Fed. Reg. 51,131, 51,132 (Aug. 7, 2002) (commentary on definition codified at 11 C.F.R. 100.29). See Spencer Overton, *Restraint and Responsibility: Judicial Review of Campaign Reform*, 61 WASH. & LEE L. REV. 663, 672-73 (2004) (stating the term “electioneering communication” expands the definition of express advocacy); Pratt, *supra* note 42, at 1666 (claiming “electioneering communications” was meant to eliminate the distinction between issue and express advocacy). However, one commentator has claimed that “electioneering communications” is not an expansion of express advocacy, but rather an attempt to carve out an exception to *Buckley*’s constitutional mandate of “express advocacy.” Bopp, *supra* note 42, at 291-318. He then claimed *McConnell* was incorrect because *Buckley* provided no grounds for an exception. *Id.*

49. 2 U.S.C. § 434(f)(3)(A)(i)(II); 11 C.F.R. § 100.29. See Lillian R. BeVier, *McConnell v. FEC: Not Senator Buckley’s First Amendment*, 3 ELECTION L. J. 127, 136-27 (2004) (defining electioneering communication); Overton, *supra* note 48, at 672-73 (discussing the definition of “electioneering communication”); Levine, *supra* note 22, at 272-73 (discussing the definition of “electioneering communication”); Briffault, *supra* note 44, at 156 (discussing the definition of “electioneering communication”); Whittaker, *supra* note 19, at 1084-85 (defining “electioneering communication”).

50. 2 U.S.C. § 434(f)(3)(A)(ii).

51. 149 CONG. REC. S5738, S5740 (daily ed. May 5, 2003) (statement of Sen. McCain). See also Electioneering Communications, 67 Fed. Reg. 65,190, 65,191 (Oct. 23, 2002) (to be codified at 11 C.F.R. § 100.29) (giving the alternative definition, and stating that it would not appear in the CFR unless the primary definition is ruled unconstitutional).

52. Electioneering Communication, 67 Fed. Reg. at 65,196; 2 U.S.C. 434(f)(3)(B)(iv).

53. §§ 203(b)-204, 116 Stat. 90-91; 2 U.S.C. § 441b(c) (2000).

54. See *supra* text accompanying note 1 for a brief description of 501(c)(3) organizations.



of 501(c)(4)<sup>55</sup> and 527<sup>56</sup> corporations.<sup>57</sup> However, the BCRA prevents such nonprofit corporations from making “electioneering communications” if they accept corporate or union funds and intermingle them with individual contributions and make “targeted communications,” the definition of which encompasses all “electioneering communications.”<sup>58</sup> WRL does accept corporate donations and does not separate them.<sup>59</sup>

The FEC created a list of proposed exceptions and ultimately rejected the third proposed exception, which would have covered the issue advertisements that are the topic of this comment.<sup>60</sup> There were four variations of the third exception, but they all served the same purpose: to exclude any advertisement that made reference to a pending legislative or executive issue and was clearly only meant to urge citizens to voice their opinion.<sup>61</sup> The commission determined all of these exceptions to be either too vague or outside the scope of its power.<sup>62</sup>

#### D. McConnell v. Federal Election Commission

Once the BCRA was signed into law, Senator Mitch McConnell and a host of other plaintiffs filed suit. They claimed that several provisions, including the definition of “electioneering communications” and the ban of those communications when paid for by corporate money, were unconstitutional.<sup>63</sup> The Court disagreed, reasoning that the definition was

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55. A 501(c)(4) organization is a non-profit “civic league or organization” that promotes the “social welfare” whose funds are used for “charitable, educational, or recreational purposes.” I.R.C. § 501 (2000).

56. A 527 organization is a political organization that is considered to be exempt from income taxes other than the taxes provided for in section 527 of the Internal Revenue Code. I.R.C. § 572 (2000). Most notably, such organizations are allowed to attempt to influence elections at any level, unlike their 501(c)(3) counterparts. *Id.*

57. Electioneering Communication, 67 Fed. Reg. at 65,199, 65,200; 11 C.F.R. § 100.29(c)(6).

58. §§ 203(b)-204, 116 Stat. 90-91; 2 U.S.C. § 441b(c).

59. Will, *supra* note 2, at 72.

60. Electioneering Communications, 67 Fed. Reg. at 65,201.

61. *Id.* The four alternatives of this exception can be broken down into two groups. The first group consists of alternatives ‘A’ and ‘B’, which deal only with pending legislation or executive decisions. Electioneering Communications, 67 Fed. Reg. 51,131, 51,145 (Aug. 7, 2002) (rejected in 67 Fed. Reg. 65,190, 65,201-02). ‘A’ would require that the advertisement make no attempt to judge the candidate or his position on the issue. *Id.* ‘B’ would require that the advertisement mention only the candidate’s name as a means of urging the public to call and suggest the position the candidate should take, and provide no additional information about the candidate. *Id.* The second group, consisting of alternatives ‘C’ and ‘D’, does not place the pending restriction on the issue of the ads. *Id.* ‘C’ would forbid “express advocacy” and require the advertisement to provide contact information for the target of the ad, along with a statement urging the public to use it. *Id.* ‘D’ would require that the advertisement provide only the name of the candidate, with an urge to contact him and would forbid any reference to “past or present positions.” *Id.*

62. Electioneering Communication, 67 Fed. Reg. at 65,201, 65,202.

63. Neil A. Lewis & Richard A. Oppel Jr., *Campaign Finance: The Overview; Mixed Ruling on Constitutionality of New Campaign Finance Law*, N.Y. TIMES, May 3, 2003, at A1. See Kerr, *supra* note 11, at 89-99 (discussing *McConnell*’s holdings with regard to corporate speech).

not vague because any reasonable person could easily determine what was and was not an “electioneering communication.”<sup>64</sup> It also held that *Buckley*’s “express advocacy” was not a constitutional mandate, but a statutory one.<sup>65</sup> The Court, however, refused to discuss the sufficiency of the alternative definition because it upheld the primary definition.<sup>66</sup> Next, the Court stated that the nonprofit restrictions on “targeted communications” were subject to MCFL<sup>67</sup> analysis.<sup>68</sup> Finally, the Court ruled that Congress’s interest in preventing corporations and unions from unduly influencing an election is significant enough to outweigh the opposing First Amendment interests.<sup>69</sup> This drew a vigorous dissent from Justice Kennedy, who worried about the BCRA’s impact on true issue advertisements and the impact on *Buckley*’s

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64. *McConnell*, 540 U.S. at 194.

65. *Id.* at 191-93. However, this served to overrule precedent in the majority of circuits of the United States Court of Appeals. See, e.g., *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 386 (2d Cir. 2000) (holding facially unconstitutional a law that banned certain expenditures for political ads unless its reach was limited to express advocacy); *Iowa Right to Life Comm. v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999) (holding the Constitution requires that any prohibition on political speech be limited to express advocacy); *Chamber of Commerce v. Moore*, 288 F.3d 187, 193 n.6 (5th Cir. 2002) (citing the holding of *Iowa Right to Life* above with approval); *Faucher v. Fed. Election Comm’n*, 807 F.2d 857, 859 (1st Cir. 1991) (holding the First Amendment prohibited restrictions from being placed on speech relating to political issues); *Citizens for Responsible Gov’t State PAC v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000) (holding the Constitution requires that no limitations be placed on issue ads); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 505-06 (7th Cir. 1998) (holding the First Amendment requires protection of speech related to political issues). For a more comprehensive list of federal cases with this holding, including district court cases, see Bopp, *supra* note 42, at 298 n.36 (listing in great detail federal cases holding that the First Amendment is implicated in the distinction between express advocacy ads and issue ads).

66. *McConnell*, 540 U.S. at 190 n.73.

67. *Mass. Citizens for Life*, 479 U.S. 238.

68. *McConnell*, 540 U.S. at 208-12. See Holman, *supra* note 46, at 285 (discussing the BCRA’s regulation of non-profit groups along with the *McConnell* decision’s impact on those regulations).

69. *McConnell*, 540 U.S. at 204-08. For more comprehensive discussions of *McConnell*’s holdings, see Levine, *supra* note 22, at 273-75 (arguing that *McConnell* represents a shift in how the Supreme Court views the electorate); Briffault, *supra* note 44 (discussing the holdings of *McConnell*); BeVier, *supra* note 49, at 135-45 (discussing *McConnell*’s holdings and their ramifications); Whittaker, *supra* note 19, at 1086-1103 (discussing the holdings of *McConnell* with respect to money as speech). See generally Bopp, *supra* note 42, at 300-09 (discussing the various holdings of *McConnell* and how they compare to precedent, as it existed prior to *McConnell*). The Court also returned to the argument of whether the appearance of corruption is a sufficient justification to allow the regulation of expenditures. The Court, without expressly overruling *Buckley*, found Congress’s interests sufficient to support regulation where *Buckley* had found it insufficient. *McConnell*, 540 U.S. at 156. See BeVier, *supra* note 49, at 135-36 (discussing *McConnell*’s holding with respect to appearance of corruption); Whittaker, *supra* note 19, at 1088-92 (discussing *McConnell*’s finding of a sufficient interest to regulate); Briffault, *supra* note 44, at 161-67 (discussing *McConnell*’s finding of a sufficient interest in preventing the appearance of corruption); Bopp, *supra* note 42, at 339 (discussing *McConnell*’s newfound deference to preventing the appearance of corruption).

holding that Congress's interest in preventing the appearance of corruption does not outweigh First Amendment interests.<sup>70</sup>

Thus, when WRL sought to air its advertisement, the Supreme Court had already issued a decision directly on point finding the definition of and blackout period for "electioneering communications" contained in the BCRA was constitutional. Due to the fact that WRL's challenge came less than one year after the decision in *McConnell*, WRL had little chance of any court granting an injunction that would have allowed the advertisement to air.

## II. *BUCKLEY* AND *MCCONNELL*: CONSISTENCY WITHIN APPARENT CONTRADICTION

### A. *First Amendment Implications of Campaign Finance Reform*

Whenever Congress attempts to regulate speech, it must adequately protect the rights provided in the First Amendment.<sup>71</sup> This is especially critical when the speech is of a political nature, because political speech was the prime concern of the Founding Fathers in drafting the First Amendment.<sup>72</sup> Besides restraining freedom of speech, the Court has found that regulation of political activity also restrains freedom of association.<sup>73</sup> Any limitation on financial political activity restrains freedom of association because contributions allow an individual to associate himself with a specific

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70. *McConnell*, 540 U.S. at 286-288, 320-42 (Kennedy, J., dissenting). Justice Kennedy's dissent ended up being somewhat prophetic when he remarked that the definition of "electioneering communications" "makes it a felony for an environmental group to broadcast an ad, within 60 day of an election, exhorting the public to protest a Congressman's impending vote to permit logging in national forests." *Id.* at 287. For an in-depth comparison of Justice Kennedy's dissent and the majority opinion, see Overton, *supra* note 48, at 679-92 (discussing the majority opinion in *McConnell* and comparing it to Justice Kennedy's dissent). Justice Kennedy's dissent has received some attention in articles that denounce the decision in *McConnell*. See Bradley A. Smith, *McConnell v. Federal Election Commission: Ideology Trumps Reality, Pragmatism*, 3 ELECTION L. J. 345, 348-50 (2004) (discussing where the dissent in *McConnell* differed from the majority); Levine, *supra* note 22, at 273 (discussing Kennedy's above-mentioned fear of what the BCRA had made a felony).

71. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.50 (7th ed. 2004). The portion of the First Amendment pertinent to this paper is: "Congress shall make no law. . . abridging the freedom of speech. . . or the right of the people [to] peaceably assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

72. NOWAK, *supra* note 71, § 16.50; *Buckley*, 424 U.S. at 14-15; *McConnell*, 540 U.S. at 206.

73. *Buckley*, 424 U.S. at 22-23. Freedom of association is never directly mentioned in the First Amendment; however, the court has found that the right is implied within the First Amendment. *NAACP v. Alabama*, 356 U.S. 443, 60-61; NOWAK, *supra* note 71, § 16.41. This is because many of the activities protected by the First Amendment (i.e. religion, peaceable assembly) require people to associate with one another. NOWAK, *supra* note 71, § 16.41.

candidate, while independent expenditures allow the individuals to expose their concerns to the general public.<sup>74</sup>

Despite the general prohibition of the First Amendment,<sup>75</sup> the Court has found that where there is a substantial government interest, regulation can be proper.<sup>76</sup> When it comes to the regulation of political campaigns, the purpose Congress cites is the prevention of corruption or the appearance of corruption.<sup>77</sup> The sufficiency of this interest and whether the legislation has a rational relation to it have been the determinative issues in the question of whether Congress had the constitutional ability to create the regulations in question.<sup>78</sup> Ultimately, the inconsistencies between the decisions in *Buckley* and *McConnell* have resulted from the way the Court has balanced congressional and First Amendment interests. *Buckley* provided greater emphasis on the First Amendment to the extent of overprotection, whereas *McConnell* provided great deference to congressional interest to the detriment of the First Amendment. However, neither decision reaches an appropriate middle ground that the FEC — although it took no action — felt might be necessary.<sup>79</sup>

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74. *Buckley*, 424 U.S. at 22-23. See Levine, *supra* note 22, at 263-64 (discussing *Buckley*'s holding that freedom of association was invoked by both contributions and expenditures, but was more prevalent in expenditures); Robert F. Bauer, *McConnell, Parties, and the Decline of the Right of Association*, 3 ELECTION L. J. 199, 200-03 (2004) (discussing, at length, the treatment of the right of association in the *McConnell* decision); Samuel Issacharoff, *Throwing in the Towel: The Constitutional Morass of Campaign Finance*, 3 ELECTION L. J. 259, 260-61 (2004) (discussing the First Amendment implications of the BCRA as considered in *McConnell*).

75. U.S. CONST. amend. I. (stating "Congress shall make no law").

76. NOWAK, *supra* note 71, § 16.50; *Buckley*, 424 U.S. at 44-45; *McConnell*, 540 U.S. at 204. See also *Schenck v. United States*, 249 U.S. 49, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.").

77. *Buckley*, 424 U.S. at 45-47; *McConnell*, 540 U.S. at 142-45; NOWAK, *supra* note 71, § 16.50. See also 147 CONG. REC. S2433, S2444 (daily ed. Mar. 19, 2001) (statement of Sen. Feingold) (stating that the only permissible purpose for regulating campaigns is to prevent corruption or the appearance thereof); 147 CONG. REC. S3022, S3040 (daily ed. Mar. 28, 2001) (statement of Sen. Edwards) (stating the Supreme Court agrees that the prevention of corruption or the appearance thereof is a compelling interest that warrants regulation); 147 CONG. REC. S3233, S3236 (daily ed. Apr. 2, 2001) (statement of Sen. Kohl) (stating that it is an important goal of Congress to prevent the appearance of corruption); 148 CONG. REC. S2096, S2099 (daily ed. Mar. 20, 2002) (statement of Sen. Dodd) (discussing the importance of preventing a public perception of corruption by regulating political campaigns).

78. *Buckley*, 424 U.S. at 14-16, 44-51; *McConnell* 540 U.S. 312-16, 204-07. See Levine, *supra* note 22, at 265 (discussing *Buckley*'s holding that government interests did not justify regulations on expenditures).

79. *Electioneering Communications*, 67 Fed. Reg. at 51,136, 51,145. See also *Electioneering Communications*, 67 Fed. Reg. at 65,201-02 (rejecting the proposed exceptions).

### B. *The Ineffective Rule of Buckley*

When the *Buckley* Court ruled that the only constitutional definition of expenditure was the use of funds to expressly advocate the election or defeat of a candidate,<sup>80</sup> it erred on the side of overprotection of rights to the detriment of true congressional concerns. When the Court discussed the prohibition on expenditures greater than one thousand dollars and laid out the express advocacy framework, it admitted that by only regulating express advocacy, the rule could easily be circumvented by someone who could choose his words well.<sup>81</sup> The Court used this rationale to strike down the provision, and yet the Court chose to define expenditures throughout FECA using the “express advocacy” framework, after admitting how easily it could be circumvented.<sup>82</sup> By accepting an admittedly flawed framework, the Court was clearly protecting speech at the cost of congressional interest.

The Court was certainly reasonable in protecting the rights involved for two basic reasons. First, FECA did not distinguish between the methods by which an organization can reach out to the public.<sup>83</sup> This led the Court to consider the impact that FECA would have on an organization seeking to purchase a full-page advertisement in a large city’s leading newspaper and an organization that took it upon itself to print a leaflet.<sup>84</sup> The enforcement of FECA would lead to a decrease in the amount of public political speech, which the First Amendment was designed to protect in its entirety.<sup>85</sup>

Second, the Court took a “show me” approach to congressional interest, pointing out that any discussion of corruption was not backed by concrete evidence, but rather stemmed from a purely speculative standpoint.<sup>86</sup> Given that the Court was confronted with a law that would reduce political speech and a congressional interest that was based entirely on speculation, the Court had no choice but to protect the First Amendment rights.

### C. *McConnell Overcompensates for Buckley’s Ineffectiveness*

When the Supreme Court handed down its ruling in *McConnell*, it overruled the doctrine of *Buckley* as it had developed over the previous twenty-seven years. The Court did so through two specific determinations. First, the Court, in balancing the First Amendment and congressional interests, applied identical considerations as those in *Buckley* but reached the opposite conclusion.<sup>87</sup> Second, when the Court upheld the definition of

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80. *Buckley*, 424 U.S. at 80-81; Hasen, *supra* note 46, at 276-83.

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

82. *Id.* at 80-81. See BeVier, *supra* note 49, at 139 (discussing how the *Buckley* Court created the requirement of express advocacy out of the feeling that it was “impelled by the powerful First Amendment interest in protecting the discussion of issues”).

83. *Buckley*, 424 U.S. at 16-20.

84. *Id.* at 19, 20 n.20.

85. *Id.* at 20-21.

86. *Id.* at 45-47.

87. *McConnell*, 540 U.S. at 204-07.

“electioneering communication,” it improperly applied the holding of *Buckley* as refined through its progeny.<sup>88</sup>

The Court in *McConnell* found that congressional interest in preventing the appearance of corruption was sufficient to warrant restrictions on expenditures relating to “electioneering communications.”<sup>89</sup> The *Buckley* Court concluded that an interest in preventing the appearance of corruption was insufficient for regulation of expenditures.<sup>90</sup> While on their face these two positions are inconsistent, they reflect the changes in how political campaigns were run in the twenty-seven years between *Buckley* and *McConnell*. The balancing of interests yields different results because of the facts, not the issues. In *McConnell*, the Court addressed two post-*Buckley* events that led to its change in position. First, spending on presidential elections nearly doubled in each four-year cycle, to the extent that combined political party expenditures reached nearly five hundred million dollars.<sup>91</sup> Second, a six-volume Senate report that totaled nearly ten thousand pages detailed the impact that money had on the 1996 election, including instances that created at least the appearance of corruption.<sup>92</sup> This is in stark contrast to the *Buckley* Court, which found no evidence suggesting the system created even an appearance of corruption.<sup>93</sup> This, in and of itself, is not an overruling of *Buckley* but rather a proper application of *Buckley* to a new set of facts.<sup>94</sup>

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88. *Id.* at 187-94.

89. *Id.* at 204-07.

90. *Buckley*, 424 U.S. at 44-51.

91. *McConnell*, 540 U.S. at 302-04. *See also* 147 CONG. REC. S3022, 3034 (daily ed. Mar. 28, 2001) (statement of Sen. Jeffords) (discussing how over five hundred million dollars was spent on the 2000 election cycle and comparing it with spending in previous years); Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 MINN. L. REV. 1773, 1777 (2001) (discussing the ever-increasing amounts of money spent on the elections including citing five-hundred nine million dollars as being spent on the 2000 election cycle).

92. *McConnell*, 540 U.S. at 307-11. *See* 147 CONG. REC. S3233, 3248 (daily ed. Apr. 2, 2001) (statement of Sen. Levin) (detailing how special interest groups could purchase access to politicians through “soft money” donations); 148 CONG. REC. S1991, S1996 (daily ed. Mar. 18, 2002) (statement of Sen. Dodd) (discussing the amounts of money raised for the election and pointing out that most of it was used for what was considered “issue advocacy”); Smith, *supra* note 70, at 162-63 (discussing specific portions of the report that discussed how “soft money” could be used to obtain access to political figures, which creates the appearance of corruption); Whittaker, *supra* note 19 at 1089-90 (discussing the Court’s reference to donations used to purchase access to politicians). *See also* Ellen L. Weintraub, *Perspectives on Corruption*, 3 ELECTION L. J. 355, 355-60 (2004) (comparing the analysis with respect to corruption in the majority opinion and dissents of *McConnell*).

93. *Buckley*, 424 U.S. at 45-47.

94. For contrary arguments, *see* Hasen, *supra* note 34, at 31-34 (2004) (arguing the Court has abandoned the requirement that the law prevent corruption or its appearance and instead adopted Justice Bryer’s notions of a promotion of “political equality”); Yoav Dotan, *Campaign Finance Reform and the Social Inequality Paradox*, 37 U. MICH. J. L. REF. 955, 955-69 (2004) (discussing *McConnell* as an apparent shift by the Court to a notion of “political equality”); Bauer, *supra* note 34, at 17-29 (arguing the Court’s

The Court overruled *Buckley* when it ruled on the propriety of the definition of “electioneering communication.” The Court stated that “the express advocacy restriction was an endpoint of statutory interpretation and not a first principle of constitutional law.”<sup>95</sup> This is true as far as the express words of *Buckley*,<sup>96</sup> but it fails to acknowledge that the U.S. Court of Appeals routinely interpreted the distinction to be constitutionally mandated.<sup>97</sup>

The *McConnell* decision, however, was justified in light of the definition of “electioneering communication.” What made the BCRA different from the other campaign finance reforms was the fact that it used a term that only applied to specific means of speech. When the *Buckley* Court created the distinction between “issue advocacy” and “express advocacy,” it considered that FECA did not distinguish between the means by which the speech would be disseminated.<sup>98</sup> The definition of “electioneering communication” is strictly limited to radio and television advertising.<sup>99</sup>

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deference to Congressional judgement is in stark contrast to *Buckley*’s use of a definition of corruption to determine if such political action was conducive to corruption or its appearance).

95. *McConnell*, 540 U.S. 189-91. See *BeVier*, *supra* note 49, at 137-38 (discussing the Court’s abandonment of the “express advocacy”/“issue advocacy” distinction). See also *Overton*, *supra* note 48, at 672-73 (stating the term “electioneering communication” extends the definition of express advocacy); *Pratt*, *supra* note 42, at 1666 (claiming “electioneering communications” operates outside the distinction between issue and express advocacy).

96. *Buckley*, 424 U.S. at 79-80. In *Buckley*, the Court specifically stated:

To insure that the reach of § 434 (e) is not impermissibly broad, we construe “expenditure” for purposes of that section the same way we construed the terms of § 608 (e) — to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.

*Id.* at 80.

97. See *Hasen*, *supra* note 46, at 277-78 (discussing lower court precedent claiming *Buckley*’s holding is an overriding constitutional principal); *Hasen*, *supra* note 91, at 1788 (discussing how lower courts have struck down attempts to regulate sham issue advocacy). See generally *Vt. Right to Life Comm.*, 221 F.3d 376; *Iowa Right to Life Comm.*, 187 F.3d 963; *Moore*, 288 F.3d 187; *Faucher*, 807 F.2d 857; *Citizens for Responsible Gov’t State PAC*, 236 F.3d 1174; *Brownsburg Area Patrons Affecting Change*, 137 F.3d 503; *Bopp*, *supra* note 42, at 298 n.36. In the debate over the BCRA, some of the opposing senators also voiced a belief that the “express advocacy”/“issue advocacy” line was a constitutional mandate. 147 CONG. REC. S3022, S3038 (daily ed. Mar. 28, 2001) (statement of Sen. Hatch); 147 CONG. REC. S3233, S3241 (daily ed. Apr. 2, 2001) (statement of Sen. Hatch).

98. *Buckley*, 424 U.S. at 16-20.

99. 2 U.S.C. § 434(f)(3)(A)(i) (2004); 11 C.F.R. § 100.29; *Electioneering Communications*, 67 Fed. Reg. at 65,191, 65,192. See also *BeVier*, *supra* note 49, at 136-27 (discussing the definition of “electioneering communication” including its limitation to radio and television); *Overton*, *supra* note 48, at 672-73 (discussing the definition of “electioneering communication,” including its limitation to radio and television); *Levine*, *supra* note 22, at 272-73 (discussing the definition of “electioneering communication,” including its limitation to radio and television); *Briffault*, *supra* note 44, at 156 (discussing the definition of “electioneering communication,” including its limitation to radio and television); *Whittaker*, *supra* note 19, at 1084-85 (defining “electioneering communication,” including its limitation to radio and television).

However, the Court took this rationale one step further in ruling that congressional prohibition of “electioneering communications” was proper. The Court reasoned that such a ban was proper because “issue ads broadcast during the 30- and 60-day periods preceding federal and primary general elections are the functional equivalent of express advocacy.”<sup>100</sup> The Court had earlier pointed out that market research suggested ads that amounted to “issue advocacy” under *Buckley*’s rules were more persuasive to the general public than anything considered “express advocacy.”<sup>101</sup> However, this claim drew the ire of the dissenters as it blindly dismissed any notion that “issue advocacy” might truly be just that - a group advocating its position on an issue before Congress, which would deserve the strictest First Amendment protections.<sup>102</sup>

Confronting the unfavorable developments in a post-*Buckley* world, the Court swung the pendulum in the opposite direction by allowing over-regulation. This, however, is not to say no one considered a middle ground.

#### D. Administrative Attempts at a Middle Ground

In implementing the BCRA, the FEC had the ability to consider potential additional exceptions to “electioneering communications” and proposed four potential exceptions for true “issue advocacy.”<sup>103</sup> All were rejected for being outside the scope of the FEC’s authority to create the

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100. *McConnell*, 540 U.S. 205-07; Smith, *supra* note 70, at 156. See Pratt, *supra* note 42, at 1686 (citing statistics that show only 0.6% of advertisements run during the sixty day window of the BCRA were “genuine issue ads”); Holman, *supra* note 46, at 250-54 (discussing the prevalence of “sham issue ads”). See also Joshua Downie, *McConnell v. FEC: Supporting Congress and Congress’s Attempt at Campaign Finance Reform*, 56 ADMIN. L. REV. 927, 933-36 (discussing *McConnell*’s upholding of “electioneering communication”); Briffault, *supra* note 9 at 1751-56, 1782-88 (discussing the prevalence of “sham issue ads,” which are advocacy ads that look like issue ads, and how any regulation, to be effective, must target the “sham issue ads” in a time frame close to the election); Hasen, *supra* note 46, at 276-83 (discussing the ease with which groups can avoid the restrictions of express advocacy by the creation of “sham issue ads”).

101. *McConnell*, 540 U.S. at 125-27; see Holman, *supra* note 46, at 250-54 (discussing the preference groups have for “sham issue ads”). See also Briffault, *supra* note 9 at 1751-56, 1782-88 (discussing the preference groups have for “sham issue ads,”); Hasen, *supra* note 46, at 276-83 (discussing the ease with which groups create “sham issue ads”).

102. *McConnell*, 540 U.S. at 286-88 (Kennedy, J., dissenting); *Buckley*, 424 U.S. at 80-81. See Daniel H. Lowenstein, *BCRA and McConnell in Perspective*, 3 ELECTION L. J. 277, 279 (2004) (discussing the problems of the definition of “electioneering communication”); BeVier, *supra* note 49, at 138-39 (discussing the importance of “issue advocacy to the First Amendment”). For a brief, but interesting, argument concerning the First Amendment analysis in *McConnell*, see Daniel R. Ortiz, *The Unbearable Lightness of Being McConnell*, 3 ELECTION L. J. 299, 302-04 (2004) (arguing that the Court chose not to consider the regulations as regulating speech, but rather as a means of political participation). For an additional discussion of the FECA, BCRA, *Buckley*, and *McConnell*, see Cecil C. Kuhne, *Rethinking Campaign Finance Reform: The Pressing Need for Deregulation and Disclosure*, 38 J.MARSHALL L. REV. 633 (2004).

103. Electioneering Communications, 67 Fed. Reg. at 51,136, 51,145; Electioneering Communications 67 Fed. Reg. at 65,201.



exceptions.<sup>104</sup> There was an additional problem with all four: they served to open loopholes that would circumvent the system.

The first exception the FEC considered required that the advertisement concern only current legislation, and only request individuals to contact their representative.<sup>105</sup> First, this exception, like the other three, fails to address the possibility that the advertisement may use loaded words<sup>106</sup> to at least create inferences in the minds of individuals as to a candidate's position. Second, it places no restrictions on where the candidate's name may be given, which would allow a well-written advertisement to create the inference of a position. This specific alternative also fails to require the organization to provide contact information. This is pivotal because without requiring contact information, some viewers would take the message at face value, not bother to look up contact information, and assume the candidate is against their position. If the contact information is provided, there is at least the possibility that more viewers will call and be given the representatives' view of the situation.

The second exception required the advertisement to concern pending legislation, request individuals to contact their representative and urge a position without referencing the representative's position or political abilities, and only to reference the candidate's name during the urge to contact.<sup>107</sup> This suffers from two of the deficiencies of the first alternative, although curing the problem of potential repeated use of a candidate's name.

The third exception would have required the advertisement to make no attempt at express advocacy, reference a specific "piece of legislation" or issue, and give contact information while urging individuals to use it.<sup>108</sup> While this alternative cures the lack of contact information, it reinstates the

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104. Electioneering Communications 67 Fed. Reg. at 65,201, 65,202. Even if the FEC had determined that it had the power to create such an exception, it probably would not have accepted a single one of them. Some commentators objected to the use of the standard "promote, support, attack, or oppose" as inappropriate. *Id.* at 65,201. The third alternative was praised by some as appropriate, while others claimed that it would have allowed a complete circumvention of the BCRA. *Id.* Some argued the fourth alternative's use of "incumbent legislator" would raise equal protection issues. *Id.* Commentators even proposed a fifth possible alternative, that would have required the advertisement to be "devoted exclusively to a pending legislative or executive branch matter" and only name the candidate for the purposes of urging individuals to contact him, along with a requirement that there be no mention of political parties or the candidates position or abilities. *Id.* Some of those advocating this exception wanted to limit identification to "[y]our Congressman." *Id.* This would tend to suggest that even if the FEC felt it could exempt issue ads, it never would have come to a reasonable definition.

105. *Id.* at 65,201; Electioneering Communications 67 Fed. Reg. at 51,145.

106. "Loaded words" is a term used to apply to words that have a strong connotation that tends to invoke an emotional response from the listener. An extreme example of such words would be if a group referred to abortion as "baby killing." See Jonathan S. Fox, *Push Polling: the Art of Political Persuasion*, 49 FLA. L. REV. 563, 621 (1997) (discussing the use of loaded words in push polling and using the "baby killing" example).

107. Electioneering Communications 67 Fed. Reg. at 51,145; Electioneering Communications 67 Fed. Reg. at 65,201.

108. Electioneering Communications 67 Fed. Reg. at 51,145; Electioneering Communications 67 Fed. Reg. at 65,201.

problem of creative use of the candidate's name. It also removes the requirement that the legislation be pending and replaces it with a requirement that it only be "specific legislation." This opens the door to advocacy of already-settled issues, which would amount to support or opposition of the candidate.

The fourth exception would have required the advertisement to "urge support or opposition" to legislation or an issue and to refer to a representative and request individuals to urge support or opposition to the legislation without mentioning their current position.<sup>109</sup> This exception suffers from all of the problems of the third exception and also fails to require that the advertisement provide contact information.

The Supreme Court had two opportunities to find a way to harmonize legitimate congressional interests with the First Amendment, and has chosen one doctrine that ineffectively enforces congressional interests and another that restricts First Amendment rights in an inappropriate manner. An administrative agency was on the right track to protecting "issue advocacy" but had to stop because it was outside the scope of its power. Ultimately, either the Court or Congress must find an acceptable way to implement a middle ground that does not make it a crime for a group to urge a petition on pending legislation that it finds important.<sup>110</sup>

### III. HARMONIZING THE NEEDS OF CONGRESS WITH THE DEMANDS OF THE FIRST AMENDMENT

Because it is clear that congressional interests and the First Amendment require a middle ground between *Buckley* and *McConnell*, the question is how to find it.<sup>111</sup> This comment proposes an exception, similar to the ones the FEC attempted to create, that would be effective in allowing true "issue advocacy" while screening out "sham issue ads."

The ultimate goal of any such exception is to allow true issue advertisements while preventing either implied or express advocacy of a candidate under the guise of "issue advocacy."<sup>112</sup> Therefore, for an exception to function properly, it must focus on the means by which

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109. Electioneering Communications 67 Fed. Reg. at 51,145; Electioneering Communications 67 Fed. Reg. at 65,201.

110. *McConnell*, 540 U.S. 286-88, 320-42 (Kennedy, J. dissenting). See Levine, *supra* note 22, at 273 (discussing Kennedy's above mentioned fear of what BCRA had made a felony). 147 CON. REC. S3022, S3024-25 (daily ed. Mar. 28, 2001) (statement of Sen. DeWine) (stating his opposition to the BCRA because it would severely limit groups in his home state from running advertising urging constituents to petition him to take certain actions).

111. Not all commentators agree that an exception is the appropriate solution. See, Kuhne, *supra* note 102, at 645-47 (arguing that the appropriate solution is removal of caps on contributions with mandatory disclosure of those contributions).

112. See Electioneering Communications 67 Fed. Reg. at 51,136, 51,145 (discussing four potential exceptions that would exempt true issue ads from becoming "electioneering communications"); Electioneering Communications 67 Fed. Reg. at 65,201-02 (rejecting all of the earlier proposed potential exceptions on the grounds that they all would allow for abuses similar to those made by the current "sham issue ads").

individuals disguise candidate advocacy as “issue advocacy.”<sup>113</sup> An exception that requires an advertisement to satisfy the following five requirements should effectively screen out sham issue ads.

The first requirement of a valid exception would be that the advertisement should be as neutral as possible in connotation.<sup>114</sup> Since it is not always easy to determine exactly what would be too negative or too positive, the requirement should simply prohibit advertisements from using loaded words. This could be done with a general definition that is similar to one already used by the government: Any word that draws an emotional response far greater than its descriptive value.<sup>115</sup>

The second requirement should be that the advertisement reference only pending matters.<sup>116</sup> The exception would have to define pending as any matter either in a committee or on the floor for debate or vote of the house of Congress of which the mentioned representative is a member.<sup>117</sup> While there are some grounds for concern that this requirement would not serve to screen out “sham issue ads,” it would certainly help to prevent the advocacy of things either already resolved but to a contrary position, or not even on the agenda, that realistically only serve to attack the record of an incumbent

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113. See 148 CONG. REC. S2096, 2115 (daily ed. Mar. 20, 2002) (statement of Sen. Levin) (discussing how effective campaign finance reform must screen sham issue ads); 147 CONG. REC. S2433, S2458 (daily ed. Mar. 19, 2001) (statement of Sen. Snowe) (speaking to the effectiveness of “sham issue ads” and how effective campaign finance reform must subject them to the rules); Holman, *supra* note 46, at 259-60 (discussing the BCRA’s attempt to prevent such “sham issue ads”); Hasen, *supra* note 46, 276-83 (2000) (discussing the need for regulations that will cover “sham issue ads”); Briffault, *supra* note 9 at 1777-99, (discussing a means by which the government should attempt to redefine campaign speech to allow regulation of “sham issue ads”).

114. Connotation is a key word here because, unlike other words that are often used to describe words that suggest a specific bias, connotation can be either positive or negative. See THE AMERICAN HERITAGE DICTIONARY 400 (3d ed. 1992) (defining connotation as “the set of associative implications constituting the general sense of a word in addition to its literal sense”).

115. This is not any less vague than the definition that the Federal Communications Commission and Supreme Court use for “obscene”: Any material that “the average person. . . would find. . . appeals to the prurient interest. . . depicts or describes, in a patently offensive way, sexual conduct” or has no redeeming “literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1972); Radio Broadcasting, New Indecency Enforcement Standards, 52 Fed. Reg. 16,386, 16,386 (May 5, 1987) (codified at 47 C.F.R. ch. I). This proposal also reflects some similarity to Federal Rule of Evidence 403, which warrants exclusion of evidence where “probative value is substantially outweighed by the danger of unfair prejudice.” FED. R. EVID. 403.

116. See Electioneering Communications, 67 Fed. Reg. at 51,145 (proposing exceptions 3-A and 3-B, which would have exempted ads concerning pending legislation as long as the other requirements are met).

117. This definition of “pending” stems from Justice Kennedy’s dissent, where he expressed concerns about a groups ability to call to the public’s attention an impending vote in Congress that would affect the group’s interests. *McConnell*, 540 U.S. at 286 (Kennedy, J., dissenting). The definition encompasses more situations than the state of urgency the Kennedy dissent reflects, but it goes to the Kennedy dissent’s overriding theme that the definition of “electioneering communication” “is a severe and unprecedented ban on protected speech.” *Id.* at 768.

candidate by suggesting that he either took a position opposite to the one in the advertisement or did nothing at all.

The third requirement is that the advertisement should only mention the name of the representative once at the end of the ad. This would serve to prevent certain creative uses of language that could create an inference of the position a representative has taken.<sup>118</sup> The best example of a potential abuse that this requirement would prevent is an advertisement that would begin: “While Representative X has been in Congress. . . .” This would clearly imply that the representative had taken the position that followed.

The fourth requirement should be that the advertisement only mentions the name of the candidate for the purpose of urging the public to call him and voice its opinion.<sup>119</sup>

The fifth and final requirement should be that the advertisement provides the contact information for the representative at the end of the ad, when the urge to contact is made. This would at least give those that did draw an inference of position the contact information as opposed to requiring them to find it on their own. A busy individual might simply take his inference into the voting booth, rather than take the time to look up the information, call the representative, and get the position straight from him or her.

Now, having established a potential framework, the question becomes whether it works from a practical standpoint. The best way to do this is to take the WRL issue advertisement mentioned earlier and show that it would pass the test, while a classic “sham issue ads” would be screened out.

First, the WRL advertisement did not use any words or phrases that could be classified as “loaded.” The closest that the advertisement gets to this is the phrase, “it’s politics at work, causing gridlock and backing up some of our courts to a state of emergency.”<sup>120</sup> “State of emergency” does elicit an emotional response, but not to the extent that phrases like “mass chaos” or “rampant disorganization” would. In addition, while loaded words would be prohibited, a group framing the issue according to its beliefs would not. Since the group is correct that, if such filibusters continued there would

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118. See *Electioneering Communications*, 67 Fed. Reg. at 65,201, 65,202 (discussing that all four proposed exceptions could be understood to “promote, support attack, or oppose” a candidate, but that 3-C, the only alternative that did not create restrictions on when an incumbent could be named, would specifically serve to completely circumvent the BCRA).

119. See *Electioneering Communications*, 67 Fed. Reg. at 51,145 (proposing exceptions 3-A, 3-B, and 3-D all of which would limit references to an incumbent candidate to a public request to contact that incumbent regarding the matter).

120. See *supra* text accompanying note 2 for the full transcript of the ad, but the full portion quoted is as follows:

Voice-over: Sometimes it’s just not fair to delay an important decision. But in Washington it’s happening. A group of senators is using the filibuster delay tactic to block federal judicial nominees from a simple “yes” or “no” vote. So qualified candidates don’t get a chance to serve. Yes, it’s politics at work, causing gridlock and backing up some of our courts to a state of emergency.

Will, *supra* note 2, at 72.

be a judicial shortage, the advertisement would be considered proper under the first requirement.

The second requirement, that the advertisement involve a pending matter, is certainly satisfied. The advertisement concerns confirmation of judicial nominees.<sup>121</sup> These nominees were not rejected, but rather the Senate Democrats used a filibuster to prevent the vote.<sup>122</sup> The Senate is free to reconsider at any time and vote to break the filibuster. Unless and until the nominees come to a vote or are withdrawn by the President, the matter is pending.

The WRL advertisement also satisfies the third requirement, that the advertisement mention the representative's name once and do so only at the end of the ad. The advertisement concludes with the line, "Contact Senators Feingold and Kohl . . .,"<sup>123</sup> which is the only time the advertisement ever mentions the name of anyone in the Senate.

The WRL advertisement only mentions the name of a representative in conjunction with an urge to call that representative, thereby satisfying the fourth requirement. It tells viewers to "[c]ontact Senators Feingold and Kohl,"<sup>124</sup> which is exactly what is required.

It is unclear whether the advertisement satisfies the fifth requirement, but it would not be difficult for WRL to edit it so that it does. The advertisement aired on television and, thus, contact information would fall out of the scope of the transcript of the ad. However, it is not difficult to take modern editing equipment and add several seconds of a black screen with white type containing two telephone numbers.

Next, it must be shown that the requirements would screen out "sham issue ads." Since such an advertisement only has to fail one requirement to lose its exemption status, this comment only needs to show the advertisement fails one.

The Bill Yellowtail advertisement mentioned earlier<sup>125</sup> is a classic example of "sham issue advocacy" as it discusses how he had abused his wife.<sup>126</sup> It thus fails to meet the pending matters requirement. Personal matters of a representative are almost never the matters of congressional action. In addition, it mentions his name several times, particularly at the beginning.<sup>127</sup>

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121. *Id.*

122. *Id.* See Neil A. Lewis, *7th Candidate for Judgeship Is Blocked By Democrats*, N.Y. TIMES, July 21, 2004, at A14.

123. For a full transcript of the ad, see text accompanying note 2, but this note specifically quotes "Contact Senators Feingold and Kohl and tell them to oppose the filibuster." Will, *supra* note 2, at 72.

124. *Id.*

125. See text accompanying note 9 for the full transcript, but the portions pertinent to analysis are as follows: "Who is Bill Yellowtail? . . . [H]e took a swing at his wife. He talks law and order, but is himself a convicted criminal. . . Yellowtail failed to make his own child support payments, then voted against child support enforcement." Briffault, *supra* note 9, at 1751.

126. *Id.*

127. *Id.*

A second “sham issue ad” that aired during the 1996 presidential elections fails on similar grounds. The advertisement was in support of Republican candidate Bob Dole.<sup>128</sup> The advertisement mentioned Bob Dole’s name multiple times and did not relate to any governmental issue, as it only stressed Bob Dole’s good character.

A third “sham issue ad” that would fail was one that ran against John McCain when he ran for president in the Republican primary.<sup>129</sup> Not only did it mention McCain’s name multiple times, but it mentioned his opponent, George W. Bush, and compared their records with no urge to contact.<sup>130</sup>

Therefore, the five requirements would allow a true issue advertisement to run while screening out at least the classic forms of “sham issue ads.”

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128. The transcript of the advertisement is as follows:

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

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

Mr. Dole[:] I went looking around for a miracle that could make me whole again.

Voice over[:] The doctors said he’d never walk again. But after 39 months, he proved them wrong.

A man named Ed[:] He persevered, he never gave up. He fought his way back from total paralysis.

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

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

148 CONG. REC. S2096, 2115 (daily ed. Mar. 20, 2002) (statement of Sen. Levin); Pratt, *supra* note 42, at 1676. The ad, unlike the three others that appear in this paper, was paid for by the candidate’s political party. It was chosen because it was paid for by “soft money” which subjected it to *Buckley* analysis, which determined it to be “issue advocacy”. 148 CONG. REC. S2096, 2115 (daily ed. Mar. 20, 2002) (statement of Sen. Levin); Pratt, *supra* note 42, at 1676.

129. The transcript of this advertisement is as follows:

Voice over: Last year, John McCain voted against solar and renewable energy.

That means more use of coal-burning plants that pollute our air. New York Republicans care about clean air. So does Governor Bush. He led one of the first states in America to clamp down on old coal-burning electric power plants. Bush clean air laws will reduce air pollution more than a quarter million tons a year.

That is like taking five million cars off the road. Governor Bush: Leading so each day dawns brighter.

Perez-Pena, *supra* note 46, at A15.

130. *Id.*

## CONCLUSION

The Supreme Court's decision in *McConnell* was harder than it had to be on First Amendment rights, but it was better than the existing framework under *Buckley*. However, the situation is still not ideal. The ultimate proposal of this paper is an attempt to find a healthy middle ground that allows organizations and individuals to openly advocate important issues, while maintaining a level of integrity in the electoral process.