Defining Express Advocacy for Purposes of Campaign Finance Reporting and Disclosure Laws

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I. Introduction

In the wake of *Buckley v. Valeo,*[1] the seminal Supreme Court decision concerning the First Amendment limits on campaign finance regulation, one of the most important and difficult questions confronting campaign finance reform is the extent to which states or Congress may require reporting and disclosure of the sources and uses of independent expenditures made for the purposes of influencing elections.[2] *Buckley* upheld reporting and disclosure requirements in the Federal Election Campaign Act (FECA) that (1) required "political committees" to file reports with the Federal Election Commission providing a variety of information, including the identity of contributors, contributions received, and contributions or expenditures made;[3] and (2) required others making an independent expenditure "for purposes of influencing an election" to file a report identifying themselves, the expenditure, and the source of the funds used to make the expenditure.[4] While the Court in *Buckley* indicated that such reporting and disclosure requirements were in principle consistent with the First Amendment,[5] it construed FECA narrowly to avoid constitutional problems, reasoning that the language of FECA was so vague that it could apply to the mere discussion of issues and candidates in relation to those issues. Specifically, the Court limited the application of reporting and disclosure requirements to political committees whose primary purpose is the election or defeat of a candidate, and to other independent expenditures that expressly advocate the election or defeat of a clearly identified candidate or candidates, which the court indicated in a footnote would be confined to certain words and phrases of explicit advocacy or their equivalent (the "magic words").

Because *Buckley* also held that Congress, and by extension the states, may not directly limit independent expenditures,[6] reporting and disclosure requirements are the principal means of regulating independent expenditures in connection with political campaigns. The express advocacy requirement of *Buckley,* however, has made it relatively easy for those making independent expenditures to avoid application of reporting and disclosure requirements. By eschewing the use of magic words or other explicit language urging the audience to vote for or against a candidate or candidate, an individual or group (other than a political committee) can make independent expenditures for "issue advertisements" that are clearly designed to further the election or defeat of a candidate yet are exempt from FECA's reporting and disclosure requirements. As a result, the use of issue advertising has proliferated[7] and has become the target of campaign finance reform efforts.[8] In Kansas, for example, two Bills introduced this session would broaden the definition of express advocacy for purposes of the state's campaign finance reporting and disclosure requirements.[9]

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Buckley and subsequent decisions, however, leave unclear the extent to which states may apply reporting and disclosure requirements such as those in FECA to independent expenditures that contain a clear message of support for or opposition to a candidate without using the magic words of express advocacy or otherwise explicitly urging the audience to vote for or against that candidate. Consider the following radio advertisement, which aired in Kansas during the contested Republican gubernatorial primary between Governor Bill Graves and his challenger, David Miller:

> Have you ever had someone try to trick you? You know, twist the truth to make you think one thing instead of another? Children are quite good at this. Unfortunately, Governor Bill Graves is trying to do the same thing, telling you he is pro-life when, in fact, he is a strong supporter of legal abortion in Kansas. During his last campaign, Gov. Bill Graves held a rally for his supporters–Dr. George Tiller, the infamous late-term abortionist was in attendance to support Bill Graves. We know Bill Graves props up the abortion industry because we are Kansans for Life–it's our job to know who is pro-life and who is pro-abortion. Yet there are political ads, which this radio station is required by law to run, by Bill Graves trying to deceive you. The truth is David Miller, who is challenging Bill Graves for Governor, is pro-life. David Miller has always been pro-life. David Miller will not try to fool you just because it is an election. Now you know the truth!
>
> Paid for by Kansans for Life.[10]

This advertisement contains what could be called "clear implicit advocacy" of the nomination of David Miller and the defeat of Bill Graves. No reasonable person could hear the advertisement and fail to understand that he or she was being urged to vote for David Miller; the message is clear.[11] Nonetheless, the advertisement does not explicitly say anything about voting for or against anyone; the message is implicit.

In *Kansans for Life v. Gaede,*[12] the Federal District Court for the District of Kansas recently held that this advertisement was constitutionally protected issue advocacy such that the Kansas Governmental Ethics Commission could not require Kansans for Life to disclose the source of the funds used to pay for it, and invalidated the Commission's enforcement policy, under which "[a] communication which, when viewed as a whole, leads an ordinary person to believe that he or she is being urged to vote for or against a particular candidate for office, will be deemed to expressly advocate the nomination, election or defeat of a clearly identified candidate."[13] In light of my involvement with the broader legislative campaign finance reform efforts in the state, I have followed the *Gaede* litigation with more than a passing interest,[14] and I am troubled by the implications of the district court's analysis in *Gaede.* My concern lies not so much with the result, which is arguably correct, but with the court's reasoning, which I believe is overly broad and reflects some common misconceptions regarding the meaning of *Buckley* and its progeny. This is hardly surprising given the inherent ambiguities of *Buckley* and the wide-

spread confusion that has arisen in its aftermath. Nonetheless, the broad reasoning of *Gaede* is cause for concern because it might be read to close the door on efforts to apply reporting and disclosure requirements to clear, implicit advocacy. While these efforts may or may not be a good idea as a matter of policy, I do not believe that, as a matter of constitutional doctrine as it currently stands, they are completely foreclosed.

My goal with this article, then, is to bring some order to the chaos of constitutional doctrine in the hope that decisionmakers can proceed with a better understanding of the limits of campaign finance reporting and disclosure laws. I will begin in Part I with a relatively detailed exposition of the relevant portions of *Buckley,* which focuses on separating the constitutional and statutory components of the Court's analysis. This analysis suggests that *Buckley* in fact recognized two distinct constitutional concerns: the protection of issue advocacy from overbroad reporting and disclosure laws and the problem of vague statutory provisions that provide insufficient notice to the speaker regarding what independent expenditures are covered by reporting and disclosure requirements. The article then considers these constitutional concerns in Parts II and III, respectively, which discuss the issues in light of subsequent Supreme Court and lower court decisions. Part II concludes that neither *Buckley* nor subsequent decisions erect an absolute constitutional barrier to the application of reporting and disclosure requirements to advertisements that contain some issue discussion, and that even some forms of pure issue advocacy might be regulated. Part III concludes that the vagueness doctrine does not necessarily limit application of reporting and disclosure laws to express advocacy, provided that the statute in question contains a clear definition of the communications to which it applies, and that the requirements are not susceptible of broad application to pure issue advocacy.

I will apply these insights in Part IV of the article to analyze critically the district court's reasoning in the *Gaede* decision, suggesting that the court's analysis based on the mistaken premise that any communication that does not contain express advocacy is by definition constitutionally protected issue advocacy. This flawed premise led the court into several analytical errors. First, and most broadly, the court improperly assumed without more that the construction of FECA was controlling as a constitutional matter on state legislatures. Second, instead of focusing on whether the Kansans for Life advertisement contained issue advocacy, the court should have asked whether the advertisement contained candidate advocacy that was sufficiently clear to warrant regulation because even express advocacy that is clearly subject to reporting and disclosure requirements may contain a discussion of issues. Third, because the district court assumed that the constitutional issues were clear, it did not seriously consider more restrained approaches to the case. My concerns about the district court's reasoning do not necessarily mean that I believe the Kansas Governmental Ethics Commission's action in *Gaede* was valid – the Commission enforcement policy might be insufficient to sustain application of reporting and disclosure requirements to the Kansans for Life advertisement at issue, either because the policy is inconsistent with the statute or unconstitutionally vague. But the district court's reasoning has unnecessarily broad constitutional

implications and would come very close to preventing any future efforts to expand reporting and disclosure requirements.

Finally, in Part V of the article, I will consider the import of *Gaede* for future campaign finance reform efforts in the state. This analysis focuses primarily on the two bills introduced this session that would redefine express advocacy for purposes of Kansas campaign finance laws. My analysis suggests that even under *Gaede's* broad reasoning, there is a potential argument for the constitutionality of pending campaign finance reform bills. Nonetheless, if *Gaede* is any indication, the district court is unlikely to be receptive to such arguments.

II. *Buckley* and Express Advocacy

The starting point for constitutional analysis of campaign finance regulation, including reporting and disclosure requirements, is *Buckley*.[15] The Court's consideration of FECA's reporting and disclosure requirements came in the context of the Act's broader regulatory scheme, which was directed at contributions and expenditures by and on behalf of candidates for federal electoral office. Having upheld contribution limits but invalidated limits on independent expenditures (even as narrowly construed to apply only to express advocacy of a candidate), the Court began with the observation that while contribution and expenditure limits directly restrict speech, reporting and disclosure requirements burden speech only incidentally. Thus, instead of applying strict scrutiny (which requires that the law be narrowly tailored to meet a compelling state interest), the Court applied a form of intermediate scrutiny, which required a "'relevant correlation' or 'substantial relation' between the government interest and the information sought to be disclosed."[16] In general terms, the reporting and disclosure requirements passed this test because reporting and disclosure was substantially related to three purposes of sufficient "magnitude" to satisfy this test: (1) informing the electorate regarding the sources and uses of campaign money; (2) deterring actual corruption and avoiding the appearance of corruption through "the light of publicity;" and (3) gathering information to detect violations of contribution limits.[17] Moreover, reporting and disclosure requirements were substantially related to these objectives, notwithstanding the fact that some people might be deterred from making contributions or expenditures because of them. The Court also rejected a blanket exemption for minor parties and independents, requiring them instead to make a showing in individual cases that reporting and disclosure would expose contributors to a substantial risk of retaliation.[18]

Crucially for present purposes, however, the Court limited the scope of the reporting and disclosure requirements' permissible application. Drawing on its earlier narrowing construction of FECA's expenditure limits,[19] the Court reasoned that reporting and disclosure requirements for independent expenditures must be construed narrowly to avoid vagueness problems.[20] In particular, the Court expressed concern that FECA's broad and open-ended language would appear to apply to a wide range of discussion of public issues, and might therefore "chill" protected speech. Thus, the Court interpreted FECA's general reporting and disclosure requirements for "political committees" as limited to "organizations that are under the

control of a candidate or the major purpose of which is the nomination or election of a candidate."[21] Second, the Court held that the specific reporting and disclosure requirements for persons or organizations other than political committees who made contributions and expenditures "for the purpose of . . . influencing an election or nomination"[22] was limited to "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[23] In adopting the express advocacy requirement, the Court cross-referenced (in a footnote) a footnote from its earlier discussion of express advocacy in connection with expenditure limits,[24] in which it had stated that the express advocacy "construction would restrict the application of [the relevant provision] to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,'' reject.'"[25] This is the so-called "magic words" formulation of express advocacy.

The precise relationship between *Buckley's* narrowing construction of FECA and the constitutional limits of reporting and disclosure requirements is unclear. As with any case in which the Court narrowly construes a statute to avoid constitutional difficulties, the particular construction adopted by the Court is to some extent determined by the specific language and purposes of the statutory provisions at issue. At the same time, because the narrowing construction is grounded in constitutional concerns, it also clearly has a constitutional dimension. This inherent ambiguity is further complicated in *Buckley* by the intermingling of overbreadth and vagueness concerns in the Court's explanation of its narrowing construction and the resultant merger of two distinct components of that construction. In particular, it is important to distinguish between the protection of issue advocacy and the requirement that advocacy be express. A statute might apply to express advocacy concerning both issues and candidates, or it might apply to express and implicit advocacy of the election or defeat of a clearly identified candidate or candidates.

Buckley's emphasis on the need to prevent the application of FECA to the mere discussion of issues that may include discussion of candidates reflects the overbreadth doctrine, under which an otherwise valid statute is unconstitutional if it applies to protected speech.[26] Thus, *Buckley's* narrowing construction tends to suggest, but does definitively hold, that the discussion of issues, as opposed to candidate advocacy, is constitutionally protected.[27] While the Court's broad language implies that issue discussion is constitutionally protected, the overbreadth problem is integrally tied up with the specifics of FECA. The Court reasoned that application of reporting and disclosure requirements to issue discussion would not further the purposes of FECA's reporting and disclosure requirements because the Act regulated only candidate elections.[28] In light of this reasoning, it is possible that other statutory schemes with different purposes might support the application of reporting and disclosure requirements to at least some forms of issue discussion, such as express advocacy of ballot initiatives. Moreover, the distinctive features of FECA may lessen the constitutional force of the Court's analysis. Because reporting and disclosure requirements were subjected to intermediate rather than strict scrutiny, they arguably

might have a broader permissible reach than direct limitations on campaign contributions and expenditures. Although *Buckley* incorporates identical requirements under both the expenditure and the reporting and disclosure provisions of FECA without considering this difference, that may be a product of the Court's desire to achieve consistency in the application of FECA's comprehensive provisions.

Buckley's express advocacy requirement responds to vagueness concerns by eliminating any question about whether a particular communication is covered by the FECA's reporting and disclosure requirements. The void for vagueness doctrine is grounded in the due process principle that it is unfair to penalize someone for conduct unless there is notice that the conduct is prohibited, but it has special force in the First Amendment context because vague laws may "chill" protected speech.[29] For this reason, vagueness and overbreadth doctrines often overlap: a vague statute is usually susceptible to a broad construction that would reach protected speech. In the context of campaign expenditures, the problem is to distinguish between "discussion of issues and candidates and advocacy of election or defeat of candidates [which] may often dissolve in practical application."[30] This concern applies regardless of whether some forms of issue advocacy (for example, concerning ballot initiatives)[31] may be regulated, because the distinction between advocacy and more general discussion would still be difficult to draw in practice. *Buckley* leaves unclear whether it is possible to define advocacy with sufficient clarity to avoid vagueness problems without requiring that the advocacy be express. This is the particular question presented by Kansas' recent campaign reform efforts.[32]

Unfortunately, neither *Buckley* nor its progeny provide very clear guidance on these issues. First, the cases do not always distinguish between the two distinct substantive components of *Buckley's* narrowing construction, merging the question of issue advocacy and the requirement that advocacy be "express." Second, with respect to both questions, the case law does not carefully separate the statutory construction components of *Buckley* from its constitutional dimensions. In the next two sections of this article, I will address the subsequent developments with respect to each substantive component of *Buckley's* narrowing construction, focusing on the extent to which each component has become a constitutional requirement for reporting and disclosure requirements.

III. Is Issue Advocacy Protected Speech?

Although *Buckley* may be ambiguous as an original matter, subsequent cases tend to treat it as establishing that "issue advocacy" is constitutionally protected and cannot be subjected to campaign finance reporting and disclosure requirements. In a series of cases addressing the constitutionality of regulations prohibiting the use of corporate treasury funds for political expenditures, the Supreme Court has indicated that, if properly tailored, such regulations are constitutional as applied to express advocacy of candidates, but not as applied to issue advocacy. The Court has also distinguished *Buckley* in cases involving restrictions on issue advocacy. These decisions do not definitively resolve the question, however, and some state courts have upheld the application of reporting and disclosure requirements with respect to express advo-

cacy concerning ballot initiatives. Nonetheless, the majority of courts treat issue advocacy as protected speech, and it would be prudent to assume that issue advocacy is "off limits" for constitutional purposes.

The distinction between express advocacy of a candidate and issue advocacy has figured prominently in a series of decisions involving regulation of corporate political expenditures. Regulation of corporate expenditures typically takes the form of prohibiting the use of corporate treasury funds and requiring that political contributions and expenditures be made from segregated funds made up entirely of voluntary contributions. Such regulations rest on two purposes.[33] First, the use of corporate treasury funds is said to distort the political process because corporations can amass "massive war chests" based on the legal advantages of the corporate form and make expenditures that are disproportionate to the popularity of their political views. Second, the use of corporate funds for political purposes is seen as contrary to the interests of shareholders, who may be financially disadvantaged and who may not share the corporation's political views.

While the Supreme Court has accepted these justifications as sufficient to sustain the regulation of corporate expenditures in the context of express advocacy of political candidates, it has held them unconstitutional as applied to corporate expenditures for issue advocacy. In *First National Bank of Boston v. Belotti*,[34] the Court invalidated a ban on the use of corporate treasury funds for advocacy in connection with ballot initiatives.[35] The Court applied strict scrutiny because the ban substantially burdened speech and concluded that the state had not demonstrated a sufficiently corrosive effect from corporate expenditures on issue referenda to justify this burden. While the Court emphasized that preventing corporate speech on public issues was fundamentally inconsistent with the First Amendment,[36] it also recognized that limitations on corporate spending on behalf of candidates are broadly accepted,[37] and suggested that informing the electorate through disclosure of the source of corporate advertising was an available means of protecting the public interest.[38]

Subsequently, in *FEC v. Massachusetts Citizen's for Life, Inc (MCFL)*,[39] the Court held that a FECA provision prohibiting the use of corporate treasury funds for the purposes of influencing an election could not be applied to a small, non-profit corporation that did not engage the purposes of restrictions on corporations. In the course of its analysis, the Court also narrowly construed the provision as limited to "express advocacy of the election or defeat of a clearly identified candidate," reasoning that *Buckley's* application of the requirement to reporting and disclosure provisions "require[d] a similar construction of the more intrusive provision that directly regulates independent expenditures."[40] Finally, in *Austin v. Michigan Chamber of Commerce*,[41] the Court upheld a Michigan law barring corporate expenditures on behalf of political candidates. The Court accepted as compelling the asserted governmental interest in preventing the distortion of the political process, and concluded that the law was narrowly tailored to further that interest. Because *Austin* focused primarily on distinguishing *MCFL* and identifying the characteristics that make some nonprofit corporations constitutionally protected from the ban, the Court did not address the concept of express

advocacy.[42]

The Court has also distinguished between issue advocacy and express advocacy of candidates in other cases. First, in *Citizens Against Rent Control v. Berkeley*,[43] the Court invalidated a state law imposing limits on contributions to committees favoring or opposing ballot measures. The Court distinguished *Buckley*, emphasizing that the interest in preventing the reality or appearance of "quid pro quo" corruption, which sustained the contribution limits in *Buckley*, was limited to candidate elections, and did not extend to ballot measures that presented only issues.[44] The Court also indicated that disclosure of contributions to committees favoring or opposing ballot measures offered sufficient protection to the public.[45] Second, in *McIntyre v. Ohio Election Commission*,[46] the Court invalidated a ban on anonymous political communications as applied to a leaflet in opposition to a ballot issue. *McIntyre's* principal rationale was that the first amendment protected the right to distribute political literature anonymously, and the Court characterized the requirement of self-identification as a greater intrusion on speech than the reporting and disclosure requirements at issue in *Buckley*.[47] But the Court also distinguished *Buckley* on the grounds that the ban on anonymous political communications in *McIntyre* applied to issue advocacy, while *Buckley's* reporting and disclosure requirements were limited to express advocacy of a candidate or candidates.[48] *McIntyre* is not definitive on the application of self-identification requirements to issue advocacy, but the Court's reliance on this distinction in yet another context is further evidence that issue advocacy enjoys special constitutional protection from campaign finance regulation.[49]

Strictly speaking, none of these decisions forecloses the application of reporting and disclosure requirements to issue advocacy because each of them turned on the Court's conclusion that there was an insufficient relationship between the provision in question and the asserted state interests in regulating issue advocacy. With respect to expenditures from corporate treasury funds, *Belotti* found that the state had not demonstrated that corporate expenditures distorted the electoral process surrounding ballot issues, and *MCFL* involved FECA, which concerns only candidate elections. *Citizens Against Rent Control* reasoned that limiting contributions regarding ballot initiatives was not necessary to further the state's interest in preventing the reality or appearance of quid pro quo corruption. The constitutional analysis in *McIntyre* focused on the right of individuals to publish personal discussions of public issues anonymously, and the law's applicability to issue advocacy was just one of many factors the Court relied upon to distinguish *Buckley*. Moreover, the distinction between reporting and disclosure requirements and the provisions at issue in these cases relates to more than the government interests that support them. All of the restrictions in these cases imposed direct and substantial burdens on speech so as to subject them to strict scrutiny, while *Buckley* indicated that reporting and disclosure requirements imposed only incidental restrictions on speech and were therefore subject to intermediate scrutiny.[50] Thus, both *Belotti* and *Citizens Against Rent Control* identified reporting and disclosure as a less restrictive alternative means of preserving public confidence in the electoral process.[51]

In light of these considerations, several

state supreme court decisions have upheld reporting and disclosure as applied to independent expenditures that include express advocacy for or against ballot measures, even though communications supporting or opposing ballot measures are by definition issue advocacy.[52] In *Doe v. Mortham*,[53] for example, the Florida Supreme Court recently upheld a state law that applied reporting and disclosure requirements to independent expenditures "with respect to any candidate or issue," as construed by the court to apply only to express advocacy of candidates or ballot issues. The court in *Mortham* reasoned that the Supreme Court in *Buckley* "limited the reach of [FECA] to embrace only communications concerning 'a clearly identified candidate,' as opposed to a referendum issue, not because restrictions on issues are improper per se, but rather because [the reporting and disclosure provision] addresses 'expenditures,' and the definition of 'expenditure' [in FECA] by its very terms applies only to political candidates."[54] *Doe v. Mortham* does not discuss the interests that would support the application of reporting and disclosure requirements to independent expenditures respecting ballot issues, but other decisions have recognized the state interest in ensuring an informed electorate as compelling,[55] and emphasized that reporting and disclosure requirements are much less restrictive than contribution and expenditure limits.[56]

Notwithstanding these state court decisions, it seems unlikely that the United States Supreme Court would accept application of reporting and disclosure requirements to independent expenditures for issue advocacy, even if issue advocacy is limited to express advocacy for or against a ballot measure. *Mortham* emphasized every aspect of the Supreme Court decisions that might be read as permitting application of reporting and disclosure requirements to advocacy regarding ballot initiatives, much of which is dicta, and ignored the language of the Supreme Court decisions characterizing the discussion of issues as constitutionally protected. The Supreme Court's repeated reliance in various contexts on the distinction between express advocacy of candidates and issue advocacy, and its conclusion that the First Amendment protects issue advocacy against every form of regulation challenged to date, tend to suggest that issue advocacy has a special, constitutionally protected status. In the context of corporate expenditures, for example, the Court was not receptive to government interests that might be sufficient to support the regulation of issue advocacy, since the "corrosive" effect of corporate issue advertising and the concern for protecting shareholder interests are arguably present when corporations spend on issue advocacy, even if the concern for "quid pro quo" corruption involving candidates is not.[57] For this reason, many lower courts treat the regulation of issue advocacy in any form as constitutionally impermissible.[58]

Because Kansas has not adopted and is not to my knowledge considering reporting and disclosure laws regarding ballot initiatives, but rather is focused on the regulation of candidate elections, it is unnecessary to determine in this context whether *Mortham* and similar cases are properly decided. Even those cases do not suggest that the reporting and disclosure laws may be applied to issue advocacy in general (as opposed to express advocacy for or against ballot measures), or that the "express advocacy" requirement (or its equivalent) is unneces-

sary.[59] Thus, however the state chooses to define the independent expenditures subject to reporting and disclosure requirements, it must avoid a definition that would extend the requirements to the mere discussion of issues. The more important questions for the state are whether reporting and disclosure requirements may only be applied to ***express*** advocacy (of the election or defeat of a clearly identified candidate), and whether express advocacy is limited to the magic words or their equivalent. These interrelated questions are addressed in the following section.

IV. Are Express Advocacy and/or the Magic Words Constitutionally Required?

Buckley's requirement that advocacy be "express" was adopted in response to the inherent vagueness of FECA's language, which applies reporting and disclosure requirements to independent expenditures "for the purposes of influencing an election."[60] As noted above, the vagueness question and *Buckley's* response to it are distinct from the question of whether issue advocacy is constitutionally protected. The two are interrelated, however, because the Court raised the possibility that FECA might apply to general discussions of issues and candidates as justification for construing the statute narrowly to avoid vagueness problems.[61] But even if reporting and disclosure requirements may not constitutionally be applied to issue advocacy, the question remains whether there are other ways to distinguish between more pointed exhortations to vote and general discussion of issues and candidates. The case law on this question is not entirely clear. *MCFL* and a number of lower court decisions consider the express advocacy requirements under FECA, but despite some broad language these cases should be read as addressing only the meaning of FECA, not constitutional standards. Other cases address the constitutionality of particular state regimes, but few of these cases focus on the express advocacy question because the laws involved clearly would apply to issue advocacy and other protected speech.[62]

· The Supreme Court applied the express advocacy requirement with respect to corporate spending limits under FECA in *MCFL*, concluding that a flyer urging voters to vote for pro-life candidates and identifying candidates fitting that description constituted express advocacy.[63] The Court explained that "*Buckley* adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons,"[64] and that *Buckley* "concluded . . . that a finding of 'express advocacy' depended on the use of language such as 'vote for,' 'elect,' 'support,' etc."[65] Applying this understanding of *Buckley*, the Court in *MCFL* found that the flyer contained the sort of pointed "exhortation" to vote required by *Buckley* because it provided an "explicit directive" to "vote for these (named) candidates," and thus was not "a mere discussion of public issues that by their nature raise the names of certain politicians."[66] While the Court recognized that the flyer's message was "marginally less direct than 'Vote for Smith,'" that did not change its "essential nature."[67] Having thus rejected the argument that the flyer was not covered by FECA's ban on corporate expenditures, the Court went on to hold that the ban could not constitutionally be applied to *Massachusetts Citizens for Life* because it was a nonprofit, noncommercial entity that did not pose the dan-

gers addressed by the limitations on corporate expenditures.[68]

MCFL tends to equate express advocacy with the magic words, but it is not clear on this point and provides even less insight into the constitutional status of express advocacy and the magic words. Because the flier in question told its audience to "vote" in a particular way, it contained one of the magic words, and the case may therefore be read as a straightforward application of the magic words requirement with little or no import as to whether a broader definition would be statutorily or constitutionally permissible. While the Court's general description of *Buckley* implies that only the magic words or their equivalent satisfy the express advocacy requirement, the Court also observed that the linkage in the flyer between the exhortation to vote pro-life and the clearly identified candidates was not direct. In that sense, the exhortation to vote ***for a candidate or candidates*** was, in a sense, implicit. Thus, there is some division of authority in the lower courts as to whether *MCFL* requires the magic words or would support a more open-ended, "objective" definition of express advocacy. Even if *MCFL* requires the magic words, however, its constitutional, as opposed to statutory, implications remain unclear because the Court was applying FECA and linked its analysis to the prior construction of that statute in *Buckley*.

For the same reason, the constitutional implications of lower court decisions concerning the application of the express advocacy requirement under FECA remain unclear. For the most part, the courts interpret *Buckley* and *MCFL* as requiring the magic words or their equivalent to support the application of FECA, although even this point is not definitively resolved. The broadest definition of express advocacy can be found in *FEC v. Furgatch*,[69] a relatively early decision in which the United States Court of Appeals for the Ninth Circuit rejected an absolute requirement that the magic words "or their nearly perfect synonyms" were required for a finding of express advocacy because such a rigid construction would make it too easy to evade FECA.[70] The court instead adopted an "objective" test for express advocacy under which a communication "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."[71] Applying this test, the court upheld the FEC's application of FECA to the advertisement in question, which criticized President Carter's "degradation" of the office and urged voters "don't let him do it." Critical to the court's analysis, however, was its conclusion that "don't let him do it" was express advocacy of some action and that in context it was clear that this action was voting against President Carter.[72]

In both individual cases and by regulation the FEC has relied on *Furgatch* to support a relatively broad definition of express advocacy that is not limited to the magic words, but these efforts have met with scant success. For example, in *FEC v. Christian Action Network (CAN)*[73] the United States Court of Appeals for the Fourth Circuit resoundingly rejected the FEC's effort to apply reporting and disclosure requirements to an advertisement that implicitly criticized President Clinton and Vice President Gore's perceived pro-homosexual agenda, awarding attorney fees against the agency under the Equal Access to Justice Act

(EAJA) because the FEC's position was not "substantially justified." The court emphasized that the advertisement contained no express words advocating that the audience vote in any particular way, and clearly was protected issue advocacy.[74] Indeed, the court was sharply critical of FEC's argument that a communication did not have to contain explicit words of advocacy to constitute express advocacy, if the message were clear to the ordinary viewer.[75] Other decisions have also held that communications that did not contain express words of advocacy were beyond the reach of FECA.[76] Likewise, an FEC regulation that attempted to define express advocacy without invoking the magic words or otherwise limiting the concept to communications that contain explicit words of advocacy[77] has been invalidated by the courts.[78]

Because the latter cases tend to equate express advocacy with the use of the magic words or their equivalent, it is sometimes suggested that they are in conflict with *Furgatch* as to whether express advocacy is limited to the magic words.[79] But the federal courts of appeals at least have tended to read *Furgatch* as supporting a strict construction of FECA, and have been careful to distinguish it on the grounds that the communication in *Furgatch* contained express advocacy of the election or defeat of a clearly identified candidate.[80] Conversely, the cases do not squarely hold that express advocacy is only the magic words, but rather emphasize that express advocacy must include explicit words of advocacy.[81] Thus, while it is probably incorrect to say that the magic words formulation is ***the*** definition of express advocacy under FECA, it is clear that express advocacy means what it says: to trigger the application of FECA, a communication must explicitly exhort the audience to vote for or against a candidate. Precisely what words and phrases would qualify as sufficiently explicit remains unclear, but *Furgatch* probably represents the broadest possible reading of FECA.

It is important to bear in mind, however, that these cases are construing the scope of the FEC's authority under FECA, and not the constitutional limits of campaign finance regulation.[82] Although they often stress the constitutional aspects of the express advocacy requirement, particularly the principle that issue discussion must be protected,[83] it would be a mistake to assume without more that the refinement of the express advocacy requirement under FECA determines the constitutional parameters of campaign finance regulation.[84] Because *Buckley's* express advocacy requirement and magic words formulation were the product of the particular statutory language and purpose of FECA, the courts' subsequent construction and application of those concepts do not necessarily resolve the question of whether different statutory language that did not require express advocacy might be sufficiently clear and precise to avoid vagueness and overbreadth problems. Note, however that if *Buckley* and *MCFL* are read as imposing "express advocacy" as a constitutional requirement for any regulation of independent political expenditures,[85] then the courts' subsequent interpretation of this phrase in the context of FECA would have a more direct constitutional dimension.

The constitutional questions surrounding the express advocacy requirement are presented more directly in the context of decisions involving state campaign finance regulation,

and several lower court decisions address state reporting and disclosure requirements.[86] These cases tend to treat express advocacy as a constitutional requirement, but because the laws in each case plainly applied to protected speech and were therefore overbroad, they do not, strictly speaking, preclude the possibility that other statutory schemes could survive constitutional scrutiny without an express advocacy requirement. Moreover, aside from the recent Kansas decision that will be discussed in detail later, none of these cases considers whether the concept of express advocacy is limited to the magic words or their equivalent. Thus, even if express advocacy is required, a state might still be able to define express advocacy more broadly than the magic words formulation. In any event, the precise constitutional limits of a state's authority to impose reporting and disclosure requirements remains unresolved.

An excellent example of the issues raised by state reporting and disclosure laws is *Virginia Society for Human Life v. Caldwell*,[87] a recent decision upholding 1996 amendments to Virginia's campaign finance laws. The amendments tracked the language of FECA, imposing reporting and disclosure requirements on expenditures "for the purpose of influencing the outcome of an election,"[88] and therefore suffered from the identical vagueness and overbreadth problems addressed in *Buckley*. The federal district court initially construed the statute narrowly and dismissed the case on the grounds that the plaintiffs lacked standing to challenge the constitutionality of the amendments because they did not engage in express advocacy, but the court of appeals considered it inappropriate for the federal courts to construe the state statute, and certified the issue to the Virginia Supreme Court.[89] That court concluded that because the legislature was aware of *Buckley* and incorporated the very language that had been narrowly construed in that decision, it must have intended that the statute be construed "so as to have no application to individuals or groups that engage solely in issue advocacy and that do not expressly advocate the election or defeat of a clearly identified candidate."[90] Based on this authoritative construction of the state law, the court of appeals affirmed the district court's dismissal of the case for lack of standing.[91]

Cases such as *Caldwell* tend to treat "express advocacy" as a constitutional requirement, but they do not definitively resolve the issue, or tell us whether "express advocacy" is limited as a constitutional matter to the magic words. Thus, for example, in *West Virginians for Life v. Smith*,[92] the district court invalidated a statute creating a presumption that voter guides or scorecards constituted express advocacy as overbroad because the presumption would encompass issue advocacy. In a similar vein, the district court in *Vermont Right to Life Committee, Inc. v. Sorrell*,[93] "narrowly construed" a statute imposing reporting and disclosure requirements on any communication which "expressly or implicitly advocates the success or defeat of a candidate" by limiting it to express advocacy.[94] Because all of these statutes were plainly susceptible of application to constitutionally protected discussion of issues and candidates, the courts involved were not required to determine the degree to which the statutory construction of *Buckley*, *MCFL*, and the lower court FECA decisions determines constitutional parameters of state laws. Thus, the cases do not necessarily tell us whether a

more carefully crafted statute might conceivably avoid vagueness and overbreadth problems without using the express advocacy limitation, and they do not specifically require states to use the magic words formulation of *Buckley* as the definition of express advocacy.

I do not believe that *Buckley* and its progeny should be read as holding that express advocacy and the magic words are constitutional requirements in every case. First and foremost, in *Buckley* and *MCFL* the Supreme Court did not say that the First Amendment limited reporting and disclosure requirements to express advocacy; it said that the statutory provisions defining expenditures for purpose of FECA as including those made "for the purpose of influencing an election" would be unconstitutionally vague unless narrowly construed, and that adopting the express advocacy requirement would eliminate that problem. One of the underlying justifications for narrowly construing a statute rather than invalidating it is to avoid resting the decision on constitutional grounds, and reading a narrowing construction as stating constitutional requirements undermines that justification.[95] Second, the incorporation of the express advocacy requirements with respect to reporting and disclosure requirements would appear to be driven to a significant extent by distinctive statutory features of FECA, including its language, structure, and purposes. The phrase, "for the purposes of influencing an election" was applicable to various aspects of FECA, including limits on independent expenditures, reporting and disclosure requirements, and restrictions on corporate spending. Thus, it was necessary to construe this phrase in the same way in all three contexts, even though each context presented different constitutional issues. In particular, *Buckley* recognized that reporting and disclosure requirements were subjected to a lower level of scrutiny and served broader interests than limits on contributions and expenditures, which might otherwise justify a greater degree of vagueness and a broader reach for such requirements. Indeed, in upholding the reporting and disclosure requirements as narrowly construed, the Court in *Buckley* emphasized that reporting and disclosure requirements were a less restrictive means than contribution and expenditure limits of ensuring public confidence in the electoral process, and that reporting and disclosure requirements also served the important interests of informing the electorate.[96]

If we put the vagueness and overbreadth issues to one side for a moment, a strong case can be made for the constitutionality of applying reporting and disclosure requirements to advertisements that effectively advocate for or against a candidate without using the magic words or their equivalent. The key point here is that not every communication that avoids the use of explicit words of advocacy is by definition the "mere discussion of issues and candidates" and therefore constitutionally protected. When a communication has the purpose and effect of advocating the election or defeat of a candidate, it engages the interests that *Buckley* recognized as sufficient to sustain the application of reporting and disclosure requirements. In particular, if the state interest in informing the electorate justifies reporting and disclosure of express advocacy, it would also extend to preventing evasion of the requirements through clear, implicit advocacy. Similarly, the goal of facilitating enforcement of valid contribution

and expenditure limits also extends to such cleverly worded advocacy. Consider, for example, the Kansans for Life advertisement that is the center of the current controversy. Let us assume hypothetically that the money for this advertisement came from a high ranking member of David Miller's campaign staff. First, it would seem that this information would be relevant to the audience that hears this advertisement, and the state interest in an informed electorate would justify its disclosure. Second, the contribution is arguably a coordinated expenditure subject to contribution limits, but without reporting, the Governmental Ethics Commission might not discover it. Of course, any statute attempting to reach such advocacy would have to be drafted to avoid the vagueness and overbreadth problems that infected the language of FECA,[97] but assuming that can be done, it is hard to see why such a law would not be valid under *Buckley*.

Notwithstanding these potentially powerful arguments against the treatment of express advocacy and the magic words as constitutional requirements, defending a statute that goes beyond express advocacy and/or the magic words would be an uphill battle. First, there is little or no direct authority for focusing on the statutory, as opposed to constitutional, components of the FECA cases.[98] Even the cases that expressly limit their decisions to the scope of FECA do not directly state that the constitutional limits of reporting and disclosure requirements might be broader.[99] Second, there is a great deal of language in some of the cases equating the constitutional and statutory issues, or at least emphasizing the constitutional dimensions of the statutory construction issue. Although this language may be criticized as ill-considered dicta based on faulty or unexplained assumptions, its repetition in a number of cases may be regarded as authoritative.[100] Finally, even if express advocacy and the magic words are not constitutionally required, alternative definitions are likely to be either overbroad or unconstitutionally vague unless they are very carefully drafted.[101]

V. *Gaede* and the Scope of Kansas Reporting and Disclosure Laws

The case law is thus decidedly unclear about the extent to which states may apply reporting and disclosure requirements to clear implicit advocacy like the advertisement at issue in *Kansans for Life v. Gaede*.[102] Insofar as this sort of advertisement sends a clear message advocating the election or defeat of a candidate, it is not the "mere discussion of issues and candidates in relation to them" that *Buckley* and its progeny indicate is constitutionally protected. But because the message is implicit, it remains unclear whether any regulatory approach other than an express advocacy limitation will satisfy the vagueness and overbreadth doctrines. The issue was brought into sharp focus in the *Gaede* litigation, and the district court's rulings that the advertisement was constitutionally protected issue advocacy and that the Governmental Ethics Commission policy was unconstitutional have profound implications for the future of reporting and disclosure requirements in the state. As I will develop more fully in this part of the Article, I believe the district court's analysis in *Gaede* rests on a fundamentally flawed premise – that any communication which does not contain express advocacy is by definition constitutionally protected issue advocacy – and that this

faulty premise leads the court to focus its analysis on the wrong questions. This is not to say that the result in *Gaede* is necessarily wrong, because the enforcement policy may be invalid and therefore insufficient to sustain application of the reporting and disclosure requirements, but the advertisement in question should not be regarded as constitutionally protected issue advocacy and the court's analysis of the enforcement policy has unnecessarily broad constitutional implications.

While the Kansas statutes arguably adopt a narrow "express advocacy" test for the application of reporting and disclosure requirements,[103] the Kansas Governmental Ethics Commission, which is responsible for administering the law, gave it a broader interpretation in the administrative ruling that gave rise to the *Gaede* litigation. As noted above, Kansans for Life ran a radio advertisement that implicitly advocated the nomination of David Miller over Governor Bill Graves during the heated primary contest between the two.[104] After an anonymous complaint was filed against the advertisement, a staff member of the Governmental Ethics Commission contacted Kansans for Life and suggested that it seek an advisory opinion concerning the applicability of reporting and disclosure requirements to the ad.[105] When Kansas for Life followed this advice, the Commission issued a ruling in which it found that the advertisement constituted express advocacy.[106] In particular, the Commission adopted an enforcement policy under which "[a] communication which, when viewed as a whole, leads an ordinary person to believe that he or she is being urged to vote for or against a particular candidate for office, will be deemed to expressly advocate the nomination, election or defeat of a clearly identified candidate."[107]

Kansans for Life challenged the application of the reporting and disclosure requirements to its advertisement, and the district court in *Gaede* agreed, concluding that the advertisement in question was protected issue advocacy and that the Commission's definition was unconstitutional.[108] After discussing *Buckley* and *MCFL* under the apparent assumption that their discussion of express advocacy represented constitutional requirements,[109] the Court concluded that the advertisement was protected speech:

> To reiterate, the July ad at issue in this case contains none of the "buzz" words or phrases which the Supreme Court or the Kansas Legislature have listed as trademarks of "express advocacy." It does not expressly exhort the listener to vote for, elect, or support one candidate or another. A reasonable and ordinary person would imply [sic] from the ad that plaintiff favors one candidate over the other. But, the ad does not expressly advocate the election or defeat of a candidate or direct the public to take action for or against an identified candidate. The ad contrasts the positions of the candidates on the issue of abortion and asserts that one candidate is honestly stating his position on the issue while the other candidate is not. Thus the ad discusses an issue while disparaging one candidate and commending his opponent. However, the question of whether a candidate's ads are truthful and whether a candidate is candidly

> stating his positions during a campaign are very common "issues" in an election season. Those issues are the subject of the message. Because the ad addresses those issues without expressly advocating the election or defeat of a candidate, the court finds that it was unconstitutional for defendants to regulate this speech by directing that a report be filed which discloses who paid for the communication.[110]

The court also rejected the Governmental Ethics Commission's enforcement policy, which the court interpreted as making reporting and disclosure requirements applicable "if reasonable people could disagree whether the communication urges a vote for or against a particular candidate," as unconstitutionally vague.[111] After contrasting "one approach" to express advocacy that "focuses on the use of the 'buzz' words or 'magic' words," with "[a]nother, arguably broader approach" taken in *Furgatch,* the court concluded that "the enforcement policy described in the advisory opinion at issue does not conform to any of the approaches described above."[112]

This analysis appears to rest on the premise that any communication which does not contain express advocacy is by definition constitutionally protected issue advocacy. In my view, however, that premise misreads *Buckley* and its progeny.[113] *Buckley* and *MCFL* interpret *FECA* to require that advocacy be express not because everything else is protected issue advocacy, but so as to foreclose the possibility that the statute might be applied to the mere discussion of issues and candidates in relation to issues. Thus, even if the express advocacy requirement is constitutionally required, it is not because it is constitutionally impermissible to regulate anything other than express advocacy, but because any other approach would be inherently vague and/or susceptible to overbroad application. Indeed, *Buckley* itself recognized that the express advocacy construction "does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result."[114] In other words, there is a gray area between express advocacy, which may be subjected to reporting and disclosure requirements, and mere discussion of issues, which may not. This area includes partisan discussions (such as clear implicit advocacy) which might in principle be subjected to reporting and disclosure requirements, but which are difficult to distinguish from mere discussion of issues and candidates that is constitutionally protected. The district court's failure to recognize this constitutional gray area leads it to ask the wrong questions and therefore give the wrong answers in both parts of its analysis.

Consider first the Court's conclusion that the advertisement in question constituted protected issue advocacy. In describing the constitutional framework, the court's discussion of *Buckley* and *MCFL* did not even mention that the express advocacy requirement was adopted as a matter of statutory construction, much less address the complex relationship between that construction and the constitutional principles that drove it.[115] For purposes of this discussion, however, the more fundamental problem was the court's analysis of the particular advertisement in question and its conclusion that the advertisement was protected issue advocacy.

This analysis, reprinted in its entirety above,[116] rested on two considerations: (1) that there were no express words of advocacy; and (2) that the advertisement contained a discussion of issues and candidates in relation to those issues. Critically, however, even if express advocacy is constitutionally required, and even if both of these points are taken as a given, it does not follow that the advertisement is constitutionally protected issue advocacy.

As discussed above, the absence of words of express advocacy does not mean that a communication is the mere discussion of issues and candidates in relation to issues so as to be constitutionally protected. To illustrate this point, imagine that Kansans for Life had, instead of broadcasting the radio advertisement, purchased and distributed bumper stickers that said "David Miller" or "David Miller in '98," or even "David Miller for Governor." None of these messages say "vote for" or "elect" or contain any of the magic words or other equally explicit words of advocacy. Yet it could hardly be argued that they do not "exhort" the audience to vote for David Miller. The exhortation is implicit, but nonetheless clear and unmistakable because of the context in which the message is communicated.[117] A communication that conveys a clear and unmistakable message of advocacy is more than the mere discussion of issues and candidates in relation to those issues that *Buckley* and its progeny indicate receive constitutional protection. The absence of words of express advocacy may take a communication beyond the scope of FECA.[118] The absence of words of express advocacy may make it impossible for states to apply reporting and disclosure requirements to a communication, if only an express advocacy requirement can avoid vagueness and overbreadth problems. But the absence of words of express advocacy is not, by itself, sufficient to characterize a communication as constitutionally protected issue advocacy.

Conversely, the presence of some discussion of issues and candidates in relation to issues is not, standing alone, sufficient to place a communication beyond the reach of reporting and disclosure requirements. *Buckley* and *MCFL* clearly assume that if there is a "pointed exhortation to vote,"[119] then there is express advocacy, even if the advertisement in question also discusses issues. It is the presence of express advocacy (e.g., the magic words) that triggers the application of FECA's reporting and disclosure requirements under *Buckley,* and there is no suggestion in the opinion that the lack of issue discussion is also a prerequisite. For example, if the advertisement at issue in *Gaede* were aired with the identical text, but the phrase "vote for David Miller" were added, there can be little doubt that this would constitute express advocacy subject to reporting and disclosure laws. A contrary reading would render reporting and disclosure requirements meaningless, since any communication containing express advocacy could also discuss issues and candidates in relation to them.[120]

To resolve the question whether the advertisement is constitutionally protected issue advocacy, the court should have asked whether the advertisement went beyond the mere discussion of issues and candidates in relation to them to advocate the election or defeat of a candidate or candidates. It seems to me that it does. The message of advocacy in the advertisement is hardly less clear than the bumper sticker in the example above. It compares two

candidates for the Republican nomination for governor in the midst of a heated primary campaign, calling one candidate a liar regarding his position on abortion and extolling the other as a true supporter of the pro-life cause. It includes references to campaign rallies and sets itself up as a response to misleading campaign advertisements, thus placing itself squarely in the middle of the campaign. It is true that there are no magic words, but in context the message of support and the implied directive to vote for David Miller is unmistakable.[121] At the very least, the issue is far more difficult than the court's analysis suggests.

The problematic aspects of the court's reasoning in support of its conclusion that the advertisement was protected issue advocacy are all the more troubling because the analysis was unnecessary to the decision. The validity of the Commission's extension of reporting and disclosure requirements to the advertisement was dependent on the validity of the Commission's enforcement policy. If that policy is invalid, regardless of the reason, then there is no basis for applying the requirements to the advertisement. The court should have resolved this antecedent question first, and if the court decided (as it did) that the policy was constitutionally or otherwise invalid, it should have stopped there to avoid deciding an unnecessary constitutional question.

The court's ultimate conclusion that the enforcement policy was invalid may be correct, but the court's analysis of issue is beset by similar problems. First, because the court mistakenly assumed that the absence of express words of advocacy mean that a communication is by definition constitutionally protected issue advocacy, it decided this issue on unnecessarily broad constitutional grounds. The constitutional issues would have been avoided altogether if the Commission's policy exceeded its statutory authority, and the court might have construed the statute narrowly, abstained, or certified the question of the statute's proper interpretation. Second, assuming that the constitutional validity of the policy had to be addressed, the court mistakenly treated the FECA cases as establishing controlling constitutional standards without addressing the difficult question of whether the express advocacy requirement is the only means to avoid vagueness and overbreadth problems. Third, the court read the enforcement policy in the broadest possible way, rather than attempting to preserve its constitutionality through a narrowing construction.

With respect to the first point, the Kansas statutes defining express advocacy for purposes of reporting and disclosure requirements are ambiguous and the Commission's policy arguably exceeds its authority. Current Kansas law requires a report of receipts and expenditures for persons (other than certain committees that are subject to general reporting requirements) who make any communication that "expressly advocates the nomination, election or defeat of a clearly identified candidate,"[122] and further defines express advocacy as any communication "which uses phrases including, ***but not limited to***" a list of explicit phrases patterned on *Buckley's* magic words.[123] While the specified phrases are consistent with *Buckley,* the legislature clearly intended that the reporting and disclosure requirements would not be limited to communications containing the specified phrases, and it is unclear what additional words and phrases might be covered. The statutory language might be read as limited to

similar words and phrases of explicit advocacy,[124] both as a matter of general construction[125] and in light of the constitutional problems a broader interpretation might raise. If so, then the Commission's policy was contrary to the statute and invalid on that basis. On the other hand, this interpretation is not inevitable, especially since the wording of the provision does not directly state that other covered words and phrases must be substantially similar to those listed, and one might expect such a limitation if the legislature had intended it.

When confronted with ambiguous state statutes that have been challenged on constitutional grounds, there are several options open to the federal courts.[126] In some cases, federal courts have construed the state statutes themselves, usually imposing a narrowing construction to avoid constitutional problems. In others, courts have certified the issues to state courts or abstained under the *Pullman* abstention doctrine. The court in *Gaede,* however, assumed that the constitutional issues were unavoidable and did not pursue any of these alternatives. The district court did not even consider the possibility that the court itself might construe the statute narrowly, apparently because neither party suggested it.[127] The court did, however, expressly reject the Commission's argument that it should abstain, on the ground that "delay from abstention would perpetuate the alleged chilling effect on First Amendment rights."[128] The court did not discuss certification to the Kansas Supreme Court as an option, although we might infer that it would have rejected this option because certification would also cause delays that might raise concerns about the perpetuation of the policy's chilling effect. The correct response for a federal judge in a situation where a narrowing construction of state law might avoid First Amendment problems is a difficult question, but one might ask whether the court would have disposed of these alternatives so easily if it had regarded the constitutional question as a difficult one.

Unfortunately, the court did not appear to recognize the difficulty of the constitutional question because it simply assumed that express advocacy is constitutionally required. The court's discussion of the competing approaches to defining express advocacy did not seem to recognize that the narrow question in those cases is the scope of the FEC's authority under FECA, and instead assumed that their interpretation of FECA's express advocacy requirement stated constitutional standards.[129] This assumption in turn rests on the mistaken premise, discussed above, that any communication that does not contain express advocacy is constitutionally protected issue advocacy.[130] Once the proper constitutional underpinnings of the express advocacy requirement are recognized, the question becomes much more difficult. It may be that express advocacy is a constitutional requirement, and that only the magic words formulation can satisfy that standard, but only if there is no other potential formulation that satisfies the vagueness and overbreadth doctrines. While there are some passages in *Buckley* and *MCFL* that might support such an argument, the issue is not definitively resolved by those decisions, the lower court decisions under FECA, or cases addressing state reporting and disclosure laws.[131]

Finally, even assuming that express advocacy as construed by the FECA cases is a constitutional requirement, the court interpreted the

enforcement policy broadly in a manner certain to render it unconstitutional. Specifically, the court read the policy as applying reporting and disclosure requirements whenever reasonable people might disagree about whether a communication advocates the election or defeat of a clearly identified candidate.[132] A statute that permits regulation of expressive activity whenever reasonable persons could disagree about its meaning is unconstitutionally vague virtually by definition.[133] But the Governmental Ethics Commission policy does not say that a communication is express advocacy if reasonable people could disagree; it says that a communication is express advocacy if it "leads an ordinary person to believe that he or she is being urged to vote for or against a particular candidate."[134] This language is just as susceptible to a narrow interpretation, excluding cases where reasonable people could disagree and confining express advocacy to cases where the message is clear and unambiguous as it is to the district court's broad reading of it. In any event, the court's broad interpretation of the policy means that the decision did not resolve the question whether alternative formulations might be permissible. Indeed, the court acknowledged the potentially conflicting approaches to defining express advocacy under FECA, and while it may have cast some doubt on the *Furgatch* approach, the Court ultimately concluded that the policy was inconsistent with either approach. The Court distinguished *Furgatch* with the simple statement that the policy did not "restrict regulation to advertisements which can only be reasonably interpreted as advocating the election or defeat of a candidate; which contain a clear plea to action; and which are unmistakable and unambiguous."[135] Thus, even given its assumption that the FECA cases represent constitutional standards, *Gaede* does not definitively foreclose alternative definitions that would meet these requirements.

Regardless of the concerns discussed above, *Gaede* holds that the advertisement in question is protected issue advocacy and that the Governmental Ethics Commission enforcement policy is unconstitutionally vague. By invalidating the Commission's policy, *Gaede* revitalizes the interpretive issues raised by the statute itself, which the court did not discuss. In all likelihood, *Gaede* means that the phrase "but not limited to" in the current definition of express advocacy must be read as requiring the presence of equivalent words or phrases to those listed in the statute, or at the very least, to other phrases that contain "explicit" words of advocacy. Otherwise, the statute would almost certainly be unconstitutionally vague because it does not clarify what kinds of communications, other than those containing the magic words or their equivalent, would constitute explicit advocacy.[136] A court confronted with this question would probably construe the statute as limited to the magic words or their equivalent to avoid constitutional difficulties. The question remains whether there is any constitutional option open to the legislature if it wishes to expand the reach of reporting and disclosure requirements beyond the magic words or their equivalent. I will address that question in the final section of this article.

VI. Alternative Definitions of Advocacy

As the foregoing discussion demonstrates, legislative efforts to expand the reach of reporting and disclosure requirements must overcome significant constitutional hurdles. Even under

the most favorable reading of the cases, the definition of the communications subject to such requirements must be written so as to exclude mere discussion of issues and candidates, lest they be deemed overbroad, and yet clearly enough to avoid vagueness problems. And while I do not believe that *Buckley* and *MCFL* should be read as requiring express advocacy in all cases, or that the definition of express advocacy in the FECA cases is controlling on the constitutional issues, many lower court decisions (like *Gaede*) do so without discussion, and other cases mingle the constitutional and statutory considerations.[137] If these cases are taken as controlling authority, then express advocacy is constitutionally required, and depending on the viability of the *Furgatch* approach, express advocacy may have to be defined in terms of the magic words or their equivalent. In light of these concerns, the safest course would be to confine the scope of reporting and disclosure requirements to the magic words or their equivalent,[138] even if this means that cleverly worded advertisements can evade reporting and disclosure requirements. If the legislature believes – as suggested by bills introduced in the both the House and Senate this session[139] – that such advertisements represent a serious threat to the integrity of the electoral process, it may nonetheless wish to define express advocacy more broadly. Such a definition of express advocacy would have to be carefully crafted and still might be held unconstitutional.

Even assuming that the magic words or their equivalent are not constitutionally required, drafting a constitutional definition of express advocacy presents a difficult task because of the interaction between the vagueness and overbreadth requirements. To avoid vagueness, a clear, bright-line definition is required; that is the genesis of the express advocacy requirement. But if such a definition is drawn broadly enough to reach implicit advocacy, it is likely to be overbroad. Consider, for example, the "name or likeness" approach used in some recent campaign finance reform efforts, which would define express advocacy in terms of the use of a candidate's name or likeness within a specified number of days before an election.[140] Such a statute is not vague because anyone who read it would know what constituted express advocacy. But such a definition of express advocacy, standing alone, is clearly overbroad because it would make reporting and disclosure requirements applicable to many communications that are not advocacy at all (such as newspaper articles or neutral information) or that include "mere" discussion of issues and candidates.[141] But if the legislature attempts to tailor the definition of express advocacy to avoid mere discussion of issues and candidates while reaching cleverly worded advertisements that advocate the election or defeat of a candidate without using the magic words, the definition will necessarily be dependent to some extent upon interpretation and would arguably be vague.[142] In the final analysis, it may not be possible to draft a definition that reaches cleverly worded advertisements without violating either the overbreadth or vagueness doctrine.[143]

House Bill No. 2022 and Senate Bill No. 23, which were introduced this legislative session, attempt to address these concerns. Even assuming that express advocacy and the magic words are not constitutional requirements, it is unclear whether they are constitutional. Both

bills would amend the definition of express advocacy in Kan. Stat. Ann. Supp. 25-4143(h) in substantially identical ways. Each version provides that express advocacy includes three types of communications. First, express advocacy includes any communication using certain specified phrases of explicit advocacy.[144] This is the magic words approach, and as such, this part of the definition probably does not present any constitutional problems, even under the strictest constitutional reading of *Buckley* and its progeny.[145]

Second, express advocacy also includes "any communication of campaign slogans or individual words, which in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, including, but not limited to, posters, bumper stickers and advertisements which state:

(A) "Smith's the one";
(B) "Jones '98";
(C) "Smith/Jones";
(D) "Jones!"; or
(E) other similar communications;. . . ."[146]

This component of the express advocacy definition is somewhat more problematic.[147] It appears to be a novel approach – at least none of the cases I found addressed statutes incorporating such a definition or the application of FECA to such communications. Although it is difficult to know what inference should be drawn from the absence of cases addressing the issue,[148] the question of slogans and bumper stickers provides an excellent illustration of why the express advocacy requirement as construed under FECA should not be regarded as establishing the constitutional standard for reporting and disclosure requirements.

As noted above, slogans and bumper stickers of this sort convey a clear and unmistakable exhortation to vote for the identified candidate or candidates and are therefore substantially related to the recognized interests served by reporting and disclosure requirements. But that message is not express. There are no explicit words telling the audience to vote any particular way, however clear that message may be. Thus, if the Constitution truly required express advocacy as defined under the FECA cases, the state could not constitutionally apply reporting and disclosure requirements to independent expenditures for bumper stickers or advertisements consisting entirely of a candidate's name or campaign slogan. It seems to me if reporting and disclosure requirements are constitutional in principle, then the state must be able to apply them to bumper stickers and campaign slogans. Of course, the state must do so through a statute or regulation that satisfies the twin *Buckley* concerns of overbreadth and vagueness. The provision quoted would stand a reasonably good chance of surviving such an inquiry. Slogans, posters, bumper stickers, or advertisements using them, cannot possibly be the mere discussion of issues and candidates in relation to them, and by specifying these communications the bill would appear to avoid overbreadth problems.[149] The specificity of the provision, including the examples, also helps to avoid vagueness problems because the limited scope of the provision is reasonably clear.[150] Thus, I believe this provision is likely constitutional, provided that the magic words or their equivalent (i.e., explicit words of advocacy) are not constitutionally required in every case.

The most expansive provision of the bills is the third paragraph, under which express advocacy includes any communication that,

> when taken as a whole and with limited reference to external events, such as proximity to an election, only may be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates because:
> (A) The electoral portion of the communication is unmistakable, unambiguous and suggestive of only one meaning; and
> (B) reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates or encourages some other kind of action.[151]

This provision is modeled after the regulations adopted by the FEC, and may do as well as possible at navigating the shoals of overbreadth and vagueness.[152] It avoids overbreadth through language that prevents application to issue advocacy, requiring (1) that the communication may ***only*** be interpreted as advocating the nomination, election, or defeat of a clearly identified candidate; (2) that the message must be ***unmistakable, unambiguous, and suggestive of only one meaning***; and (3) that ***reasonable minds could not differ*** as to whether the action advocated is the nomination, election or defeat of a candidate or candidates.[153] But even if the provision is not overbroad, it may be unconstitutionally vague.

In particular, this definition of express advocacy necessarily requires interpretation of the message sent by a given communication, and given the nature of language there is an inherent uncertainty in any standard dependent upon the interpretation of the speaker's message. Indeed, while it might seem there could be no interpretive uncertainty regarding a communication that met the statutory requirements, such certainty may disappear in practice. Consider, for example, the Kansans for Life advertisement at issue in *Gaede*. Many observers, myself included, might conclude that the message could only be interpreted as advocating the nomination of David Miller, that the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning, and that reasonable people would have to agree that it advocates the nomination of David Miller. But the district court in *Gaede* apparently did not, characterizing the veracity of a candidates' statements to be an issue and the discussion of that issue to be protected speech. A prospective speaker may thus be quite uncertain as to whether a particular communication, especially one that commented favorably or unfavorably on a candidate in proximity to an election, would meet this definition. This is not to say that the provision is necessarily unconstitutionally vague, but rather that even the most carefully crafted statute is likely to raise difficult constitutional questions.[154]

In light of *Gaede*, moreover, it is possible that the District Court of Kansas would regard the definition as unconstitutional because it failed even the *Furgatch* approach. In particular, *Gaede* found that even under the *Furgatch* approach the Governmental Ethics Commission's policy did not "restrict regulation to advertisements which can only be rea-

sonably interpreted as advocating the election or defeat of a candidate; which contain a clear plea to action; and which are unmistakable and unambiguous."[155] While the proposed bills respond to the first and third of these deficiencies, they do not require a "clear plea to action." At least one other court has emphasized that the *Furgatch* court found that the advertisement in question did contain explicit words exhorting action, and was only implicit about what particular action was being advocated.[156] In light of this concern, it might be advisable to model the third component of the proposed redefinition of express advocacy after the district court decision in *Gaede*. Even this definition might be rejected, however, if the court regards the *Furgatch* approach as having been rejected and the cases rejecting it as stating constitutional requirements.[157]

VII. Conclusion

Legislative efforts at campaign finance reform in the wake of *Buckley* must traverse a land mine of constitutional uncertainty. Given the complex interaction of difficult constitutional concepts and the construction of a convoluted statutory scheme, *Buckley* and its progeny raise as many questions as they answer. It is tempting for proponents of campaign finance reform to view *Buckley's* limits on campaign finance regulation as obstacles to be overcome, but it is also important to recognize that these obstacles rest on fundamental constitutional principles. Campaign finance reform should not impede legitimate, protected forms of communication, and should heed *Buckley's* warning of the need to leave ample scope for the free exchange of ideas.

In the context of these concerns, the Supreme Court has indicated that reporting and disclosure requirements are an appropriate form of regulating campaign activities, and suggested that they may be the least restrictive means of protecting the public interest in the integrity of the electoral process. At the same time, not all speech discussing candidates is campaign activity, and many speakers might be prevented from participating in free and open debate on political issues if their support or opposition to candidates subjects them to burdensome reporting requirements or the disclosure of information about themselves or their contributors which they do not wish to disclose. While reporting and disclosure requirements are consistent with the notion that the remedy for "bad" speech is more speech, a protected first amendment interest in not speaking exists, and compelled disclosure is compelled speech. Balancing these competing considerations is no easy task, as the recent Kansas experience has demonstrated.

It is not my goal to espouse a position on the wisdom and merits of campaign finance regulation as a matter of policy. My goal has been to analyze carefully the law on the subject in the hopes of clarifying, to the extent possible, when the application of reporting and disclosure requirements is constitutionally prohibited, when it is constitutionally permitted, and when its constitutionality is uncertain. We do know that reporting and disclosure requirements may not be applied to the mere discussion of issues and candidates. We also know that they may be applied to express advocacy that uses the magic words or their equivalent. Unfortunately, any effort to go beyond the magic words must operate in a gray area of constitutional law, and will likely provoke a constitutional challenge. Whether the proposed

Kansas legislation would survive such a challenge cannot be stated with certainty.

Notes

1. 424 U.S. 1 (1976). For further discussion of *Buckley* in connection with reporting and disclosure requirements, *see infra* notes 15-32 and accompanying text. A more general discussion of *Buckley* is contained in my earlier article in this Journal, Richard E. Levy, *The Constitutional Parameters of Campaign Finance Reform*, 8 KAN. J. L & PUB. POL'Y 43, 43-46 (1999).
2. An expenditure is "independent if it is not made by, under the control of, or coordinated with a candidate or candidate committee.
3. *See* 2 U.S.C. §§ 434(a) & (b).
4. *See id.* § 434(e).
5. The Court recognized that under *NAACP v. Alabama*, 357 U.S. 449 (1958), disclosure of contributors' identities might infringe upon associational rights if potential contributors fear retaliation, but rejected a facial challenge to the statute. Instead, the Court indicated that such challenges must be presented in the context of the application of the statute in individual cases, and that the burden would be on the party challenging the application of the statute to show a reasonable fear of retaliation. *See* Levy, *supra* note 1, at 45.
6. In contrast, contributions to a candidate or candidate committee, as well as expenditures made under the control of or in coordination with a candidate, or candidate committee, could be limited. *See id.* at 44-45.
7. For a summary of relevant statistics, *see* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, ESKRIDGE & FRICKEY'S CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 25-26 (2d ed. 1998 Supp.) (citing Anneberg Public Policy estimates that between $135 and $150 million dollars were spent on issue advertisements in the 1996 election cycle, that 87% of these advertisements mentioned a candidate by name, and that 41% of these independent issue advertisements were purely negative in tone).
8. At the federal level, the McCain-Feingold Bill, S. 25 105th Cong., 1st Sess. (1997), and the Shayes-Mehan Bill, H.R. 417 106th Cong. (1999) would broaden the definition of express advocacy.
9. *See* H.B. No. 2022 (Kan. 1999); S.B. No. 23 (Kan. 1999). These Bills are discussed in greater detail *infra* notes 144-154 and accompanying text. As of this writing, the fate of these bills remains unresolved. While the House Bill had apparently been killed at the end of March, *see* Jim McLean, *Dems, Conservatives Lay Reform Bills to Rest*, TOPEKA CAPITAL JOURNAL, March 27, 1999, available in 1999 WL 15715179, it was apparently revived in modified form and may be strengthened by the Senate. *See* Lew Ferguson, *Senate Promises Additions to Finance Reform Bill*, TOPEKA CAPITAL JOURNAL, April 11, 1999.
10. Quoted in *Kansas for Life v. Gaede*, 1999 WL 115156 (D. Kan. Feb. 24, 1999) at *1.
11. I have yet to discuss this advertisement with anyone who did not immediately understand that the message of the advertisement was to vote for David Miller and against Bill Graves. This is clearly not a scientific sample, but I think the message is unmistakable.
12. 1999 WL 115156 (D. Kan. Feb. 24, 1999).
13. *Id.* As a result of the ruling, the Commission later issued a notice of failure to file a required report and gave Kansas for Life five days to comply. *See Gaede* at *2. Kansans for Life eventually filed the report, but the district court concluded that the case was not moot because the plaintiff asked that the report be expunged. *Id.* at *4.
14. I became involved in legislative reform efforts when I was asked to appear before the Special Committee on Local Government on October 14, 1998. In conjunction with my appearance, I submitted written testimony which appeared in adapted form in this Journal. *See* Levy, *supra* note 1. At the close of that testimony, I was asked to comment on House Bill No. 2662, which had been adopted the previous year, and Senate Bill No. 432, which had been proposed by the governor but did not pass. I submitted additional written comments concerning those bills, and was asked to return to discuss my written comments in November of 1998. When the two new bills were introduced this session in the House and the Senate, I was invited to appear before a joint session of the House and Senate committees considering those bills, and did so in January of 1999.

The sequence of events leading to the *Gaede* decision had already begun when I first appeared before the Special Committee, and my appearance before the joint session in January coincided with the oral argument in *Gaede*. For that reason, my comments generated some

media attention. *See* Jim McLean, *Professor: Finance Law Needs Work*, TOPEKA CAPITAL JOURNAL, January 26, 1999, at p.1. My appearances before the legislature also caught the attention of the participants in the *Gaede* litigation. I received a letter from one of the attorneys for Kansans for Life after my initial appearance in October of 1998, and was contacted by a member of the Governmental Ethics Commission and a staff attorney following my appearance in January. These contacts involved general discussion of campaign finance reform and the issues raised by the *Gaede* litigation. I did not, however, participate in the litigation on behalf of either party.

15. 424 U.S. 1 (1976).
16. *Id.* at 64.
17. *Id.* at 66-68.
18. *Id.* at 69-74.
19. *See id.* at 39-44. In this discussion the Court concluded that to avoid vagueness problems the limitations on expenditures "relative to a clearly identified candidate" must be construed as applicable only to express advocacy. Ironically, however, that narrowing construction meant that the expenditure limits would fail strict scrutiny because "[t]he exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness . . . undermines the limitation's effectiveness as a loophole-closing provision by facilitating circumvention . . . ." *Id.* at 45.
20. *See id.* at 76-82.
21. *Id.* at 79.
22. 2 U.S.C. § 434(e)
23. *Id.* at 80.
24. *Id.* at 80 n.108 (referring to note 52).
25. *Id.* at 44 n.52.
26. *Buckley* itself did not explicitly rely on overbreadth, but a later decision, *Massachusetts Citizens for Life, Inc. v. FEC*, 479 U.S. 238, 248 (1986), characterized *Buckley* as an overbreadth case. For further discussion of *Massachusetts Citizens for Life*, see *infra* notes 39-40; 63-68 and accompanying text.
27. *See id.* at 42-44 (expenditures) 79-80 (reporting and disclosure).
28. *See id.* at 79-80 (indicating that where the maker is not a political committee as narrowly defined, "the relation of the information sought to the purposes of the Act may be too remote," and concluding that "to ensure that the reach of [the provision] is not impermissibly broad, we construe 'expenditure' . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate," and reasoning that this construction "is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.").
29. *See id.* at 75-76.
30. *Id.* at 42 (discussing expenditure limitations). The Court's discussion of reporting and disclosure requirements did not identify the specific cause of vagueness under the statute, emphasizing instead that application of those provisions to issue advocacy would not further the purposes of FECA. Because the discussion of the vagueness issue in connection with reporting and disclosure requirements was intimately tied to the earlier discussion of expenditure limits, however, the same problem is presumably the cause of vagueness concerns in both provisions.
31. *See infra* notes 52-58 and accompanying text.
32. There were two different statutory provisions concerning reporting and disclosure requirements in *Buckley*, one applied general reporting and disclosure requirements to "political committees" and the other requiring persons and groups other than political committees to report expenditures made for purposes of "influencing" an election. *See supra* notes 3-4 and accompanying text. Although the Court narrowly construed both provisions, the express advocacy requirement relates primarily to the latter. The narrowing construction of the term "political committee" also presents problems for current Kansas law, which does not confine campaign finance regulation to a narrow class of political committees. *See* K.S.A. 25-4143(i) and (k). Because this aspect of Kansas law has not been the subject of specific legislative proposals or litigation, I will not address it in this article.
33. These same purposes are also used to justify similar restrictions on labor unions.
34. 435 U.S. 765 (1978).
35. *Belotti* also established that corporations have first amendment rights in the political arena, although the Court declined to indicate whether those rights are coextensive with individual rights.
36. *See* 435 U.S. at 788-92 (reasoning that the state had not demonstrated the corrosive effect of corporate expenditures on issue advocacy, as opposed to expenditures on political candidates). The Court also rejected the protection of shareholder interests as insufficient justification

because the law was both underinclusive and overinclusive. *Id.* at 792-95.

37. *See id.* at 788 n.26.

38. *See id.* at 791-92 & n.32.

39. 479 U.S. 238 (1986).

40. *Id.* at 249. The Court in *MCFL* went on to conclude that the expenditures in question constituted express advocacy, but ultimately concluded that the prohibition on corporate expenditures could not be applied to *MCFL* because it did not bear any of the characteristics justifying limits on corporate expenditures. *See infra* notes 63-68 and accompanying text.

41. 494 U.S. 652 (1990).

42. Indeed, the statute at issue barred the use of corporate treasury funds for independent expenditures, with "expenditure" defined as "a payment, donation, loan, pledge or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate." *Id.* at 655 (quoting Mich. Comp. Laws § 169.206(1)). This definition is clearly broad enough to encompass some issue advocacy, and is precisely the kind of vague standard that caused the Court in *Buckley* to incorporate the express advocacy requirement. Yet the Court let this definition pass without comment, and seemed to assume that the law applied only to express advocacy.

43. 454 U.S. 290 (1981).

44. *See id.* at 296-99.

45. *See id.* at 298-300. Critically, however, these reporting and disclosure requirements applied to contributions to committees supporting or opposing ballot measures, not independent expenditures for or against ballot initiatives. Thus, it is unclear whether *Citizens Against Rent Control* would support application of reporting and disclosure requirements to independent expenditures for or against ballot initiatives. *See infra* note 51.

46. 514 U.S. 334 (1995).

47. *See* 514 U.S. at 341-43.

48. *See id.* at 356.

49. The United States Court of Appeals for Sixth Circuit relied on this distinction to uphold self-identification requirements for express advocacy of the election or defeat of a candidate or candidates in *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 646-48 (6th Cir. 1997). *Accord* Gable v. Patton, 142 F.3d 940, 945 (6th Cir. 1997) (rejecting additional argument that self-identification requirement could not be applied to anonymous distribution of a small number of printed circulars in the context of a facial challenge, but indicating that an as applied challenge on this basis was not foreclosed by *Kentucky Right to Life*). *But see* Doe v. Mortham, 708 So. 2d 929, 934 (Fla. 1998) (upholding identification requirement applicable to express advocacy of candidates and issue advocacy but preventing statute from applying to "'personal pamphleteering by individuals acting independently and using their own modest resources.'") (quoting McIntyre v. Ohio Election Com'n, 514 U.S. 334, 351 (1995)).

50. *Compare McIntyre*, 514 U.S. at 355 (distinguishing *Buckley* on the ground that reporting and disclosure requirements are less intrusive than required compelled identification of the author of a political pamphlet) *and Massachusetts Citizens for Life, Inc.*, 479 U.S. at 251-56 (concluding that the requirement that corporations make political expenditures from segregated funds infringed upon First Amendment rights and requiring that the law be "justified by a compelling state interest") *with Buckley*, 424 U.S. at 64 (applying intermediate scrutiny).

51. *See supra* notes 38 and 45 and accompanying text. Neither of these statements, however, necessarily endorse the application of reporting and disclosure requirements broadly to all independent expenditures for issue advocacy. *Belotti* concerned only corporate advertising on issues, rather than expenditures from other sources, and *Citizens Against Rent Control* concerned only contributions to groups that opposed ballot measures, and not independent expenditures for or against such measures.

52. *See* Messerli v. State, 626 P.2d 81 (Alaska. 1980); Doe v. Mortham, 708 So. 2d 929 (Fla. 1998); Bemis Pentecostal Church v. State, 731 S.W.2d 897 (Tenn. 1987); *see also* Veco Int'l, Inc. v. Alaska Public Offices Com'n, 753 P.2d 703 (Alaska. 1988) (following *Messerli*).

53. 708 So. 2d 929, 933 (Fla. 1998). This discussion will focus on *Doe v. Mortham* because it is the more recent decision and its reasoning is more detailed.

54. 708 So. 2d at 932. Likewise, the court in *Mortham* distinguished *McIntyre* and upheld the application of a self-identification requirement for advertisements expressly advocating for or against a ballot initiative, after narrowly construing the statute so as to render it inapplicable to "personal pamphleteering of 'individuals acting independently and using their own modest resources.'" *Id.* at 934 (quoting *McIntyre*, 514 U.S. at 351). By comparison,

the court in *Bemis* simply stated that the law in question "does not apply to financing of general discussion of public issues and is triggered only when a group is financing election outcome specific advocacy in a particular campaign," and that this was consistent with *Buckley's* express advocacy requirement. 731 S.W.2d at 905. The *Bemis* court then quoted *MCFL* somewhat disingenuously, adding a bracketed reference to referenda results that was not present in the Supreme Court's explanation of *Buckley:*

> "*Buckley* adopted the 'express advocacy' requirement to distinguish discussions of issues and candidates from more pointed exhortations to vote for particular persons *[or referenda results]*. We therefore concluded in that case that a finding of 'express advocacy' depended upon the use of language such as 'vote for,' 'elect,' 'support,' etc. *Buckley, supra,* [424 U.S., at 44, n. 52, 96 S. Ct., at 646, n. 52."

Id. (brackets and citations in original Tennessee Supreme Court decisions) (emphasis added). The addition of the bracketed reference to referenda conveys the misleading impression that *MCFL* and *Buckley* support the application of reporting and disclosure requirements to ballot initiatives when at most they leave the question open. *Bemis* also distinguished *Belotti* and relied on *Citizens Against Rent Control v. City of Berkeley* as supporting the use of reporting and disclosure requirements for independent expenditures.

55. *See Bemis,* 731 S.W.2d at 903-04; *Messerli,* 626 P.2d at 87.

56. *See Bemis,* 731 S.W.2d at 904-05 (suggesting that *Buckley* and *Citizens Against Rent Control* endorsed "simple" disclosure requirements as alternatives to contribution and expenditure limits); *Messerli,* 626 P.2d at 87 (suggesting that *Buckley* and *Belotti* endorsed disclosure requirements as alternatives to contribution and expenditure limits).

57. *Belotti* relied on the lack of a factual showing to support the state's asserted interest in preventing corporate advocacy from distorting the political process as applied to issue referenda. *See supra* note 36. *Austin,* by way of contrast, accepted the state's argument that corporate status conferred legal advantages that justified the restriction to prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660. It is hard to see why the problem as articulated by the Court in *Austin* is any different in the context of issue advocacy. The Court in *Austin* did not address the protection of shareholder interests as a justification for the restriction on corporate expenditures. *Belotti* reasoned that as to this purpose the law was underinclusive because it did not apply to other corporate political activity, such as lobbying, that might also be contrary to shareholder interests, and underinclusive because it prohibited expenditures from corporate treasury funds even with the unanimous consent of the shareholders. *See supra* note 36. It is interesting to consider whether a law that prohibited all political expenditures from corporate treasury funds except with the unanimous consent of the shareholders would be constitutional under this analysis.

58. *See infra* notes 86-94 and accompanying text (discussing lower court decisions).

59. *Veco Int'l Inc. v. Alaska Public Offices Comm'n,* 753 P.2d 703, 714 (Alaska 1988) imposed an alternative narrowing construction that limited reporting and disclosure requirements to groups that engage in "substantial activities that are likely to directly cause more than a few votes to shift...."

60. *See supra* notes 22-30 and accompanying text. Specifically, this language triggered reporting requirements for individual expenditures by groups other than political committees. A separate vagueness problem was raised by the application of general reporting requirements for contributions and expenditures to "political committees," which the Court construed narrowly as limited to groups whose primary purpose was the election or defeat of a candidate or candidates. A similar dual construction was employed in *MCFL,* which construed the contribution limits on corporations under FECA as applicable only to contributions to political committees (as construed in *Buckley*) and to expenditures for express advocacy. *See supra* notes 39-40 and accompanying text.

61. As noted above, the concern for FECA's potential applicability to discussion of issues and candidates is, technically speaking, an overbreadth concern, *see supra* notes 26-28 and accompanying text, but vagueness and overbreadth often overlap in practice.

62. A notable exception *Gaede,* which will be discussed in detail *infra* notes 102-136 and accompanying text.

63. *MCFL*, 479 U.S. at 249.
64. *Id.* at 249.
65. *Id.*
66. *Id.*
67. *Id.* The presence of a disclaimer that the flyer did not constitute the endorsement of any candidates was insufficient to alter this conclusion. *Id.*
68. *Id.* at 256-65. Specifically, this type of corporate expenditure limit is designed to prevent corporations from using the benefits of corporate status to amass "massive war chests" which could be used to distort the political process. Because *Massachusetts Citizens for Life* was a nonprofit corporation that did not engage in profitable business activities, it did not pose such a threat. For further discussion of corporate spending, see *supra* notes 33-42 and accompanying text.
69. 807 F.2d 857 (9th Cir. 1987).
70. The only prior decisions discussed by the court in *Furgatch* were *Buckley*, *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45, 53 (2d Cir. 1980) (holding that leaflet criticizing member of Congress's tax voting record was not subject to FECA because "it contains nothing which could rationally be termed express advocacy"), and the lower court decision in *MCFL*, *FEC v. Massachusetts Citizens for Life*, 769 F.2d 13 (1st Cir. 1985). *Furgatch* did not cite or discuss the Supreme Court decision in *MCFL*, although it had been handed down approximately a month before *Furgatch* was announced. *See* FEC v. Christian Action Network, 110 F.3d 1049, 1053 n.4 (4th Cir. 1997) (suggesting that omission was curious and that *MCFL* would have provided "reaffirmation" for the *Furgatch* court's conclusion that "explicit 'words' or 'language' of advocacy are required").
71. *Id.* at 863, 864. The Court went on to explain that this standard has 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.

Id. at 864.
72. *Id.* at 864-65 (reasoning that the failure of the advertisement to specify what action should be taken was irrelevant because voting against Carter was "the only action open to those who 'would not let him do it.'").
73. 110 F.3d 1049 (4th Cir. 1997). The decision on the merits is *FEC v. Christian Action Network*, Inc. 894 F. Supp. 946 (W.D. Va. 1995), *aff'd* 92 F.3d 1178, 1996 WL 431996 (4th Cir. 1996) (unpublished opinion). The full text of the advertisement is reproduced in my legislative testimony on campaign finance reform that appeared in an earlier issue of this journal. *See* Levy, *supra* note 1, at 52.
74. *See* 110 F.3d at 1057 ("Indeed, the commercial and advertisements that the FEC here contend fall squarely within its regulatory purview are precisely the kinds of issue advocacy that the Supreme Court sought to protect in *Buckley* and *MCFL*; and the FEC's interpretation of these advertisements is exactly that contemplated by the Court when it warned of the constitutional pitfalls in subjecting a speaker's message to the unpredictability of audience interpretation.")
75. *Id.* at 1064 ("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 required to expressly advocate the election of a candidate,' simply cannot be advanced in good faith (as the disingenuousness in the FEC's submissions attests), much less with 'substantial justification.'"); *see generally id.* at 1055-1064.
76. *See, e.,g.*, FEC v Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2d Cir. 1980); FEC v. National Organization for Women, 713 F. Supp. 428 (D.D.C. 1989).
77. 11 C.F.R. § 100.22 (1995) provided in pertinent part that express advocacy included any communication that

> (b) When taken as a whole and with limited references to external events, such as 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) because –

> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly defined candidate(s) or encourages some other kind of action.

78. Right to Life of Dutchess County, Inc. v. FEC, 6 F. Supp.2d 248 (S.D.N.Y. 1998); Maine Right to Life Committee v. FEC, 914 F. Supp. 8 (D.Me. 1996), *aff'd* 98 F.3d 1 (1st Cir. 1996) (table); *see also* FEC v. Christian Action Network, 110 F.3d at 1055-56 (discussing *Maine Right to Life* with approval). An earlier FEC regulation permitting corporate funding of voter guides only if the guides were nonpartisan and did not engage in express or implicit advocacy was invalidated in *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991). *Faucher* is often cited as in conflict with *Furgatch*. *See infra* notes 79, 81, and 112.

79. *See, e.g.*, Wisconsin Right to Life, Inc. v. Paradise, 138 F.3d 1183, 1186 (7th Cir. 1998) (dismissing challenge to Wisconsin reporting and disclosure laws presented no justiciable case or controversy).

80. The court in *Christian Action Network*, for example, noted that *Furgatch* was a relatively early decision that did not cite *Massachusetts Citizens for Life*, even though that decision had been handed down nearly a month earlier, 110 F.3d at.1053 n.4, but also to read *Furgatch* as requiring "explicit words of advocacy" even if it did not limit FECA to the magic words. Indeed, *Christian Action Network* explained at great length that *Furgatch* found explicit words of advocacy and considered context only in connection with determining what particular course of action was advocated. *See id.* at 1053-55.

81. For example, *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991), is often cited as in conflict with *Furgatch*, but this overstates the conflict between the cases. The Court in *Faucher* did describe the express advocacy as "language which 'in express terms advocate[s] the election or defeat of a clearly identified candidate' through the use of such phrases as [the magic words.]" *Id.* at 470. However, the court was not called on to decide whether the magic words formulation was the only possible definition of express advocacy, and it did not so hold. *Faucher* invalidated as beyond the FEC's authority, a regulation that by its terms applied to issue advocacy, rejecting the FEC's invitation to treat *MCFL's* interpretation of FECA's corporate expenditure provisions as dicta. *See id.* at 470-71. The court actually relied on *Furgatch* in support of its holding, *see id.* at 471, and its statement equating express advocacy and the magic words was unnecessary to the decision in the case.

82. *See, e.,g., Central Long Island Tax Reform Immediately Committee*, 616 F.2d at 47-48 (remanding case presenting constitutional defenses to the application of FECA "with directions to dismiss the complaint for the reason that the challenged provisions of FECA are inapplicable to defendants' activities and therefore no justiciable case or controversy is presented"); Maine Right to Life Committee, Inc., v. FEC, 914 F. Supp. at 13 ("For these reasons I conclude that 11 C.F.R. § 100.22(b) is contrary to the statute as the United States Supreme Court and the First Circuit Court of Appeals have interpreted it and thus beyond the power of the FEC. I do not address the plaintiff's argument that the subpart is also void for vagueness.").

83. *See Right to Life of Dutchess County*, 6 F. Supp. 2d at 254 (finding that 11 C.F.R. § 100.22(b) "is unconstitutionally overbroad and beyond the scope of [FECA]. Given this holding, the Court need not reach plaintiff's claim that the regulation is unconstitutionally vague . . .").

84. Some of the cases, however, do not distinguish between the statutory and constitutional components of *Buckley* and its progeny.

85. *See* Wisconsin Right to Life, Inc. v. Paradise, 138 F.3d 1183, 1184 (7th Cir. 1998) (stating that "[i]n *Massachusetts Citizens for Life* the Court held that many elements of the *Buckley* approach are required by the first amendment, which means they apply to the states."). Even under this assumption, however, the constitutional and statutory meaning of the express advocacy requirement need not be identical. In other contexts, the Supreme Court has interpreted identical statutory and constitutional language differently. For example, federal jurisdiction over cases "arising under" federal law has a different meaning in the context of Article III and the statutory grant of original jurisdiction. *See* Richard E. Levy, Comment, *Federal Preemption, Removal Jurisdiction and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634,

636-37 (1984).

86. *See* Virginia Society for Human Life, Inc. v. Caldwell, 152 F.3d 268 (4th Cir. 1998) (upholding Virginia statutes after the Virginia Supreme Court had construed them as limited to express advocacy in response to the federal court's certification of the issue); Vermont Right to Life Committee v. Sorrell, 19 F. Supp. 2d 204 (D. Ver. 1998) (upholding statute as narrowly construed to apply only to express advocacy and concluding that, as construed, the statute did not reach advertisements including only implicit advocacy); West Virginians for Life, Inc. v. Smith, 960 F. Supp. 1036 (S.D.W.Va. 1996) (invalidating statutory presumption that dissemination of voter guide or scorecard within 60 days of an election was engaging in express advocacy). The cases concerning express issue advocacy discussed previously in Part II of this article, *see supra* notes 52-58 and accompanying text, also read *Buckley* and its progeny to require that advocacy be express.

87. 152 F.3d 268 (4th Cir. 1998).

88. Va. Code Ann. §§ 24.2-901 (1998). Individuals making such expenditures are required to file a statement of organization, to report their annual expenditures, and to include author identification on written communications. *See* Virginia Society for Human Life, Inc. v. Caldwell, 500 S.E.2d 814, 815 (Va. 1998) (construing provisions on certification).

89. *See Caldwell*, 152 F.3d at 269-72. The problem of construing state statutes in the context of constitutional challenges brought in state court is a recurrent one, and the proper response is not clear. As *Caldwell* suggests, while federal courts may construe state statutes, federalism concerns make the prospect of federal courts imposing narrowing constructions particularly problematic. On the other hand, a narrowing construction may save a statute from being unconstitutional, and this is preferable to invalidating the statute. In some contexts, courts will therefore abstain or certify the state law question to the state supreme court. *Caldwell* also illustrates the presence of justiciability issues, such as standing or ripeness that may prevent a court from reaching the constitutional questions. *See also* Wisconsin Right to Life, Inc. v. Paradise, 138 F.3d 1183, 1186 (7th Cir. 1998) (dismissing challenge to Wisconsin reporting and disclosure laws that presented no justiciable case or controversy).

90. *Caldwell*, 500 S.E.2d at 817. In reaching this conclusion, the Virginia Supreme Court implicitly rejected the Fourth Circuit's contrary suggestion. *See Caldwell*, 152 F.3d at 271.

91. *Caldwell*, 152 F.3d at 275.

92. 960 F. Supp. 1036 (S.D.W.Va. 1996).

93. 19 F. Supp. 204 (D. Vt. 1998).

94. Under *Caldwell* one might question whether it was appropriate for the district court to narrowly construe a state statute. *See supra* note 89 and accompanying text.

95. The avoidance of unnecessary constitutional decisions is an important principle of judicial restraint precisely because it leaves the legislature some flexibility in attempting to achieve its objectives by curing potential constitutional defects.

96. *See Buckley*, 424 U.S. at 66-68.

97. For discussion of possible statutory approaches, see *infra* notes 140-157 and accompanying text.

98. In this regard, *Doe v. Mortham*, which upheld a statute imposing reporting and disclosure requirements on express advocacy regarding both candidates and ballot measures, would actually tend to support the argument that express advocacy is constitutionally required because the court emphasized the requirement that advocacy be express as necessary to cure vagueness problems. *See supra* notes 53-54 and accompanying text.

99. *See, e.g.*, cases cited *supra* note 82.

100. *See, e.g.*, Kansans for Life, Inc. v. Gaede, 1999 WL 115156 (D. Kan. Feb. 24, 1999). For further discussion of *Gaede*, see *infra* notes 102-136 and accompanying text.

101. *See infra* notes 140-143 and accompanying text.

102. 1999 WL 115156 (D. Kan. Feb. 24, 1999).

103. *See infra* notes 122-131 and accompanying test (discussing whether the court should have narrowly construed the statute or abstained in Gaede).

104. The text of the advertisement is reproduced *supra* text at note 10.

105. *See Gaede*, at *1.

106. *See* Kansas Governmental Ethics Commission Advisory Opinion 1998-22 (described in *Gaede*, at *3).

107. *Id.* As a result of the ruling, the Commission later issued a notice of failure to file a required report and gave Kansas for Life five days to comply. *See Gaede*, at *2. Kansans for Life eventually filed the report, but the district court concluded that the case was not moot because the plaintiff asked that the report be expunged. *Id.* at *4.

108. Before addressing the merits, the district court rejected the Commission's mootness, ripeness, and absten-

tion arguments. *See id.* at *4-7.
109. *Id.* at *7-8.
110. *Id.* at *8 (The correct verb would be "infer."). This passage constitutes the courts' entire discussion of why the advertisement was constitutionally protected under *Buckley* and *MCFL.*
111. *Id.* at *9.
112. *Id.* at *9 (citing *Faucher* as an example of the magic words approach). The court also noted that the FEC regulations that attempt to follow *Furgatch,* "have been attacked successfully as unconstitutionally vague." *Id.* This conclusion certainly misreads those cases to the extent that implies that these cases have rejected *Furgatch.* In light of the courts' efforts to reconcile their decisions with *Furgatch,* it would be more accurate to state that the FEC unsuccessfully attempted to rely on *Furgatch* to support regulations that took a similar approach to the Governmental Ethics Commission. See *supra* notes 77-78 and accompanying text.
113. *See supra* text following note 96. *Buckley* reasons, for example, that "the distinction between discussion of issues and candidates and ***advocacy*** of the election or defeat of candidates may often dissolve in practical application.," 424 U.S. at 42 (emphasis added), and this passage is quoted in *MCFL.* 479 U.S. at 249. The omission of the word "express" in this statement is critical.
114. 424 U.S. at 80. Unlike the expenditure limits, however, this loophole was not fatal to the reporting and disclosure requirements (by rendering them ineffective in achieving their purpose, and therefore not substantially related to it) because they continued to substantially further the important purpose of informing the electorate. *Id.* at 80-81.
115. *Id.* at *8.
116. *See supra* text at note 110.
117. In contrast, the words "David Miller" on his briefcase or mailbox would obviously convey a completely different message.
118. Thus, *FEC v. Colorado Republican Federal Campaign Committee,* 59 F.3d 1015, 1023 n.10 (10th Cir. 1995), *vacated on other grounds,* 518 U.S. 604 (1996), on which *Gaede* relied to support its conclusion that the advertisement was protected issue advocacy is inapposite. The case involved a similar advertisement that accused a candidate of lying about his voting record and concluded that he "has a right to run for the Senate, but he does not have a right to change the facts." But the 10th Circuit court of appeal's conclusion that this advertisement was not express advocacy for FECA purposes does not mean that it was constitutionally protected issue advocacy.
119. *MCFL,* 479 U.S. at 249.
120. Indeed, given the court's conclusion in *Gaede* that discussion of a candidate's truthfulness is an issue discussion, *see supra* text at note 110, even an explicit directive to vote for a candidate discusses an issue: whether a given candidate warrants the voter's support.
121. This is not to say, however, that the district court's ultimate finding is necessarily wrong. The case is a close one and reasonable minds might differ as to the outcome. This problem, of course points up precisely the difficulty with attempting to draft an alternative to the magic words formulation express advocacy: any definition that attempts to include some forms of implicit advocacy may inevitably be too vague or, if drafted to create clear rules, overbroad. *See infra* notes 140-143 and accompanying text.
122. K.S.A. 25-4143(e)(1)(B); 25-4150.
123. K.S.A. 25-4143(h)(emphasis added).
124. Unfortunately, there is no legislative history available to shed light on legislative intent.
125. Although neither of them applies directly, two cannons of statutory construction would tend to support this construction: *ejusdem generis* (of the same class) and *noscitur a sociis* (it is known from its associates). The *ejusdem generis* cannon provides that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.17 at 188 (4th ed., Norman Singer ed. 1973). The *noscitur a sociis* cannon means that "when two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word." *Id.* § 47.16, at 183. While there is no general term in the Kansas statute to be narrowly construed in accordance with the specified phrases of express advocacy, the same reasoning that underlies these two cannons would arguably apply. The open-ended extension of the specific list should arguably be limited by the common thread that underlies the more specific phrases listed.
126. *See generally supra* notes 89-90 and accompanying text.

127. The Commission's reasons for omitting such an argument are obvious. Kansans for Life's reasons for doing so are less obvious. Perhaps, however, Kansas for Life was more interested in having the district court rest its holding on broad constitutional grounds than in advancing every possible basis for invalidating the Commission's policy and the application of that policy to its advertisement.
128. *Gaede* at *7.
129. *Id.* at *9. While some of the district court decisions do rest in whole or in part on constitutional considerations, the courts of appeal have generally been careful to rest their decisions solely on statutory grounds. *See, e.g.*, Faucher, 928 F.2d at 470 ("we face the question of whether the FEC has the authority, under section 441b(a), to restrict issue advocacy or whether the FEC may only restrict express advocacy"); *id.* at 472 ("*Buckley and Massachusetts Citizens for Life* [protected fist amendment values] by limiting the scope of the FECA to express advocacy. We therefore uphold the district court in striking down 11 C.F.R. 114.4(b)(5)(1) for having overstepped the regulatory boundaries imposed by the FECA as interpreted by the Supreme Court.").
130. *See supra* notes 113-114 and accompanying text.
131. *See supra* notes 60-101 and accompanying text.
132. *Gaede* at * 9 ("Under this standard, if reasonable people could disagree whether the communication urges a vote for or against a candidate, then the message is subject to the regulatory disclosure requirements applicable to express advocacy.")
133. *See Christian Action Network*, 110 F.3d at 1057 (noting that while one viewer could interpret the advertisement in question as express advocacy, another might interpret it as issue advocacy, and concluding that "the FEC's interpretation of these advertisements is exactly that contemplated by the Court when it warned of the constitutional pitfalls in subjecting a speaker's message to the unpredictability of audience interpretation").
134. *See supra* text at note 107.
135. *See Gaede*, at *10. These standards apparently reflect the court's reading of *Furgatch*. *See id.* at *9 (describing *Furgatch* as requiring that "the language had to be 'unmistakable and unambiguous, suggestive of only one plausible meaning'; it must present a 'clear plea for action'; and 'it must be clear what action is advocated.'" (quoting *Furgatch*, 807 F.2d at 864)).
136. In my unpublished presentation to the Joint Committee on Local Government in November, I expressed the view that the statute as currently written was unconstitutionally vague because it did not clarify what kinds of communications might be considered express advocacy under the "but not limited to" language. To the extent that it did not acknowledge the possibility of a narrowing construction which is plausible on the basis of the statutory language, that statement may have been too sweeping.
137. *See supra* note 86 and accompanying text.
138. In Kansas, this might involve a slight modification of current law, eliminating the "but not limited to language" that precedes the list of specific examples of express advocacy, and adding a final, catchall provision such as "or other similar words or phrases." This would resolve any interpretive questions and conform the statute to the most narrow view of communications that may be subject to reporting and disclosure requirements. Alternatively, the legislature could do nothing and leave the statute as is (without the Commission's enforcement policy) and trust the courts to interpret the provision so as to preserve its constitutionality.
139. *See* H.B. No. 2022; S.B. No. 23 (discussed in detail *infra* notes 144-154 and accompanying text).
140. *See* Levy, *supra* note 1, at 52.
141. *See* Right to Life, Inc. v. Miller, 23 F. Supp. 2d 766, 768-69 (W.D. Mich. 1998) (invalidating administrative regulation using name or likeness test in connection with corporate expenditure limits); Planned Parenthood Affiliates, Inc. v. Miller, 21 F. Supp. 2d 740, 745-46 (E.D. Mich. 1998) (same); *see also* West Virginians for Life, Inc. v. Smith, 960 F. Supp. 1036, 1039-40 (S.D. W. Va. 1996) (invalidating statutory presumption that distribution of voter guides within 60 days of an election constituted express advocacy for purposes of reporting and disclosure requirements).
142. This tension inherent in accommodating both overbreadth and vagueness concerns in the context of campaign finance regulations was recognized in *Veco International, Inc. v. Alaska Public Offices Commission*, 753 P.2d 703, 714 (Alaska 1988) (acknowledging that narrowing construction it had placed on the statute to avoid overbroad application to small groups made the statutory definition of a group more vague than if all groups were included, but observing that "[t]his is exhibitive of the peculiar connection that exists between overbreadth and vagueness: an attempt to remove a statute

from one category often causes the statute to jump into the other.").

143. In my view, this is the best argument for reading *Buckley* as imposing the express advocacy test as a constitutional standard for all campaign finance regulation.

144. The introductory phrasing of the bills differs slightly. H.B. 2022 provides applies to "[a]ny communication which states or is substantially similar to the following, including but not limited to [the specified phrases]", while the S.B. 23 applies to "[a]ny communication which uses phrases including, but not limited to [a slightly longer list of phrases, or] other similar phrases." Note that because both provisions retain the "but not limited to" language from current law, they do not completely eliminate the statutory ambiguity discussed earlier in the article. *See supra* notes 122-125 and accompanying text. In one sense, the problem is worse in the Senate Bill because it also adds a catchall "or other similar phrases" at the end of its list. If the catchall covers equivalent phrases, it is not clear what the "but not limited to" means. This ambiguity is less of a problem in the context of these bills, however, because the other paragraphs of the definition make fairly clear that the first paragraph is intended to be limited to the magic words or their equivalent. Nonetheless, it would probably be best if the wording of the Senate Bill, which is somewhat less awkward, were adopted without the "but not limited to" language, thereby removing all ambiguity.

145. This is true for most of the specified phrases listed in the bills, although some of them could be potentially problematic. Both bills include as examples "Smith for Senate" and "Bob Jones in '98", and the House Bill adds "Smith's the one". None of these phrases contains any explicit words advocating that the audience take any particular action. Of course, we all know that this message is communicated by such phrases, but the message is, nonetheless, implicit. Under the strictest possible reading of express advocacy and the magic words requirement, the absence of any such words would place these slogans beyond the reach of reporting and disclosure requirements. For further discussion of this problem, see *supra* notes 117-118 and accompanying text (using similar examples to criticize *Gaede*); *infra* notes 146-150 and accompanying text (discussing similar problem with second component of S.B. No. 23's definition of express advocacy).

146. This is the Senate version. The House version is similar, but differs in two respects. First, instead of requiring that the communication can have "no other reasonable meaning than to urge the election or defeat" of a candidate, H.B. No. 2022 requires that the communication can have "no other reasonable meaning than to support or oppose the nomination, election or defeat" of a candidate. Second, while S.B. No. 23 mentions such campaign related media as posters, bumper stickers, and advertisements and then gives examples of the kinds of slogans and words contemplated, H.B. No. 2022 does not. While these differences may seem minor, they could be crucial for purposes of constitutional analysis. Protected discussion of issues and candidates will often involve favorable or unfavorable comment on a candidate, and thus necessarily imply support or opposition to the candidate. But support or opposition is not necessarily advocacy. It does not "exhort" the audience to action. As such, the phrasing of H.B. No. 2022 might be overbroad. The problem is exacerbated by the absence of further explanation or examples that might clarify what kind of slogans or words are covered.

147. My third appearance before the legislature included a discussion of the pending bills in which I suggested that this component of the definition posed few constitutional problems. After *Gaede*, with its assumption that express advocacy as narrowly construed in the FECA cases is a constitutional requirement, the constitutional difficulties may be more serious. This, in my view, demonstrates one of the potential difficulties with the broad language of *Gaede*. *See supra* notes 124-128 and accompanying text.

148. It may be that such communications are so clearly (or so clearly not) express advocacy that their coverage (or exclusion) is taken as a given. Alternatively, it may be that the use of slogans and distribution of bumper stickers is so integrally tied with a candidate's campaign that such expenditures are generally made by candidate committees and other organizations subject to general reporting and disclosure requirements.

149. This assumes that the statute would exclude cases where the same words as used in a slogan are used in another context. Obviously, the use of a candidate's name in an issue discussion should not make the discussion express advocacy under this provision. Likewise, a newspaper picture caption stating "Smith's the one in the front right" would not be covered. A more difficult case might be presented in an advertisement that referred to a candidate's slogan and then disputed it.

150. In this respect, the Senate version is preferable to the

House version, which does not include either the reference to bumper stickers, posters, and advertisements or the examples listed in the Senate bill. *See supra* note 146. Without these limitations, the phrase "individual words" in the House bill is much less clear and has potentially broader application. Moreover, the House version only requires a message of support or opposition for a candidate, rather than a message of urging the election or defeat of a candidate, which contributes to potential overbreadth problems.

151. The language of the two bills in this provision is identical. In discussing these provisions with the legislative committees considering them, I suggested some minor changes in their wording.

152. The *Gaede* court noted that those regulations have been invalidated by several lower courts, but as I argued in Part III, these decisions rest at bottom on the construction of FECA and should not be read as resolving the constitutionality of such a definition. *See supra* notes 77-85 and accompanying text. Of course, a court that did read these decisions as establishing constitutional standards would probably invalidate this provision.

153. This language distinguishes the statute from the policy invalidated in *Gaede*, which the court expressly found would have applied the reporting and disclosure requirements to communications whenever reasonable minds might differ as to whether they constituted express advocacy. *See supra* notes 132-135. Such a definition of express advocacy is almost certainly overbroad and vague, even under the most narrowest possible reading of *Buckley* and its progeny.

154. One possible alternative is suggested by the second component of the express advocacy definition in the pending bills. If express advocacy were defined through a series of specific categories of communications that constituted express advocacy, supplemented by an additional series of exceptions for specific kinds of issue advocacy, it may be possible to accommodate both overbreadth and vagueness concerns. Such a definition would, of course, require significant time and effort to draft because each category and exception would have to be carefully considered and the language used would have to be carefully chosen.

155. *Gaede*, at *10.

156. *See Christian Action Network*, 110 F.3d at 1054 ("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 the 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.")

157. *Gaede* noted that the regulations on which the bills are modeled attempted to follow *Furgatch* and "have been attacked successfully in other circuits as unconstitutionally vague." *Gaede*, at *9.