The Constitutional Parameters of Campaign Finance Reform

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Editor's note: The following article is adapted from Professor Levy's written testimony before the Special Committee on Local Government on October 14, 1998.

Few issues today are more controversial than campaign finance reform. Fueled by a widespread public belief that the political process has been improperly distorted by the immense costs of running for public office, and the resulting perception that those who make significant campaign contributions or independent expenditures may exert undue influence on the legislative process, a number of proposals for campaign finance reform have been introduced at both the federal and state levels. At the same time, however, government regulation of political campaigns raises concerns that lie at the core of the First Amendment's protection of freedom of speech. Uncertainty regarding the permissible constitutional parameters of campaign finance reform further complicates the already difficult task faced by legislative bodies considering campaign finance reform legislation.

The purpose of my testimony is to help clarify these constitutional parameters for the Special Committee on Local Government, and thereby provide assistance to the legislature on this complex issue. My goal is not to advocate a particular position on the merits of campaign finance reform, but to explain the current state of the law in as neutral a manner as possible. In particular, the Committee has asked me to address the related subjects of "independent expenditures" and "soft money." In responding to this request, my testimony consists of three parts. First, I will review the United States Supreme Court's decision in *Buckley v. Valeo*,[1] which established the basic constitutional principles governing campaign finance regulation. Second, I will discuss the development of the *Buckley* principles in subsequent judicial decisions, with particular reference to the implications of the case law for regulation of independent expenditures and soft money. Finally, I will attempt to summarize the permissible scope of campaign finance regulation.

I. The *Buckley* Decision

In *Buckley*, the Supreme Court considered the constitutionality of the Federal Election Campaign Act (FECA), which was adopted in the wake of the Watergate scandal. FECA was a complex statute with several key components:

> (1) it set contribution and expenditure limits for candidates and individuals or political groups that supported candidates;
> (2) it imposed reporting and disclosure requirements on candidates, political committees, and individual contributors;
> (3) it provided for public funding of

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presidential election campaigns, on the condition that recipients of public funds limit their total expenditures; and

(4) it established the Federal Election Commission (FEC) to implement and enforce the Act.

The Court upheld some of these provisions and struck down others, in the process establishing the key principles that constrain campaign finance reform.

The central premise of *Buckley* is that campaign contributions and expenditures are themselves a form of political speech, which lies at the core of the First Amendment's protections. Moreover, because campaign finance regulations turn on the message of the speaker, they are "content based" restrictions that must survive the most rigorous First Amendment scrutiny to pass constitutional muster. The *Buckley* Court expressly rejected the arguments that campaign spending is a form of "conduct" or symbolic speech rather than "pure speech," and that campaign finance regulations should be regarded as "content neutral" time, place, or manner restrictions. Proceeding from its basic premise that campaign finance regulation is a content based restriction on political speech, the Supreme Court in *Buckley* evaluated FECA's contribution and spending limits, reporting and disclosure requirements, and public funding provisions separately.[2]

A. Contribution and Spending Limits

FECA placed strict limits on campaign contributions to, and expenditures on behalf of, candidates for federal office. Because these limits effectively prohibited speech based on its content, the Court applied "strict scrutiny." Under this test, which requires a content based restriction on speech to serve a "compelling" governmental interest, and to be "narrowly tailored" to serve that end, FECA's contribution limits were constitutional, but its expenditure limits were not.

The Court concluded that the contribution limits were narrowly tailored to serve a compelling governmental interest. The Court recognized that the interest in preventing the actuality or appearance of "quid pro quo" corruption; i.e., the procurement of governmental favors through large contributions, is compelling. And the limits imposed, which included a cap of $1,000 per candidate for an individual or group, $5,000 per candidate for a "political committee," and $25,000 overall per individual, were narrowly tailored in the sense that they did not severely impair the contributor's ability to communicate a given message. The Court reasoned that contributions send a symbolic message of undifferentiated support for a candidate, and that this message is not greatly enhanced by increased size. Moreover, the Court reasoned, contributors have ample alternative means of conveying their message because FECA's expenditure limits are invalid.

FECA included limits on individual expenditures that paralleled the contribution limits described above, as well as limits on a candidates' expenditures from personal funds and limits on overall campaign expenditures. Although the Court concluded that expenditures requested by or coordinated with a candidate could be characterized as contributions and thus subject to FECA's limits, it held that the limits were unconstitutional as applied to independent expenditures. First, the Court reasoned that the governmental interest in prevent-

ing the actuality or appearance of quid pro quo corruption was not compelling in the context of independent expenditures, because the danger of such corruption is much weaker when expenditures are independent. Second, the Court determined that the expenditure limitations were not narrowly tailored because they imposed direct and substantial restrictions on speech. Unlike contributions to candidates, which convey an undifferentiated symbolic message of support, expenditures convey a more focused message whose impact is greatly enhanced by greater expenditures. In addition, regulating expenditures severely restricts the avenues of communication available to the speaker. Finally, the Court flatly rejected the idea that "leveling the playing field" could be a compelling governmental interest, reasoning to the contrary that the First Amendment was intended to prohibit precisely this kind of government effort to mute the message of some speakers while enhancing the message of others. Thus, FECA's limits on independent expenditures failed strict scrutiny and were unconstitutional.

B. Reporting and Disclosure Requirements

FECA also contained reporting and disclosure requirements designed to inform the voting public and to facilitate enforcement of the Act's substantive provisions by providing information to the FEC. One set of provisions required political committees, defined as groups that receive contributions or make expenditures in excess of $1,000 in a calendar year and that are under the control of a candidate or whose major purpose is the nomination or election of a candidate,[3] to report to the FEC the name of everyone contributing more than $10 in a year, and, for contributors of over $100 in a year, to include the person's occupation and principal place of business. Another provision required every individual or group (other than a candidate or political committee) who makes contributions or expenditures of over $100 in a calendar year, other than by contribution to a political committee, to file a statement with the FEC. Because these provisions did not limit speech, the Court applied a form of "intermediate" scrutiny, requiring a "substantial relation" to the governmental interest at stake. In general terms, the reporting and disclosure requirements passed this test.

The Court recognized that compelled disclosure of support for groups can have an unconstitutional chilling effect on associational rights under *NAACP v. Alabama*[4] but concluded that there was an insufficient showing of possible retaliation or intimidation against contributors to political committees and minor parties to support a facial challenge to the statute under the vagueness and overbreadth doctrines. The Court distinguished *NAACP v. Alabama* on the ground that there had been a strong factual record supporting the fear of "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" that would come with disclosure of membership. The Court indicated that the application of the reporting and disclosure requirements could be challenged as applied in individual cases, and expressed confidence that if the fear of reprisal is a realistic one, it would not be difficult to compile the necessary record.

The reporting and disclosure requirements, however, did have vagueness and overbreadth problems insofar as they applied to all expendi-

tures "for the purpose of . . . influencing" the nomination or election of candidates for federal office. The Court reasoned that because "issue advocacy" often tends to support the election or defeat of a candidate, this provision might be read to place reporting and disclosure requirements on individuals and groups that were engaged solely in issue advocacy. To prevent the constitutional difficulties associated with such a reading, the Court construed the reporting and disclosure requirements for individuals and groups (other than candidates or political committees) as applying only to expenditures that were (1) earmarked for political purposes or authorized or requested by a candidate or a political committee; or (2) for communications that expressly advocate the election or defeat of a clearly identified candidate. This narrowing construction is generally understood as expressing the constitutional limits of reporting and disclosure requirements for political expenditures, even though its precise constitutional connection remains unclear.

C. Public Funding

Because the public funding provisions upheld in *Buckley* are not directly relevant to the Committee's deliberations, I will summarize that aspect of the Court's decision only briefly. FECA provides public funding for presidential candidates on a sliding scale basis, with major party candidates receiving the largest funding, minor candidates with over 5 percent of the vote receiving some funding, and candidates below the 5 percent threshold receiving no funding. As a condition of public funding, the candidates must agree to limit total expenditures and fundraising to the public funding amounts.[5] The Court upheld the provision of public funding as consistent with the First Amendment because it facilitated speech rather than restricted it, and rejected the argument that the sliding scale funding improperly discriminated against smaller parties and candidates. In connection with its analysis of the latter point, the Court reasoned that while minor candidates would not receive funding, this disadvantage was counterbalanced by the fact that they would not have to accept fundraising and expenditure limits, thus implicitly approving the voluntary limits attached to acceptance of public funding.

II. Post-*Buckley* Developments

Under *Buckley*, there is a key distinction between contributions and expenditures. Contributions, which include expenditures requested or coordinated by candidates, may be limited to prevent the actuality or appearance of quid pro quo corruption. Independent expenditures, however, may not be limited. While reporting and disclosure requirements may have a somewhat broader reach than spending limits, they may be applied only to independent expenditures that expressly advocate the election or defeat of a clearly identified candidate, and may be unconstitutional as applied if the threat of reprisals in particular cases creates too great a chilling effect. While the Court in *Buckley* thus upheld some aspects of FECA, its invalidation of limits on independent expenditures and imposition of restrictions on disclosure requirements for independent expenditures created opportunities for the evasion of the Act's permissible contribution limits, reporting and disclosure requirements, and voluntary spending limits attached to public funding. In particular, independent issue advertising is completely exempt from limits on contributions

and expenditures, as well as reporting and disclosure requirements. This exemption allows political parties to collect "soft money" contributions to be used for independent expenditures that benefit their candidates. Campaign reform efforts since *Buckley* have generally focused on closing these loopholes or strengthening campaign finance regulation in other ways. In addressing the constitutionality of these reform efforts, subsequent decisions have clarified and extended the principles articulated in *Buckley*.

A. Contribution Limits

Although *Buckley* held that the contribution limits in question were constitutional, a number of issues have subsequently arisen concerning the scope of permissible contribution limits. These issues include how low limits on contributions may be, whether contributions for issue advocacy may be limited, and how broadly the concept of coordinated expenditures can be defined.

1. *The Limits of Contribution Limits*: *Buckley* involved limits of $1,000 per candidate for individuals and $5,000 for groups, but gave no indication of the extent to which lower contribution limits were permissible. *Buckley* reasoned that large contributions created a danger of the actuality or appearance of quid pro quo corruption, and that the principal communicative function of contributions was a symbolic one that was not significantly enhanced by contributions above that amount. This reasoning implies, and lower courts have held, that contribution limits below a certain point would be unconstitutional because there is no danger of quid pro quo corruption and the lower limits significantly impair the symbolic value of contributions.[6] Thus for example, recent efforts to ban out-of-state contributions are probably unconstitutional.[7] On the other hand, a statute prohibiting gubernatorial slates from accepting outside contributions during the 28 days preceding an election was upheld in *Gable v. Patton*,[8] although the court invalidated a similar prohibition on candidates' contributing to their own campaigns.

2. *Contributions for Issue Advocacy*: FECA only applied to contributions to candidates and political committees, which the Court in *Buckley* construed narrowly to apply only to groups whose primary purpose was the election or defeat of a candidate for public office. Although *Buckley* thus did not address the constitutionality of limits on issue advocacy, its reasoning implies that contributions respecting issue advocacy may not be limited. This implication was confirmed in *Citizens Against Rent Control v. Berkeley*,[9] which invalidated a municipal ordinance (adopted by referendum) limiting contributions respecting ballot initiatives. The Court distinguished *Buckley* on the ground that there was no danger of quid pro quo corruption from contributions to ballot initiatives, because such contributions do not directly benefit any candidate for public office who might reciprocate with special favors. The Court also reasoned that limitations regarding ballot initiatives represent a greater restriction on speech than limits on contributions to candidates because ballot initiatives are focused as to message.

For the same reasons, contributions to issue-oriented Political Action Committees (PACs) probably may not be restricted. *Buckley* narrowly construed the term "political committee" in FECA to include only committees controlled by a candidate or whose prima-

ry purpose is to secure the election or defeat of a candidate. Thus, it is generally assumed that limits on contributions to political committees may not be extended to PACs that do not have as a primary purpose the election or defeat of a particular candidate or candidates. On the other hand, the Court upheld limits on contributions to a PAC that supported multiple candidates in *California Medical Association v. FEC*.[10]

This is one component of the "soft money" problem. While contributions to particular candidates can be limited, contributions to PACs and political parties for use in independent expenditures, issue advertising, and "party building" activities are exempt from these limits. (The freedom of such organizations from limits on expenditures, see below, is the other component.)

3. *Expanding the Concept of Contributions*: *Buckley* indicated that contributions could be defined, as under FECA, to include expenditures made on behalf of a candidate if they were under the control of or coordinated with the candidate or the candidate's campaign committee. In an effort to address the problem of soft money, the Federal Election Commission issued an interpretive ruling under which all expenditures by political parties were conclusively presumed to be coordinated with their political candidates. In *Colorado Republican Federal Campaign Committee v. FEC*,[11] a state party ran campaign advertisements attacking the likely opposition candidate before its own nominating convention, and the FEC charged that these were coordinated expenditures in violation of FECA. The Court, without a majority opinion, held that the FEC could not proceed against the state party. The plurality invalidated the FEC's conclusive presumption of coordination, which it regarded as plainly contrary to the actual facts of the case, but two concurring opinions would have decided the case on broader grounds.[12] *Colorado Republican Federal Campaign Committee* suggests that any effort to significantly expand the concept of coordinated expenditures so as to broaden the scope of permissible campaign contribution limits to encompass some independent expenditures would be unsuccessful.

B. Expenditure Limits

Buckley effectively precludes the imposition of limits on independent expenditures. As proponents of campaign finance reform have sought a means to address the problem of independent expenditures without running afoul of *Buckley*, a variety of issues have emerged. These issues include whether narrow limits on independent expenditures from particular sources are permissible, the use of voluntary expenditure limits for candidates, and whether *Buckley* may be successfully challenged.

1. *Sources of Independent Expenditures*: While *Buckley* invalidated limits on independent expenditures as applied to individuals and political parties, it did not address the question of whether contributions from certain sources might present distinctive problems that would enable limitations on expenditures from these sources to survive strict scrutiny. With the proliferation of PACs in the wake of *Buckley*, for example, the Federal Election Campaign Fund Act made it a crime for an independent PAC to make independent expenditures on behalf of a candidate for federal office who had accepted public funding. In *FEC v. National Conservative Political Action Committee*,[13] the Court relied on *Buckley* to invalidate this provi-

sion.

The regulation of contributions and expenditures by corporations and labor unions has also been an issue, because the legal advantages conferred on such organizations enables them to accumulate massive "war chests" whose use for political purposes may not be approved by all shareholders or members. As a general matter, it appears that corporations and unions may be required to finance political expenditures from voluntary contributions to segregated funds.[14] This requirement, however, may not be applied to voluntary political associations that are incorporated but do not engage in business activities, have no shareholders or others with a claim on assets or earnings, and that are not a conduit for a business corporation or a union.[15] In addition, corporations and unions may not be completely barred from spending on ballot initiatives.[16]

2. *Voluntary Candidate Expenditure Limits*: *Buckley* suggested that FECA's limits on total campaign expenditures by candidates receiving public funding were permissible because candidates voluntarily accepted them as a condition of receiving public funding. This analysis was confirmed in *Republican National Committee v. FEC*.[17] Thus, states may limit total campaign expenditures as a condition of public funding, but any such limits must be voluntarily accepted.[18] In *Shrink Missouri Government PAC v. Maupin*,[19] for example, the court invalidated as unduly coercive a system of "voluntary" spending limits under which candidates were required to file an affidavit indicating whether they would comply with voluntary spending limits. Candidates who did not so pledge were subject to restrictions on contributions from corporations, unions, PACs, and political parties and also subject to reporting requirements for expenditures above the limits. Candidates who pledged to comply were freed from such restrictions, but subject to penalties for exceeding the spending limits.

Even voluntary candidate spending limits do not apply to independent expenditures, however, since independent expenditures are not made, requested or coordinated by the candidate or his or her political committee.[20] This is the other component of the "soft money" problem -- although contributions to a candidate may be limited under *Buckley* and the candidate may accept spending limits as a condition of receiving public funding, independent expenditures are not subject to either limitation, and can easily be used to evade these limits. One creative response to this problem was invalidated in *Day v. Holahan*.[21] Minnesota's campaign finance reform law provided that the public funding amounts and voluntary spending limits for a candidate would be increased when independent expenditures were made opposing his or her election or on behalf of his or her major party opponent. The United States Court of Appeals for the Eighth Circuit held that "the knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to one half of the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech."[22] The court went on to conclude that the statute was not narrowly tailored to meet a compelling government interest.

3. *Challenging Buckley*: Efforts to limit campaign spending and/or independent expenditures notwithstanding *Buckley* have met with no success.[23] Some proponents of campaign

finance reform have suggested that the time is right for the Supreme Court to reconsider *Buckley*, but there is little indication that efforts to overturn *Buckley* would be successful.

In *Kruse v. City of Cincinnati*,[24] the city unsuccessfully challenged *Buckley* both indirectly and directly. The indirect challenge to *Buckley* proceeded by advancing compelling governmental interests that were either not considered or not yet factually supported in *Buckley*. *Buckley* itself addressed only two interests: preventing quid pro quo corruption (which is a compelling interest, but with respect to which limits on candidate spending and independent expenditures are not narrowly tailored), and "leveling the playing field" (which is not a legitimate purpose under the First Amendment). In *Kruse*, the City argued that new facts justify a different conclusion as to the problem of corruption, and also advanced two new governmental interests in support of capping candidate expenditures: freeing city council members from the burden of fundraising so that they can concentrate on their official duties, and preventing candidates with large sums of money from blocking other candidates from television advertising. These arguments were rejected by the court of appeals, and the City petitioned unsuccessfully for a writ of certiorari, making the same arguments and arguing in the alternative that if limits on candidate expenditures are precluded by *Buckley*, the Court should "revisit" the decision in light of new facts and circumstances.[25]

The denial of the petition in *Kruse* is hardly surprising since the Court has given no indication that it wants to weaken *Buckley*. Indeed, in the most recent Supreme Court decision on campaign finance regulation, *Colorado Republican Federal Campaign Committee v. FEC*,[26] some Justices expressed an interest in expanding *Buckley*. The plurality opinion (written by Justice Breyer and joined by Justices O'Connor and Souter) held fast to *Buckley's* distinction between contributions and expenditures. Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia filed a concurring opinion arguing that any restriction on expenditures by political parties -- even those coordinated with a candidate -- is unconstitutional. Justice Thomas, also joined by Chief Justice Rehnquist and Justice Scalia, wrote a separate concurring opinion arguing that contribution limits are unconstitutional and that this aspect of *Buckley* should be overruled. Only the two dissenting Justices, Stevens and Ginsburg, would have upheld the FEC's interpretation, indicating some willingness to relax *Buckley*. The case certainly does not reflect any dissatisfaction with *Buckley's* invalidation of spending limits and, if anything, would tend to suggest that the Court is prepared to broaden *Buckley*, rather than restrict it.

C. Reporting and Disclosure Requirements

Buckley indicates that the scope of permissible reporting and disclosure requirements is somewhat broader than permissible limits on contributions and expenditures because reporting and disclosure requirements are less restrictive of speech than spending limits. In particular, reporting and disclosure requirements may be imposed on independent expenditures (i.e., those that are not coordinated with a candidate) that "expressly advocate" the election or defeat of a "clearly identified candidate." The Court, however, also indicated that reporting and dis-

closure requirements could not be applied to "issue advocacy" and was especially concerned that express advocacy be defined so as to avoid vagueness and overbreadth problems. In addition, requirements that political groups disclose their contributors may have an unconstitutional chilling effect on associational rights in particular cases. Insofar as direct limits on independent expenditures are generally unconstitutional, campaign finance reform efforts often focus on strengthening reporting and disclosure requirements. These efforts have raised issues involving the imposition of new and more stringent requirements and the use of broader definitions of express advocacy. Some cases have also found the application of requirements that political groups disclose their contributors to be unconstitutional as applied to particular groups.

1. *New and More Stringent Requirements*: Lower courts have generally indicated that new and more stringent reporting and disclosure requirements are permissible, if properly constructed. One fairly common requirement is that political advertisements expressly advocating the election or defeat of a clearly identified candidate must disclose the identity of the advertisement's sponsor. The Supreme Court invalidated a broad prohibition against anonymous political pamphlets in *McIntyre v. Ohio Election Commission*,[27] indicating that compelled self-identification is more intrusive than mandatory reporting (as in *Buckley*). Nonetheless, lower courts have distinguished *McIntyre* and upheld more narrowly tailored requirements that apply only to express advocacy of the election or defeat of a clearly identified candidate.[28]

Another way of strengthening reporting and disclosure requirements is to lower the size of contributions or expenditures that trigger the reporting and disclosure requirements. Because these requirements do not prevent speech, lowering the amount that triggers reporting and disclosure would not suffer from the same problems as lowering limits on contributions. Thus, the court in *Vote Choice, Inc. v. DiStefano*,[29] held that "first dollar" reporting requirements (i.e., all contributions of one dollar or more) were not per se invalid under the First Amendment, even though the governmental interest in informing the public through disclosure of contributors grew "somewhat attenuated" as the amount of contributions decreased, because there was still a compelling governmental interest in informing the voters of the identity of contributors. The particular statute in question, however, was unconstitutional because it applied only to PACs, and thus imposed a special burden on associational rights. Under *Vote Choice*, a more broadly applicable first dollar reporting requirement might be constitutionally valid.

2. *Defining Express Advocacy*: To avoid constitutional difficulties, *Buckley* imposed a narrowing construction on FECA's reporting and disclosure requirements that prevented their application to contributions and expenditures for issue advocacy.[30] First, reporting and disclosure requirements for political committees could only be applied to committees whose primary purpose was the election or defeat of a candidate or candidates. Second, individuals and groups could be required to report their own expenditures only if the expenditures were for "express advocacy" of the election or defeat of a "clearly identified candidate." These narrowing constructions are generally thought to reflect constitutional requirements.[31]

The express advocacy test permits the circumvention of reporting and disclosure requirements through carefully worded independent expenditures. For example, in *Christian Action v. FEC*,[32] the court held that the following advertisement, run just before the 1992 presidential elections, was exempt from reporting and disclosure requirements:

> Bill Clinton's vision for America includes job quotas for homosexuals, giving homosexuals special civil rights, allowing homosexuals in the armed forces. Al Gore supports homosexual couples' adopting children and becoming foster parents. Is this your vision for a better America? For more information on traditional family values, contact the Christian Action Network.[33]

Such cleverly worded advertisements do not use express words of advocacy, but in context the message is fairly clear. Thus, many campaign reform proposals center around redefining express advocacy so that reporting and disclosure requirements apply to this kind of advertisement.

The extent to which the concept of express advocacy may be redefined remains unclear, however. In *Buckley*, the Court emphasized the need for a bright-line test that would not reach mere issue advocacy. In a footnote, the Court gave examples of words and phrases that would constitute express advocacy. In construing the scope of the Federal Election Commission's authority under FECA, lower courts have divided over whether it extends only to expenditures using *Buckley's* "magic words."[34] These cases, however, only address *Buckley's* interpretation of FECA, and do not necessarily imply that the magic words are constitutionally required. Thus, campaign finance reform statutes probably do not have to limit reporting and disclosure requirements to advertisements that use the magic words, provided that the requirements do not apply to issue advocacy and incorporate a bright-line test that avoids unclear and subjective judgments.

One proposal that might satisfy these requirements was incorporated into the McCain-Feingold Campaign Finance Reform Bill, which defined express advocacy to include (1) the use of the magic words; (2) the use of a campaign slogan or words that in context can have no reasonable meaning other than to advocate the election or defeat of a clearly identified candidate; (3) paid advertisements that expressly refer to one or more clearly identified candidates within 60 days of an election; or (4) any communication that expresses unmistakable and unambiguous support for or opposition to one or more clearly identified candidates when taken as a whole and with limited reference to external events, such as proximity to an election. While some components of this definition may be problematic, it represents a potentially constitutional redefinition of express advocacy.

3. *Disclosure of Contributors*: Although *Buckley* rejected a facial challenge to FECA's requirement that political committees (narrowly defined to include only groups whose principal purpose is the election or defeat of a candidate) disclose their contributors, the Court recognized that such requirements may have a chilling effect on associational rights. Thus, such requirements may not be applied if disclosure would subject contributors to significant retaliation, but the burden is on the group in

question to produce evidence that there is a realistic fear of retaliation.[35]

D. Soft Money

As suggested by the foregoing discussion, soft money is not so much a distinct problem as a manifestation of the gaps in campaign finance regulation under FECA and the *Buckley* framework. In its narrowest sense, soft money refers to contributions and expenditures that are exempt from FECA's contribution and voluntary expenditure limits and reporting and disclosure requirements. In particular, soft money includes contributions to political parties and PACs to be used for expenditures that are not coordinated with a candidate's campaign and do not expressly advocate the election or defeat of a clearly identified candidate. The term is thus generally used in connection with federal campaign finance regulation, and soft money reform proposals are generally designed to bring soft money under the voluntary spending limits attached to public financing and/or to extend reporting and disclosure requirements to soft money. To the extent that state campaign finance regulation mirrors federal law, soft money could present a problem for states as well, however. Such proposals would be subject to the constitutional framework articulated in *Buckley* and its progeny, and the extent to which efforts to regulate soft money are constitutional remains unclear.

III. Summary of the Constitutional Limits of Campaign Finance Regulation

Given the nature of constitutional decision-making, it is difficult to articulate precisely the constitutional rules governing campaign finance regulation. The principles involved are to some degree open-ended and the cases are highly fact specific. Thus, the case law is subject to varying interpretations. Moreover, because lower court decisions are not binding on courts from other jurisdictions, not all courts would follow all of the decisions discussed above. With these caveats in mind, I offer the following summary of the constitutional parameters of campaign finance regulation:

* The state may limit contributions to candidates and their campaign committees, provided that the limits are not set too low.

* The state may not limit "independent" expenditures, including expenditures that expressly advocate the election or defeat of a clearly identified candidate.

* The state may apply contribution limits to expenditures that are coordinated with, requested by, or under the control of candidates or their campaign committees.

* The state may not limit contributions to groups engaging in issue advocacy or supporting or opposing ballot initiatives.

* The state may require corporations and labor unions (except voluntary political associations not engaged in business activities, without shareholders or others with a claim on assets or earnings, and not serving as a conduit for a

business corporation or a union) to make political expenditures from a segregated political fund containing only voluntary contributions.

* The state may set voluntary spending limits for candidates, including limits attached to receipt of public funding, but nominally voluntary schemes may be invalid if they are coercive.

* The state may require political groups whose primary purpose is the election or defeat of a candidate or candidates to disclose their contributors unless the groups produce evidence of a reasonable fear of retaliation as a result of disclosure.

* The state may require reporting and disclosure of independent expenditures that expressly advocate the election or defeat of a clearly identified candidate, provided that express advocacy is defined through a bright line test and does not include "issue advocacy."

IV. Conclusion and Author's Postscript

On October 14, 1998, I appeared before the Special Committee on Local Government to summarize the written testimony from which this article has been adapted, and to answer questions from the members of the Special Committee. Toward the end of the question and answer session, I was asked to comment specifically on two bills: (1) House Bill No. 2662, which passed in the previous legislative session; and (2) Senate Bill No. 432, which had been proposed by the Governor but did not pass. In response to this request I later submitted additional written testimony addressing potential constitutional difficulties with the bills and returned to the Committee for further discussion of these issues. In the meantime, Kansans for Life had filed an action in federal district court seeking to block a decision in which the Governmental Ethics Commission ruled that a Kansans for Life advertisement was express advocacy subject to the reporting and disclosure requirements of Kansas law, notwithstanding the fact that the advertisement did not use the magic words or their equivalent. These events prompted legislators in both the House and the Senate to introduce new legislation this session, and I was invited to discuss campaign finance reform with the House and Senate Committees considering these bills. The central question that emerged from these developments is the extent to which the state may depart from the "magic words" formulation of *Buckley* in defining "express advocacy," and what alternative definitions, if any, would satisfy constitutional requirements. Given the ongoing importance of these matters for the State of Kansas, I will address these issues in a second article forthcoming in the next issue of the *Kansas Journal of Law and Public Policy*.[36]

Notes

1. 424 U.S. 1 (1976).
2. The Court also held that certain powers could not constitutionally be granted to the FEC because its mem-

bers were not appointed in accordance with Article II, Section 2, Clause 2, of the United States Constitution. This portion of *Buckley* applies only to the federal government and need not concern the Committee in this context.

3. FECA itself did not require political committees to be under a candidate's control or to have the nomination or election of a candidate as the major purpose, but lower courts had imposed this narrowing construction on the Act, and the Supreme Court referred approvingly to it in explaining why reporting requirements relating to the expenditures did not pose the same vagueness and overbreadth problems as reporting and disclosure requirements for individual expenditures.

4. 357 U.S. 449 (1958).

5. Specifically, because the public funding is financed by a voluntary federal income tax check-off, there is no guarantee that there will be enough to fund the full amounts established under the statute. In such cases, candidates who accept public funding may engage in fundraising to reach the full amounts.

6. *See* Carver v. Nixon, 72 F.3d 633 (8th Cir. 1995), *cert. denied sub nom.* Nixon v. Carver, 518 U.S. 1033 (1996) (invalidating contribution limits of $100 and $300 to candidates for certain state offices); Russell v. Burris, 146 F.3d 563 (8th Cir. 1998) *cert. denied* 119 S.Ct. 510 (1998).

7. *See* Vannatta v. Keisling, 151 F.3d 1215 (9th Cir. 1998).

8. 142 F.3d 940 (6th Cir. 1998).

9. 454 U.S. 290 (1981).

10. 453 U.S. 182 (1981).

11. 518 U.S. 604 (1996).

12. *See infra* notes 24-26 and accompanying text (discussing possibility that *Buckley* might be overturned or narrowed).

13. 470 U.S. 480 (1985).

14. *See* Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

15. *See* FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) (distinguished in *Austin* on these grounds); Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994), *cert. denied sub nom.* Holahan v. Day, 513 U.S. 1127 (1995) (ban on corporate expenditures invalid as applied to nonprofit political corporation).

16. *See* First National Bank v. Belotti, 435 U.S. 765 (1978).

17. 445 U.S. 955 (1980) (summarily affirming lower court decisions at 616 F.2d 1 (2d Cir. 1980) and 487 F. Supp. 280 (S.D.N.Y. 1980)(three judge panel)).

18. *Compare* Rosenstiel v. Rodriguez, 101 F.3d 1544 (8th Cir. 1996) (upholding voluntary scheme), *cert. denied* 117 S. Ct. 1820 (1997), *with* Russell v. Burris, *supra* note 6 (invalidating mandatory public funding scheme with total expenditure limitations).

19. 71 F.3d 1422 (8th Cir. 1995), *cert. denied sub nom* Nixon v. Shrink Missouri Government PAC, 518 U.S. 1033 (1996).

20. *See* National Conservative Political Action Committee, *supra* note 13 (invalidating limits on independent expenditures made by PACs on behalf of candidates receiving public funding).

21. *See* Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994).

22. *See id.* at 1360.

23. *See, e.g.*, National Conservative Political Action Committee, *supra* note 13 (invalidating cap on independent PAC expenditures on behalf of candidates receiving public funding); Kruse v. City of Cincinnati, 142 F.3d 907 (6th Cir. 1998), *cert. denied* 119 S.Ct. 511 (1998) (invalidating cap on total campaign expenditures for city council races); New Hampshire Right to Life Political Action Committee v. Gardner, 99 F.3d 8 (1st Cir. 1996) (invalidating $1000 cap on independent expenditures).

24. 142 F.3d 907 (6th Cir. 1998), *cert. denied* 119 S.Ct. 511 (1998).

25. The Supreme Court denied cert. in *Kruse*, *see* 119 S.Ct. 511 (1998), after this testimony was given.

26. 518 U.S. 604 (1996); *see supra* notes 11-12 and accompanying text.

27. 514 U.S. 334 (1995).

28. *See* Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 162 (1997) (disclosure requirement for advertisements containing express advocacy); Vermont Right to Life Committee v. Sorrell, 14 F. Supp. 2d 204 (D. Vt. 1998) (upholding disclosure requirement as narrowly construed to apply only to express advocacy); *see also* FEC v. Survival Education Fund, Inc., 65 F.3d 285 (2d Cir. 1995) (upholding disclosure requirement for solicitations of contributions for express advocacy but indicating that disclosure requirement for advertisements may be unconstitutional after *McIntyre*).

29. 4 F.3d 26 (1st Cir. 1993).

30. Note that because coordinated expenditures are, in effect, contributions, reporting and disclosure require-

ments may apply to coordinated expenditures even if they only engage in issue advocacy.

31. *See, e.g.*, North Carolina Right to Life, Inc. v. Bartlett, 3 F. Supp. 2d 675 (E.D. N. Car. 1998) (invalidating registration requirement for individuals and groups engaged in issue advocacy); Virginia Society for Human Life, Inc. v. Caldwell, 500 S.E. 2d 814 (Va. 1998) (construing state disclosure requirements narrowly to prevent application to groups engaged in issue advocacy); *see also* FEC v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997) (holding that FEC prosecution for failure to disclose expenditures for advertisement "implicitly" advocating defeat of President Clinton in 1992 campaign was so clearly outside scope of FECA as to justify award of attorney fees under the Equal Access to Justice Act).

32. 110 F.3d 1049 (4th Cir. 1997).

33. *Id.* at 1050.

34. *Compare* Christian Action Network, *supra* note 29, (implying that magic words are required) and Faucher v. Federal Election Commission, 928 F.2d 468 (1st Cir. 1991) (same), *with* Federal Election Commission v. Furgatch, 807 F.2d 857 (9th Cir. 1987) (permitting prosecution for advertisements that did not contain magic words).

35. For cases finding a realistic fear of retaliation see Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982); FEC v. Hall-Tyner Election Campaign Committee, 678 F.2d 416 (2d Cir. 1982).

36. In addition, the adaptation of this article reflects some minor substantive changes from my written testimony that reflect my further study of the issues.