

# COMPELLED DISCLOSURE OF INDEPENDENT POLITICAL SPEECH AND CONSTITUTIONAL LIMITATIONS

JAN WITOLD BARAN\*

## INTRODUCTION

The January 25, 2001 *Call To Action* issued by participants in last year's *Summit on Improving Judicial Selection*<sup>1</sup> manifests a contradiction. It professes to respect the First Amendment rights of independent groups; nonetheless, it encourages governmental regulation of their political speech.<sup>2</sup> The reasons for this contradiction are simple. The First Amendment impedes regulation while besieged candidates struggle to find "solutions" for increasingly contentious judicial elections. In the past, races for the bench took place in sleepy backwaters. Such races are now attracting increased attention both because of the personalities involved<sup>3</sup> and, more often, because of what the *Call To Action* delicately calls "the judiciary's policy-making role."<sup>4</sup> Whatever the cause, the result is growing pressure to produce "modern" judicial election campaigns (i.e., campaigns that are driven by the need for money to disseminate more information to a large but often inattentive electorate through increasingly expensive modes of communication). This pressure is likely to continue. While the 1998 campaign for one of Wisconsin's seats in the United States Senate cost \$4 million for the relatively restrained Russell Feingold, the 1999 Wisconsin Supreme Court race cost "only" \$1 million for all of the candidates combined.<sup>5</sup> Clearly, spending in statewide judicial races lags behind that of other statewide races.

Judicial campaigns are attracting the attention of independent groups or, as the *Call To Action* refers to them, "interest groups" (apparently disinterested

---

\* Partner and head of the Election Law and Government Ethics practice group at the Washington, D.C. law firm of Wiley Rein & Fielding LLP. The author is a member of the ABA Commission on Public Financing of Judicial Elections. The author gratefully acknowledges the assistance of Caleb P. Burns, Wiley Rein & Fielding LLP, in the preparation of this Paper. This Paper was prepared specifically for the *Symposium on Judicial Campaign Conduct and the First Amendment*. The views expressed herein are those of the author and do not necessarily reflect those of the National Center for State Courts, the Joyce Foundation, or the Open Society Institute. Supported (in part) by a grant from the Open Society Institute's Program on Law & Society, and a grant from the Joyce Foundation.

1. Symposium, *Call to Action: National Summit on Improving Judicial Selection*, 34 LOY. L.A. L. REV. 1353 (2001) [hereinafter *Call to Action*].

2. *See id.* at 1355.

3. *See* Steven Benen, *Monumental Mistake*, CHURCH & STATE, Dec. 1, 2001, at 8 (discussion of a judicial candidate who vowed, during his campaign, to follow the Ten Commandments).

4. *Call to Action*, *supra* note 1, at 1354.

5. *See* Federal Election Commission, Financial Activity of Senate Campaigns 1997-1998, at <http://www.fec.gov/1996/states/wisen6.htm> (Dec. 31, 1998); Wisconsin Citizen Action, Impartial Justice Position Paper, available at <http://www.wi-citizenaction.org> (last visited Mar. 6, 2002).

groups are not a problem because of their apathy). These interest groups are creating waves in the formerly placid backwaters by engaging in advertising. Some of the ads in the 2000 judicial campaigns were critical or otherwise unflattering, and have been described as “pernicious,” “nasty,” and “muck,” although not untruthful.<sup>6</sup> Even complimentary ads have been repudiated by candidates.<sup>7</sup>

Regardless of content, large-scale independent advertising is unsettling to any politician. By definition, independent ads must be independent of campaigns; therefore, they are beyond the control of the candidate. Moreover, advertising, particularly that which is critical, often requires a response. The need to respond, in turn, places demands on a campaign’s limited resources. Judicial campaigns generally have limited resources with which to respond. To complicate matters, judicial candidates are uniquely constrained in what they can say and do during a campaign.<sup>8</sup> Rather than loosen some of the self-imposed restrictions on candidates’ conduct, the *Call To Action* searches for new ways to control independent groups (especially “outside groups,” whatever those are) which are not subject to the canons of judicial conduct.<sup>9</sup>

The proposals submitted by the Deborah Goldberg and Mark Kozlowski<sup>10</sup> respond to the call for “creative ways” of regulating political speech. Unfortunately, there has been no historic lack of creative attempts to regulate independent political speech. Legislatures and agencies regularly try to impose prohibitions, limits, and disclosure requirements on interest groups. In the past three decades, the federal government has sought to restrict the political speech of particular groups. In each instance, a disfavored group communicated its approval or disapproval of candidates, public officials, or the policies they supported. The messages of these groups included calls for the impeachment of President Nixon,<sup>11</sup> opposition to Nixon’s anti-school busing program,<sup>12</sup> criticism of President Reagan’s position on nuclear disarmament,<sup>13</sup> criticism of the voting record of a member of Congress on tax issues,<sup>14</sup> and the dissemination of

---

6. *Call to Action*, *supra* note 1, at 1359; Deborah Goldberg & Mark Kozlowski, *Constitutional Issues in Disclosure of Interest Group Activities*, 35 IND. L. REV. 755 (2002).

7. See Beverly Pettigrew Kraft, *State Supreme Court Chief Justice Expresses Regrets Upon Leaving the Bench*, CLARION-LEDGER (Miss.), Dec. 24, 2000.

8. See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canon 5 (2000) (banning judges and federal candidates from inappropriate political activity).

9. See *Call to Action*, *supra* note 1, at 1359 (discussing the need for “creative ways” to impose regulation).

10. Goldberg & Kozlowski, *supra* note 6.

11. See *United States v. Nat’l Comm. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972).

12. See *ACLU v. Jennings*, 366 F. Supp. 1041 (D. D.C. 1973), *vacated as moot*, *Staats v. ACLU*, 422 U.S. 1030 (1975).

13. See *FEC v. Survival Educ. Fund*, 65 F.3d 285 (2d Cir. 1995).

14. See *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980).

members of Congress' positions on abortion.<sup>15</sup> In 1992, a group called the Christian Action Network financed television advertisements which criticized candidates Clinton and Gore for maintaining a pro-homosexual political agenda; the ads were broadcast in the heat of the presidential election season, in the market where a presidential debate was to occur, and within two weeks of that debate.<sup>16</sup> All of the above examples led to court cases in which the attempted regulation of the group's activities was struck down.

Efforts to ban or force disclosure of political speech run into the so-called "express advocacy" standard, as set forth in *Buckley v. Valeo*<sup>17</sup> and its progeny. As one court put it, "[w]hat the Supreme Court did [in *Buckley*] was draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues."<sup>18</sup> The most recent encounter with "express advocacy" was the Fourth Circuit decision in *Virginia Society for Human Life, Inc. v. FEC*.<sup>19</sup> In declaring unconstitutional a Federal Election Commission regulation which sought to broaden the definition of "express advocacy," the Fourth Circuit noted that

[t]he FEC ends its argument that [its definition of "express advocacy"] is constitutional with the following comment: "if the express advocacy requirement is read too narrowly, the prohibitions of 2 U.S.C. § 441(b) will require little more than careful diction and will do almost nothing to prevent millions of dollars from the general treasuries of unions and corporations from directly influencing federal elections, and from doing so without disclosing to the public the source of the influence." That is a powerful statement, but we are bound by *Buckley* and [*Massachusetts Citizens for Life*] which strictly limit the meaning of "express advocacy." If change is to come, it must come from an imaginative Congress or from further review by the Supreme Court.<sup>20</sup>

Neither imaginative Congresses nor the most recent decisions of the Supreme Court have produced such change. Likewise, Goldberg and Kozlowski's proposals will not satisfy constitutional standards; their strategy requires the overruling of one or more holdings of the Supreme Court. However, even if *Buckley* were overruled, the question would remain: how can the government compel disclosure without being unconstitutionally vague or overbroad?

In order to understand the conundrum facing judicial campaigns, an

---

15. See *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999).

16. See *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997).

17. 424 U.S. 1 (1976).

18. *Me. Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 12 (D. Me.), *aff'd*, 98 F.3d 1 (1st Cir. 1996). See also *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001); *Christian Action Network*, 110 F.3d at 1055; *Right to Life of Mich., Inc. v. Miller*, 23 F. Supp. 2d 766, 768 (W.D. Mich. 1998); *W. Virginians for Life, Inc. v. Smith*, 960 F. Supp. 1036, 1040 (S.D. W. Va. 1996).

19. 263 F.3d at 379.

20. *Id.* at 392 (citation omitted).

explication of the "express advocacy" standard is necessary. Accordingly, Part I of this Paper is devoted to explaining what the standard is and why the Supreme Court arrived at that result. Part II addresses the proposals to circumvent the "express advocacy" standard. Finally, Part III describes alternative mechanisms for accommodating independent advertising.

### I. THE "EXPRESS ADVOCACY" STANDARD

The Supreme Court has recognized only one governmental interest sufficient to justify the mandatory disclosure of independent groups' political activities—the prevention of corruption and the appearance of corruption.<sup>21</sup> However, even this compelling interest can justify disclosure only when a speaker engages in "express advocacy."<sup>22</sup>

*Buckley* addressed a provision of the Federal Election Campaign Act of 1971 (FECA), that required "[e]very person (other than a political committee or candidate) who makes contributions or expenditures . . . over \$100 in a calendar year" to file a disclosure statement.<sup>23</sup> The Court concluded that this statute survived strict scrutiny<sup>24</sup> because the government's compelling interest in preventing corruption and the appearance of corruption was advanced by the statute's effect of increasing "the fund of information concerning those who support . . . candidates" by helping "voters to define more of the candidates' constituencies."<sup>25</sup>

However, the Court recognized that the definition of the term "expenditure," which was incorporated into the language of the disclosure provision, was not narrowly tailored to reach only those persons in whom the government had an "informational interest" in requiring disclosure.<sup>26</sup> FECA defined the term "expenditure" as, *inter alia*, any payment made "for the purpose of . . . influencing" the election of any person to federal office.<sup>27</sup> Because the disclosure provision "could be interpreted to reach groups engaged purely in issue discussion," and the government's "informational interest" was predicated purely on discerning electoral support for political candidates, the Court was concerned that "the relation of the information sought to the purposes of [FECA] may be too

---

21. See *Buckley*, 424 U.S. at 26-27, 78-81.

22. *Id.* at 80. The government's anticorruption interest justifies numerous restrictions on both contributions to candidates and expenditures that are either requested by or coordinated with candidates. See *id.* at 46-47. The *Call To Action* seeks constitutional ways to regulate independent, not coordinated spending. See *Call to Action*, *supra* note 1, at 1359.

23. 2 U.S.C. § 434(e) (1974), cited in *Buckley*, 424 U.S. at 74-75.

24. Strict scrutiny is applied to statutes that regulate independent speech and associational activities. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); *Buckley*, 424 U.S. at 75; *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958).

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

26. *Id.* at 78-81.

27. 2 U.S.C. § 431(f) (1974), cited in *Buckley*, 424 U.S. at 79.

remote.”<sup>28</sup> Therefore, the Court construed the phrase “for the purpose of . . . influencing” to apply only to communications that include explicit words, “that expressly advocate the election or defeat of a clearly identified candidate.”<sup>29</sup>

In *Buckley*, the Court discussed the dangers of not narrowly tailoring regulation of political speech to that of “express advocacy.”<sup>30</sup> The Court also observed that the constitutionally protected discussion of issues includes the discussion of political candidates,

[f]or the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.<sup>31</sup>

The Court warned that, if regulation of political speech was not circumscribed to keep the discussion of candidates distinct from express calls for electoral action, general political discourse would be chilled and First Amendment rights would be violated.<sup>32</sup> The Court remedied this problem by formulating the “express advocacy” standard, which limits the reach of regulation “to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ [and] ‘reject.’”<sup>33</sup> Indiana Chief Justice Randall T. Shepard has noted that, at election time, “a veritable Niagara of ideas will flow.”<sup>34</sup> To borrow the metaphor, under *Buckley* the government may not dam Niagara; it may only regulate a narrowly defined tributary of the cascading speech.

The Court in *Buckley* recognized that the bright-line “express advocacy” formulation would *not* reach all “partisan discussion,” explaining that partisan speech cannot be burdened unless it “expressly advocate[s] a particular election result.”<sup>35</sup> “So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views.”<sup>36</sup> The Court determined that protecting partisan statements was constitutionally necessary in order to prevent chilling First Amendment rights. Regulation of political speech with a less “clear-cut distinction between discussion, laudation,

---

28. *Buckley*, 424 U.S. at 80.

29. *Id.* at 43, 80 (footnote omitted).

30. *See id.* at 78-80.

31. *Id.* at 42.

32. *Id.* at 43-45.

33. *Id.* at 44 n.52.

34. Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1083 (1996).

35. *Buckley*, 424 U.S. at 80.

36. *Id.* at 45.

general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers. . . ."<sup>37</sup> "Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."<sup>38</sup>

The "express advocacy" standard was reaffirmed by the Supreme Court roughly a decade later in *FEC v. Massachusetts Citizens for Life* ("MCFL").<sup>39</sup> The Court decided *MCFL* by directly quoting the "express advocacy" standard from *Buckley*, and applying *Buckley*'s core reasoning and its demand for "explicit words" that "expressly advocate" electoral action.<sup>40</sup>

Every federal court of appeals that has discussed *Buckley* and *MCFL* has agreed that the test established by those cases demands explicit words of "express advocacy."<sup>41</sup> No federal court of appeals has ever read *MCFL* to modify *Buckley*'s "express advocacy" test. However, in *FEC v. Furgatch*<sup>42</sup> the Ninth Circuit caused confusion on this point by overlooking the then just-decided *MCFL* opinion and holding that "express advocacy" need not include express

37. *Id.* at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

38. *Id.* Section 437(a) of FECA attempted to require disclosure by any group that published or broadcast material referring to a candidate or setting forth the candidate's position on any public issue, his voting record or other official acts. See *Buckley v. Valeo*, 519 F.2d 821, 869-70 (D.C. Cir. 1975). In striking down section 437(a) of FECA, the Court of Appeals for the D.C. Circuit cited many of the First Amendment concerns that later motivated the Supreme Court's "express advocacy" standard.

Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.

*Id.* at 875, quoted in *Buckley*, 424 U.S. at 43 n.50. Yet, the court still found section 437(a) unconstitutional because its regulation of communications that invoked the names of candidates could apply to "protected exercises of speech" and could "deter[] . . . expression deemed close to the line." *Id.* Section 437(a) was so indefensible that its overturning was not even appealed to the Supreme Court.

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

40. *Id.* at 249.

41. See *Va. Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 390 (4th Cir. 2001); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1187-88 (10th Cir. 2000); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 968 (8th Cir. 1999); *Me. Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996); see also *Fla. Right to Life, Inc. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (affirming preliminary injunction); *Perry v. Bartlett*, 231 F.3d 155, 161-62 (4th Cir. 2000); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir. 1999); *Va. Soc'y for Human Life, Inc. v. Caldwell*, 152 F.3d 268, 269 (4th Cir. 1998); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1053-55 (4th Cir. 1997); *Faucher v. FEC*, 928 F.2d 468, 469-70 (1st Cir. 1996); *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 52-53 (2d Cir. 1980).

42. 807 F.2d 857 (9th Cir. 1987).

words of advocacy, but could be based on a broader contextual examination of the speech.<sup>43</sup> *Furgatch* ignored *MCFL*. *MCFL* was issued in mid-December 1986, and *Furgatch* was released in early January 1987. *Furgatch*, which may well have been finalized and approved before *MCFL* was issued, cites the First Circuit's decision in *MCFL*,<sup>44</sup> but does not mention, much less discuss, the Supreme Court's *MCFL* ruling. Because *Furgatch* overlooked *MCFL*'s reaffirmation of the "express advocacy" standard, *Furgatch* is dubious precedent. The few state court cases that have cited *Furgatch* are, therefore, also of little or no authoritative value.<sup>45</sup> Only one federal district court decision, currently on appeal to the Fifth Circuit, has interpreted *Buckley* and *MCFL* differently.<sup>46</sup>

The conclusion to be drawn from *Buckley*, *MCFL*, and their progeny is that the government can compel independent private groups to disclose certain information only when they engage in political speech that contains "express advocacy."<sup>47</sup> Without this limitation, a statute is not narrowly tailored to the government's "informational interest" in allowing the public to discern electoral support for political candidates. Disclosure requirements that are not narrowly tailored result in impermissible chilling of First Amendment rights.

## II. ATTEMPTS TO CHANGE OR CIRCUMVENT THE "EXPRESS ADVOCACY" STANDARD

Some would shift the balance created by *Buckley* and *MCFL* far the other way. Commentators propose a rule that any criticism (or praise) of a government official, while that official is a candidate, is—or at least may be—regulated in the same manner as express advocacy.<sup>48</sup> Not even *Furgatch* supports such a Draconian curtailment of First Amendment rights. The First Amendment protects the right to publicly discuss, praise, or criticize high government officials, even when the criticism is "pernicious." Indeed, *Buckley* considered

---

43. *Id.* at 863.

44. *Id.* at 861.

45. See, e.g., *State ex rel. Crumpton v. Keisling*, 982 P.2d 3, 7 (Or. Ct. App. 1999), review denied, 994 P.2d 132 (Or. 2000); *Elections Bd. of Wis. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721, 733 (Wis.), cert. denied, 528 U.S. 969 (1999). In *Osterberg v. Peca*, 12 S.W.3d 31 (Tex. 2000), the ad in question used explicit words of express advocacy. See *id.* at 36.

46. *Chamber of Commerce v. Moore*, No. 00-600779 (5th Cir. Apr. 5, 2002). The author is counsel to the Chamber of Commerce in the appeal. As this issue went to print, the Fifth Circuit reversed and remanded the case. *Chamber of Commerce v. Moore*, 288 F.3d 187 (5th Cir. 2002).

47. See *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1193-95 (10th Cir. 2000); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 386 (2d Cir. 2000); *N.C. Right to Life v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir. 1999); *Va. Soc'y for Human Life, Inc. v. Caldwell*, 152 F.3d 268, 275 (4th Cir. 1998); *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 52-53 (2d Cir. 1980).

48. See Glenn J. Moramarco, *Beyond "Magic Words": Using Self-Disclosure to Regulate Electioneering*, 49 CATH. U. L. REV. 107, 107-09 (1999).

and rejected any test that turned on "laudation" or criticism of a candidate.<sup>49</sup>

Accordingly, the "contextual approach" proposed by Goldberg and Kozlowski,<sup>50</sup> in reliance in part on the district court opinion in *Chamber of Commerce v. Moore*,<sup>51</sup> will not work. Even a casual reading of *Buckley* reveals that the *Moore* court erred in concluding that ads could be regulated because they mentioned issues ("victims' rights" and "common sense judicial philosophy") without elaboration.<sup>52</sup> The *Moore* court found "express advocacy" on the basis that the Chamber of Commerce's ads described an incumbent's "background and experiences" and because the judge perceived laudation as "obviously designed to exhort support."<sup>53</sup> This is entirely contrary to *Buckley* and creates a vague and unenforceable standard.

Goldberg and Kozlowski suggest another way of regulating political speech that goes beyond explicit words of advocacy.<sup>54</sup> They advance a recently proposed theory similar to the "McCain-Feingold"<sup>55</sup> and "Shays-Meehan"<sup>56</sup> bills which regulate "electioneering communications" (i.e., speech that merely "refers to a clearly identified candidate" within a particular time period before an election.). The bills propose to prohibit any corporation (including non-business, not-for-profit corporations) or any union from financing a public communication that refers to a candidate thirty days before a primary election and sixty days before a general election. Other speakers would be subject to disclosure requirements. These proposed "electioneering communication" provisions likely would not survive a constitutional challenge.<sup>57</sup> They suffer from the same problems present in the FECA provisions addressed in *Buckley*. They do not regulate categorical communications of electoral support, but instead apply to any communication that merely refers to a candidate. These proposed bans on invoking candidate names during ninety days in an election year are unconstitutionally overbroad. Similarly, it is irrational to require disclosure merely because a candidate's name has been uttered on a certain day. The only previous Supreme Court case to examine a similar proposal struck down a one-day ban.<sup>58</sup> It is no wonder, then, that Goldberg and Kozlowski note that "[t]his approach is not without constitutional risk."<sup>59</sup>

Goldberg and Kozlowski suggest creating a rebuttable presumption of

---

49. *Buckley v. Valeo*, 424 U.S. 1, 43 (1976).

50. Goldberg & Kozlowski, *supra* note 6, at 765.

51. *Chamber of Commerce v. Moore*, 3:00-cv-778WS (S.D. Miss. Nov. 2, 2000).

52. *Id.* at 25.

53. *Id.*

54. Goldberg & Kozlowski, *supra* note 6, at 766-67.

55. S. 27, 107th Cong. § 201 (2001) ("McCain-Feingold").

56. H.R. 2356, 107th Cong. § 201 (2001) ("Shays-Meehan").

57. The government "cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963), *quoted in Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 622 (1996).

58. *Mills v. Alabama*, 384 U.S. 214, 220 (1966).

59. Goldberg & Kozlowski, *supra* note 6, at 767.

“express advocacy.”<sup>60</sup> A presumption is an “inference in favor of a particular fact.”<sup>61</sup> Recognizing that the discussion of issues and political candidates are often conflated, the Supreme Court’s “express advocacy” requirement effectively created a presumption *against* regulation of political speech.<sup>62</sup> Creating a presumption to the contrary would directly contravene *Buckley*, *MCFL*, and their progeny, which all require a presumption in favor of free discussion, not regulation.

Goldberg and Kozlowski also suggest that the different roles of judges and members of the so-called “political” branches may alter the application of First Amendment principles to judicial elections.<sup>63</sup> This argument is based on the notion that the government has a compelling interest in assuring that judges can execute their unique job functions, and that this compelling interest can justify regulation beyond “express advocacy.” There can be no doubt that the government has a compelling interest in maintaining the integrity of the judiciary. However, in order to properly assess the application of this government interest, “judicial integrity” must first be defined.

As a primary matter, the government’s interest is grounded in the differences between legislators and executives on the one hand, and judges on the other. The job of a legislator or an executive is to represent his or her constituents with respect to every professional decision made. The success of legislators and executives is measured by the degree to which these decisions advance the interests of a majority of the electorate. The job of a judge is much different. Though a judge’s constituents for electoral purposes are also the electorate, while on the bench a judge’s constituents consist only of individual litigants. As a result, a judge’s success is measured by how well he or she “represents” the litigants by impartially protecting their rights throughout the judicial process.

This difference is crucial. Judicial integrity is not grounded in abstract concepts such as the dignity of the bench or the image of the profession, but in the due process rights of present and future litigants.<sup>64</sup> These due process rights guarantee litigants a neutral adjudication by the judge presiding over their case.<sup>65</sup> Judicial integrity, therefore, is grounded in the ability of judicial candidates and judges to decide cases in a neutral manner. The government’s interest in judicial integrity is an interest in the integrity of judicial candidates and judges themselves. Only judges have the power to adversely affect the due process rights of future litigants by deciding their cases in a biased fashion.

A recent federal court of appeals case invoked the government’s interest in judicial integrity to uphold restrictions on judicial candidates’ First Amendment

---

60. *Id.* at 765.

61. BLACKS LAW DICTIONARY 1185 (6th ed. 1990).

62. *See Buckley v. Valeo*, 424 U.S. 1, 42-44 (1976).

63. Goldberg & Kozlowski, *supra* note 6, at 765-67.

64. For a full discussion on judicial integrity as the maintenance of the due process rights of litigants, see Shepard, *supra* note 34, at 1083-92.

65. *See id.*

rights.<sup>66</sup> *Republican Party of Minnesota v. Kelly* addressed state judicial canons which prohibited judicial candidates from identifying themselves with political parties and announcing their views on disputed legal issues. The canons survived strict scrutiny and were upheld by the court because they were narrowly tailored to advance the state's compelling interest in judicial integrity.<sup>67</sup> The court set the tone for its opinion by stating that "a judge's ability to apply the law neutrally is a compelling governmental interest of the highest order."<sup>68</sup> The court determined that the state had convincingly demonstrated that, when judges identify themselves with political parties and announce their legal views on various issues, the ability of judges to neutrally adjudicate cases is sacrificed.<sup>69</sup>

The *Republican Party of Minnesota* court noted, however, that the canons could not survive strict scrutiny if they had regulated activity by persons other than judicial candidates. "[B]ecause the State's compelling interest is in the rectitude of the candidate, a narrowly tailored restriction will regulate expressions by the candidate, not third parties."<sup>70</sup> "The government has an interest in the manner in which its elected officials conduct themselves while in office. The government does not and cannot have a legitimate interest in silencing the speech of third parties about the qualifications and political views of candidates for those offices."<sup>71</sup> Presumably, the government's interest also does not justify harassment of third parties through compelled disclosure. Consequently, judicial integrity may be a compelling government interest in support of restrictions on judicial candidates, but not on third parties.<sup>72</sup>

In sum, the express advocacy standard was established to permit the greatest

---

66. See *Republican Party of Minn. v. Kelly*, 247 F.3d 854 (8th Cir.), cert. granted, 122 S. Ct. 643 (2001); see also Shepard, *supra* note 34, at 1071-74.

67. *Republican Party of Minn.*, 247 F.3d at 885.

68. *Id.* at 864.

69. See *id.* at 868-72, 876, 879, 881.

70. *Id.* at 874.

71. *Id.* at 873-74 (quoting *Cal. Democratic Party v. Lungren*, 919 F. Supp. 1397, 1402 (N.D. Cal. 1996)).

72. The case of *Cox v. Louisiana*, 379 U.S. 559 (1965), is not to the contrary. See *Buckley v. Valeo*, 424 U.S. 1, 18 (1976). *Cox* addressed a Louisiana statute that criminalized picketing and parading near a court house done "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty. . . ." *Id.* at 560 (quoting LA. REV. STAT. ANN. § 14:401 (West 1962)). Part of the Court's explanation of the statute's constitutionality was that a "State may also properly protect the judicial process from being misjudged in the minds of the public." *Id.* at 565. Arguments that this statement can justify disclosure requirements of interest group activities surrounding judicial elections are misguided. As evidenced by the quoted language of the statute, *Cox* concerned conduct that could have an immediate effect on pending court cases, given the proximity of the illegal conduct to the court house. Analogies to *Cox* fit more appropriately in the Court's line of cases addressing content-neutral "time, place and manner" restrictions, and not in a discussion of content-based regulation of judicial electoral activity by interest groups. See *Burson v. Freeman*, 504 U.S. 191, 197 (1992), and cases cited therein.

range of unencumbered independent political expression. Proposals that seek to deviate from the standard must advance a valid government interest, avoid vagueness, and not be so broad as to encompass legitimate commentary about politicians and policies. The proposals advanced to date in legislatures and by Goldberg and Kozlowski are all deficient in one or more of these respects.

### III. ALTERNATIVES

The *Call To Action* implies, and Goldberg and Kozlowski state, that the appropriate response to independent advertising is to reduce or eliminate it through regulation.<sup>73</sup> This view requires two assumptions. First, one must assume that constitutional regulation is possible. As noted above, regulation of independent political advertising is, at the least, highly problematic. Second, one must assume that there would be no evasion of additional regulation.<sup>74</sup>

Whether compelled disclosure would be either effective or constitutional, there are alternatives. Of course, the best alternative is not to have elected judges. States have refused to adopt or expand merit selection of judges; nonetheless, the call for merit selection should continue. Additionally, steps can be taken to provide judicial candidates with more resources.

Public financing of judicial campaigns can provide neutral funding, reduce fundraising pressure, and give candidates more money to either inform voters or respond to advertising by others. Linking public funding with spending limits on campaigns will potentially exacerbate the disparity between campaign resources and activities by independent groups. Therefore, generous funding with high or no limits should be adopted. The ABA Commission on Public Financing of

---

73. Goldberg and Kozlowski candidly assert that “pernicious” speech will be reduced through compelled disclosure because “[m]ajor donors might be willing to bankroll nasty advertising campaigns as long as their involvement can be concealed.” Goldberg & Kozlowski, *supra* note 6, at 755, 757. Such a motive for regulation raises many constitutional issues beyond the scope of this Paper. One question is whether the compelled disclosure would create the type of “chill and harassment” that *Buckley* said would exempt even independent “express advocacy” from disclosure. *Buckley*, 424 U.S. at 82 n.109.

74. For example, a state could pass a law prohibiting certain groups (e.g., corporations and unions) from financing television ads that name a candidate for judicial office during the thirty days before an election. Assuming that such a statute is constitutional (which is unlikely), an incorporated entity or union could, nonetheless, run an ad such as this:

There is a judge who has never upheld a death penalty case. We can't tell you the name of this person because the judge also upheld a state law that makes it a crime for us to tell you. Please go to the following bar association website to find out who your judges are and don't forget to vote.

The Supreme Court noted in *Buckley*, that one should not “naively underestimate the ingenuity and resourcefulness of persons and groups” who would not have “much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign.” *Id.* at 45. The same will likely be true of alternative standards employed in the future to regulate speech.

Judicial Campaigns has proposed generous funding with high limits.<sup>75</sup> While only Wisconsin currently provides a form of public financing, this concept could be and should be promoted elsewhere.<sup>76</sup>

In addition to public financing, the response to “interest group” advertising will come from other “interest groups.” First and foremost, there is the press. Journalists and editorialists report, scrutinize and analyze controversial advertising. The accuracy of third party statements will be debated in the press. The sponsors of advertising are known either locally or nationally.<sup>77</sup> Their reputations and credibility will be at stake. This democratic mechanism should not be underestimated.

In addition, other public advocates will engage in the debate. Members of the bar, representatives of bar associations and sponsors of opposing independent advertising all have responded in the past to controversial ads. Their right to do so without further regulation will be preserved and will add to the debate.

In conclusion, when speech is perceived as “pernicious,” perhaps Justice Brandeis’ words should be heeded: “[T]he remedy to be applied is more speech, not enforced silence.”<sup>78</sup>

---

75. ABA Commission on Public Financing of Judicial Campaigns, Report (July 2001), at <http://www.ilcampaign.org/reports/JudicialFinancingReport.pdf>.

76. WIS. STAT. ANN. § 11.50 (1996 & Supp. 2002).

77. As Goldberg and Kozlowski note, “[w]hen the advertiser is the [U.S.] Chamber [of Commerce], the interest served by the ad is reasonably clear.” Goldberg & Kozlowski, *supra* note 6, at 757. In one of history’s many coincidences, both the Chamber of Commerce and the ABA Commission on Judicial Ethics were founded at the behest of the same individual, William Howard Taft.

78. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).