Regulation of Issue Speech Near an Election ("Electioneering Communications")

If you want to make a difference in government policy, the most effective time to speak is when people are paying attention. That time is usually during an election year, when public attention to policy issues is greatest. It's also the time to encourage candidates, many of whom are also elected officials, to endorse your views on policy. To give less protection to political speech at a time when most people are most interested in listening to speech on policy issues is wrongheaded. Regulating issue speech near an election does significant damage to First Amendment freedoms.

As constitutional scholar Joel M. Gora wrote, "[i]t may be inconvenient and annoying for incumbent politicians when groups of citizens spend money to inform the voters about a politician's public stands on controversial issues, like abortion, but it is the essence of free speech and democracy."[111]

Nonetheless, in 2002, Congress passed the Bipartisan Campaign Reform Act (also known as BCRA or McCain-Feingold), which, among other things, created the federal "electioneering communication" regime.[112] Electioneering communications exist to capture and regulate more speech than traditional campaign finance laws. Generally, such messages refer to a candidate (often an incumbent) shortly before an election. The speech does not have to support or oppose the candidate – it needs only to mention someone running for office. Even if the speech communicates information about public policy or a legislative issue, the mere mention of a candidate's name or even their likeness triggers regulation.

By regulating a broad range of issue speech and imposing extensive burdens on such messages, electioneering communication laws sharply reduce the amount of speech citizens will hear. Many speakers avoid speaking at all during these regulated time frames because they are unwilling to expose their supporters' private information in a publicly available government database. This can lead to harassment or retribution against the group and its members. Others avoid speaking because of the difficulty complying with complex reporting rules and for fear of running afoul of the law.

By their very nature, electioneering communication statutes are highly likely to capture and regulate genuine speech about issues of public importance or what is more commonly known as "issue advocacy." These laws, therefore, are anathema to the First Amendment.

Twenty-four states do not regulate issue speech in this manner at all. The Index views having no such law as a maximally protecting First Amendment activity.

The remainder of states have adopted various versions of such laws; those that capture a larger amount of speech over a longer time frame and those that require more regulatory compliance for speakers are judged more harshly.

The History of Issue Advocacy Protection

As the Supreme Court famously said in *New York Times Co. v. Sullivan*, "debate on public issues should be uninhibited, robust, and wide-open."[113]

In *Buckley v. Valeo*, the landmark Supreme Court case governing political speech regulations, the Supreme Court affirmed this principle. The Court directly addressed the nexus of "[d]iscussion of public issues"[114] – also referred to as "issue advocacy"[115] or "issue speech" – and speech that mentions candidates. As the *Buckley* Court recognized:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.[116]

The *Buckley* Court further observed that laws regulating issue speech inevitably discourage speakers from speaking plainly and that the First Amendment does not allow speakers to be forced to "hedge and trim" their preferred message.[117] The *Buckley* precedent for protecting issue speech remained constant and absolute for nearly 30 years.

In 2002, the passage of BCRA caused a direct confrontation with these precedents. The law was widely perceived as violating the First Amendment. Indeed, when President George W. Bush signed the bill into law, he wrote, "I also have reservations about the constitutionality of the broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election."[118] A diverse range of groups and individuals, including sitting U.S. Senators, the California Democratic Party, the Republican National Committee, the ACLU, AFL-CIO, and the National Rifle Association, alleged that the law violated their First Amendment rights. The Supreme Court eventually heard the case.

Despite the *New York Times* and *Buckley* decisions, and the nearly four decades of decisions that followed those precedents, the Supreme Court upheld the federal electioneering communications regime from BCRA. In *McConnell v. Federal Election Commission*, the government purported to show that the vast majority of electioneering communication ads (as narrowly defined by statute) were "clearly intended to influence the election."[119] That finding was based on an extensive record (over 100,000 pages),[120] including examples of ads run right before the election to sway voters. Based on this extensive evidentiary showing, the Court upheld the specific federal "electioneering communications" provisions. The ruling in *McConnell* remains controversial and is contrary to prior Supreme Court precedent.

The Federal "Electioneering Communications" Provision

The so-called electioneering communications regulations imposed by BCRA[121] were defined by the following criteria: the communication mentions the name of a clearly identified candidate; it is distributed by radio or television; it can be received by 50,000 or more people in a district or state where the candidate is running; and the communication is aired within 30 days of a primary election or within 60 days of a general elec-

tion, the so-called electioneering communication window. The law also has a media exemption.

A group running an "electioneering communication" must file a report with the Federal Election Commission indicating the cost of the communication, the candidate named in the communication, and the donors who financed the communication.

State Regulation of Electioneering Communications

How states regulate "electioneering communications" varies considerably. Some states have taken the concept to the extreme, regulating well beyond the federal standard, thus capturing more and more speech in nearly the entire election year in some states. Others hew more closely to the federal law. Since only the federal system has been specifically permitted by the Supreme Court, states should be wary of trying to "innovate" new ways to restrict more speech or increase the regulatory or disclosure burdens on speakers.

The more speech is regulated and the more those regulations are harmful, the more groups will stay silent.

Twenty-four states have no laws regulating electioneering communications whatsoever. These include traditionally blue states (Michigan and Minnesota), traditionally red states (Arizona and Kansas), swing states (Pennsylvania and Wisconsin), and states with large (New Jersey and Texas) and small (Nevada and North Dakota) populations.

Of states with such laws on the books, the Index uses seven subcategories to measure the breadth of the restrictions the state imposes on speakers. They are:

- the amount of money that must be spent to trigger "electioneering communication" reporting requirements;
- whether this reporting trigger is adjusted for inflation;
- the mediums of communications regulated by the law;
- the length of the electioneering communications window;
- whether electioneering communications are limited to messages targeted at jurisdictions where the candidate named in the ad is running;
- whether 501(c)(3) nonprofit charities are exempt from the law; and
- whether there is an exemption for media.

States that have higher thresholds before electioneering communication reports are triggered, like Ohio's over $10,000 threshold,[122] better protect small advocacy campaigns from the burdens of regulation. States that have very low triggers, like South Dakota's $100 threshold,[123] receive no points for the extreme burdens they place on First Amendment activity. Tying these thresholds to inflation is a wise move. Ensuring that reporting thresholds keep pace with inflation prevents speakers from being burdened for their activity at decreasingly low levels of spending over time. Vermont is one example of a state that has adopted this simple measure.[124]

Some states have broad definitions of the type of media covered by the law. On the federal level, regulation is limited to broadcast, cable, or satellite communications.[125] Some states have wildly expanded the universe of messages that can be regulated as electioneering communications to include even flyers[126] or, in Alaska's case, virtually any type of communication.[127] By contrast, Ohio is an example of a state that followed the federal model limiting the types of communications that

can qualify.[128] Limiting the types of mediums covered allows more issue speech in areas outside the ambit of regulation and, therefore, better protects free speech.

Another crucial factor is the amount of time when these messages are regulated. As the Supreme Court has articulated, the government's purported campaign-related interest is only in who is speaking shortly before an election,[129] not the rest of the year. Therefore, expanding the electioneering communications window beyond the timeframes established in federal law – 30 days before a primary election and 60 days before a general election[130] – greatly burdens issue speech and may be unconstitutional. In many states, the electioneering communication window overlaps with legislative sessions, suppressing speech about policy issues by concerned citizens. Simply speaking about an important issue or bill could trigger burdensome reporting requirements. Many groups will choose to remain silent rather than bearing these burdens.

Some states, like Oklahoma,[131] follow the federal window and are given credit for doing so in this section of the Index. Other states, like Massachusetts,[132] regulate electioneering communications – and, by extension, often speech about policy issues and legislative affairs – in a much longer timeframe, 90 days before any election in The Bay State. The Index penalizes this decision.

States that regulate communications outside the geographic area where the candidate named in the ads is actually running increase the burdens on issue speech. As voters outside the candidate's district are ineligible to vote for that candidate, such speech has no impact on an election and should not be regulated. In states without a targeted electorate provision, ads run statewide asking citizens to call on the state speaker of the house to take action on a policy issue, for instance, will be regulated, despite the fact that most voters seeing the ad can't vote for the speaker. To prevent such an outcome, the federal government[133] and several states, including Washington,[134] take this basic step.

An exemption for common educational work by § 501(c)(3) charitable organizations will increase the number of groups that can speak without fear of government regulation. Illinois takes this step.[135] In addition, a media exemption helps prevents the common functions of the press from being caught up in the regulatory dragnet. Maine is an example of a state that includes this important exemption, albeit in limited form.[136] Both exemptions net states additional credit in the Index.

Donor Reporting Requirements for Electioneering Communications

If a group wants to speak about important issues, it should never be required to first report its activity to the government. Such rules dissuade groups from speaking and capture unwary speakers who could never imagine such speech would be regulated. But requiring those reports to publicly disclose the names and personal information of a group's donors is particularly onerous. Once individual contributor information – typically a donor's full name, street address, occupation, and employer – is made public, a record of a donor's issue advocacy becomes permanently etched into a government database and available online forever. Such reporting requirements open up individuals to harassment, threats, or financial harm simply for supporting a cause others disagree with. Many supporters will choose not to give, and many advocacy groups will choose

not to speak. This translates to less information heard by the public.

The Supreme Court expressed concern with the harm that overbroad disclosure could cause to civic discourse because "the right of associational privacy . . . derives from the rights of [an] organization's members to advocate their personal points of view in the most effective way."[137]

Some states require no donor disclosure in their "electioneering communication" laws, limiting the burden on issue speech. These states include Maine[138] and Vermont.[139] What matters to these states is that the electorate knows who is speaking – not the private information of every citizen that supports the group funding the speech. This minimally invasive requirement is about as well as a state can protect First Amendment freedoms while still regulating electioneering communications.

Some states follow the federal model, requiring only disclosure of donations *earmarked* for electioneering communications. Courts have shown they are willing to uphold these earmarking-only state electioneering communication disclosure laws because the required disclosure is directly connected to the speech being funded.[140] For example, California only requires the group making the electioneering communication to disclose the identity of any donor who contributed $5,000 or more "*for the purpose of making* a[n electioneering] communication."[141] Likewise, in Washington, if a sponsor "undertakes *a special solicitation* of its members or other persons for an electioneering communication, or it otherwise *receives funds for an electioneering communication*," then reports must disclose donors "whose funds were used to pay for the electioneering communication."[142]

Other states take a different approach that is far from desirable, but still provides a way for certain informed donors to avoid public exposure. Often called "reverse earmarking" or "separate segregated funds," these laws mandate disclosure of any donors to an organization *unless* the donor specifically tells the organization *not to use their money* for any electioneering communications (reverse earmarking) or insists the funds are deposited in an account that does not make electioneering communications (a separate segregated fund). Said another way, the default is for speakers to violate their supporters' privacy, unless an individual specifically takes steps to protect their identity. Maryland offers both options – reverse earmarking and segregated accounts.[143] While burdensome for both organizations and their supporters, these measures allow some protection for private association.

The worst states demand donor disclosure regardless of earmarking or the wishes or intentions of the donor when giving to the organization. West Virginia demands the exposure of all donors over $1,000 who gave to an organization that eventually says something that qualifies as an electioneering communication.[144] In Idaho, merely giving $50 to an organization can place a donor on an electioneering communication report.[145]

Overbroad donor disclosure mandates, like West Virginia's and Idaho's, can mislead rather than enlighten voters. Such requirements produce "junk disclosure" when a report includes the names of people who simply joined the organization but did not know that their contribution might fund any particular message.[146] The person listed on the electioneering communications report might even oppose the message that's the subject of the report.

Invasive donor disclosure regimes pose significant barriers to free speech and association. States should not use electioneering communications laws to impose complex red tape on speakers and to invade the privacy of Americans for supporting groups that merely mention elected officials in some of their messages.