Definition of Campaign "Expenditure"

Unless you stand on a street corner shouting at passersby, speech costs money. In the context of political campaigns, the majority of funds, from the cost of printing flyers to paying for billboards and television ads, is spent on speech. When states regulate campaign expenditures, they are necessarily regulating speech.

For this reason, how states define "expenditure" greatly impacts political speech. States that define "expenditure" too broadly increase the universe of political speech that is subject to onerous campaign finance regulations. This dissuades groups and individuals from speaking. States that define "expenditure" too vaguely create uncertainty about what speech is regulated. This too chills groups and individuals from speaking out – they do not know if they are subject to regulation, and failure to properly follow these unclear laws can result in significant fines.

The First Amendment was designed to protect speakers from exactly this type of governmental pressure on what they say and when they say it – especially when discussing government officials themselves. To avoid capturing unwary speakers and to maximize the amount of free discourse, definitions of campaign expenditures should be narrow and clear.

Express Advocacy

In 1976, the Supreme Court offered a clear standard that imposes the fewest burdens on speech. Known as the "*Buckley* express advocacy" standard, it comes from the Supreme Court's landmark decision in *Buckley v. Valeo*.[86] Only "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,' [or] 'reject,'" are regulated under this standard.

The purpose of this definition was to avoid declaring a key part of the Federal Election Campaign Act unconstitutionally vague. In *Buckley*, the Supreme Court directly addressed the challenged law's broader and vaguer expenditure standards that went beyond the "express advocacy" standard. The original language would have covered speech that involved the "[d]iscussion of public issues"[87] – now referred to as "issue advocacy"[88] or "issue speech." Organizations speaking about public policy often mention candidates, especially incumbent candidates who have the power to change laws. 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.[89]

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.[90] The Court also expressed concern with the harm that overbroad expenditure definitions would

lead to less civic discourse. As more and more speech is captured by the government, fewer and fewer individuals and groups will be able to associate privately. As the Court explained, "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."[91]

Kansas is an example of a state that follows the *Buckley* mandate clearly. In Kansas, an "expenditure" is:

> A) Any purchase, payment, distribution, loan, advance, deposit or gift of money or any other thing of value made by a candidate, candidate committee, party committee or political committee *for the express purpose of nominating, electing or defeating a clearly identified candidate for a state or local office.*
>
> B) Any purchase, payment, distribution, loan, advance, deposit or gift of money or any other thing of value made to *expressly advocate* the nomination, election or defeat of a clearly identified candidate for a state or local office.[92]

The state further defines "expressly advocate" similar to the *Buckley* decision, regulating "any communication" that "uses phrases including" the following:

(1) "Vote for the secretary of state";
(2) "re-elect your senator";
(3) "support the democratic nominee";
(4) "cast your ballot for the republican challenger for governor";
(5) "Smith for senate";
(6) "Bob Jones in '98";
(7) "vote against Old Hickory";
(8) "defeat" accompanied by a picture of one or more candidates; or
(9) "Smith's the one."[93]

This clarity is helpful for speakers. The statute even gives examples of what language will qualify, just like the *Buckley* decision. This definition allows speakers to know when their words might trigger campaign finance obligations.

States that use a clear express advocacy standard are those that do the best job protecting First Amendment interests in their expenditure definitions.

Expenditure Definitions Beyond Express Advocacy

Since *Buckley*, several other standards for qualifying speech as an "expenditure" – and therefore subjecting that speech to government oversight and regulation – have been offered. None of these definitions is as First Amendment-friendly as the express advocacy standard, and some contain serious First Amendment defects.

The Index considers the standard articulated in *FEC v. Massachusetts Citizens for Life* ("*MCFL*"),[94] to fall within the *Buckley* standard. The *MCFL* standard essentially represents the principle of transitivity, under which certain candidates are identified with a label (such as "pro-life"), and then *Buckley* express advocacy language is applied to candidates with that label (*e.g.*, "vote for 'pro-life' candidates").

Broader standards include the "functional equivalent of express advocacy." Speech is regulated under this standard "only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific can-

didate."[95] To determine whether speech is the functional equivalent of express advocacy, courts must look no further than the "four corners" of a proposed advertisement,[96] not any inferred intent of the speaker or effect on the voting public. For example, if a communication has "pejorative references" to a candidate, it might qualify as the "functional equivalent of express advocacy."[97]

Nevada regulates speech in this manner, using a definition for expenditure that aligns with the "functional equivalent" standard. Expenditures are defined, in relevant part, as communications that "advocate expressly the election or defeat of a clearly identified candidate or group of candidates."[98] But, unlike in Kansas and other states that follow *Buckley* exactly, "advocates expressly" or "expressly advocates" is further defined as:

> a communication, taken as a whole, is susceptible to no other reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate or group of candidates or a question or group of questions on the ballot at a primary election, general election or special election. A communication does not have to include the words 'vote for,' 'vote against,' 'elect,' 'support' or other similar language to be considered a communication that expressly advocates the passage or defeat of a candidate or a question.[99]

The problem with this standard is that "no other reasonable interpretation" is in the eye of the government; regulators (and, if challenged, the courts) decide whether speech is for or against a candidate, leaving a great deal of uncertainty for speakers. This uncertainty poses real risks to speakers from judgments by enforcement agencies tarnished by ideology or partisanship. Nevertheless, the "functional equivalent" standard provides some assurances to speakers in states that use it. First, regulators must look only at the speech itself and not infer meaning from the speaker or external events. Second, the speech must be about candidate advocacy, protecting genuine issue advocacy from regulation. The standard, therefore, receives some credit in the Index for respecting political speech rights.

Expenditure Definitions That Fail to Protect Speakers

The Index considers all other standards to be too vague, broad, or both to adequately protect Americans' First Amendment rights.

Despite being declared unconstitutional federally more than forty-five years ago, some states maintain a broad "for the purpose of influencing" standard in their statutes. In the Federal Election Campaign Act ("FECA") definition struck down in *Buckley*, "expenditures" were defined in terms of "the use of money or other objects of value 'for the purpose of . . . influencing' the nomination or election of any person to federal office."[100] Such language was both overbroad and vague. At some abstract level, almost anything can be characterized as for the purpose of influencing an election.

Vermont is one such state. There, an "expenditure" is defined, in relevant part, as "a payment, disbursement, distribution, advance, deposit, loan, or gift of money or anything of value, paid or promised to be paid, *for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates*."[101] Such laws do nothing to protect the First Amendment rights of speakers and potential speakers. A state government enforcer unhappy with a particular message

could undoubtedly find a reason that said speech was "influencing an election."

Another overbroad definition comes from the Federal Election Commission's regulations, which has at times been adopted by the states. Under the agency's rule, speech is regulated if:

> When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because –
>
> 1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
> 2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.[102]

At first blush, this rule may appear to be similar to the *WRTL* "no reasonable interpretation" standard. But while it shares its First Amendment defects, it does away with the First Amendment protections. "Reasonable minds" often differ on the meaning of a communication. This definition allows government actors (often hostile to the message of the ad itself) to look beyond the speech to "external events" and broadens the speech covered to the vague "encourages actions to elect or defeat" standard. A potential speaker has no way of knowing if their speech would be captured by this definition.

Alaska uses the federal rule to grab even more speech. The state defines an "expenditure," in part, as an "express communication."[103] An "express communication" is "a communication that, when read as a whole and with limited reference to outside events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate."[104] By allowing reference to "outside events" Alaska's law introduces additional uncertainty to a standard that is too often applied subjectively.

In Alaska and other jurisdictions that adopt similar standards, often the only way to speak without fear of penalty is to challenge the state law in court. But such legal challenges are costly and can take months or even years to resolve. The Supreme Court has held that "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney" to "seek declaratory rulings before discussing the most salient political issues of our day."[105]

Some states provide no test or clarity at all. Connecticut is an example of a defective law that causes even expert lawyers to wonder what speech is covered and what's not. Connecticut defines an "expenditure" generally as any payment or anything of value "when made *to promote the success or defeat* of any candidate seeking the nomination for election, or election, of any person *or for the purpose of aiding or promoting the success or defeat* of any referendum question or the success or defeat of any political party."[106] The Supreme Court is wary of "intent-and-effect" tests for defining when something falls under the ambit of campaign finance laws.[107] And for good reason. The First Amendment cannot permit a government to examine the intent of a citizen's speech before allowing them to speak.

This Index is critical of such laws in the states. Speakers need clarity to be assured that they will not accidentally run afoul of the campaign finance laws.

Multiple Expenditure Definitions

With the spectrum of ways to define "expenditure" in mind, the Index tries to make sense of the chaos. Grading the states on how they define expenditure and examining court rulings on such laws' meanings is complicated. Many states have multiple expenditure definitions depending on where a reader looks in the statute or what kind of group is being regulated.

Such discrepancies create confusion for speakers. The Index errs on the side of reading the statute as an ordinary citizen attempting to follow the law. This means the Index scores the broadest standard found in the law, understanding that, for most speakers, the risk of a wrong interpretation is financially disastrous.

Hawaii offers such an example. In Hawaii, an "independent expenditure" is "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate that is not made in concert or cooperation with or at the request or suggestion of the candidate, the candidate committee, a party, or their agents."[108] The term "expressly advocating" is further defined using the "no other reasonable interpretation" standard.[109]

But Hawaii also defines "expenditure" much more broadly as (in relevant part):

> (1) Any purchase or transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, or payment incurred or made, or the use or consumption of a nonmonetary contribution for the purpose of:
>
> (A) Influencing the nomination for election, or the election, of any person seeking nomination for election or election to office, whether or not the person has filed the person's nomination papers . . . .[110]

In this case, Hawaii's vague "influencing" language trumps its clearer "express advocacy" and "functional equivalent" language; a speaker cannot be expected to decipher competing definitions of expenditure.

In general, the more closely a state adheres to the Supreme Court's direction in *Buckley* – which gives maximum clarity for when speech becomes *campaign speech*, and thus an expenditure – the better the state protects core First Amendment rights. Using vague, overbroad, and duplicative terms in a state's law that try to encompass every way a message might help or hurt a candidate will make people think twice before speaking. This chills speech.

Citizens have the right to speak about government and public affairs without fearing what a state regulator might think of their speech.