

## **UCSF**

### **UC San Francisco Previously Published Works**

#### **Title**

Interest Group Advocacy and the Power of "Magic Words"

#### **Permalink**

<https://escholarship.org/uc/item/6x02m2sg>

#### **Journal**

Election Law Journal Rules Politics and Policy, 4(3)

#### **ISSN**

1533-1296

#### **Authors**

Apollonio, Dorie E  
Carne, Margaret A

#### **Publication Date**

2005-09-01

#### **DOI**

10.1089/elj.2005.4.178

Peer reviewed

## Interest Group Advocacy and the Power of “Magic Words”

DORIE E. APOLLONIO and MARGARET A. CARNE

THIS PAPER DEFENDS the validity of the magic words test as a means of distinguishing issue advocacy from other political communication. We find that the magic words test was not, as the Supreme Court claimed in *McConnell v. FEC*, “functionally meaningless” (*McConnell v. FEC* 2003, 180). After reviewing the spending and influence of organizations that made independent expenditures relative to those that engaged in pre-BCRA issue advocacy, we find that groups overall spent more on independent expenditures and that groups making independent expenditures were more politically influential. Moreover, several of the most powerful interest groups engaged in both forms of political spending. Representatives of these organizations, when interviewed, stated that they made independent expenditures because using magic words was more effective than using pre-BCRA issue advocacy alone, even though pre-BCRA issue advocacy included the subset of advertisements now defined as electioneering. This belief is not only widely held among groups making independent expenditures, it is consistent with recent evidence suggesting that advertisements that use magic words can influence the outcome of elections (Engstrom and Kenny 2002).

Based on these findings, we conclude that the magic words test made a valid distinction between different types of political spending, despite the increasing use of issue advocacy before the passage of BCRA, and should not have been dismissed as functionally meaningless.

### INDEPENDENT EXPENDITURES AND ISSUE ADVOCACY

Groups and individuals can spend unlimited sums on both independent expenditures and issue advocacy. The Supreme Court ruled in *Buckley v. Valeo* (1976) that to restrict such spending was an unjustified infringement on the rights to free speech and free association. Independent expenditures are made by groups or individuals (and since 1996, by political parties) to expressly advocate for or against a particular candidate, and the test of express advocacy has historically been the “magic words” test (Table 1). Specifically, the Federal Election Commission determines whether a communication constitutes express advocacy by using the illustrative list of phrases suggested by the U.S. Supreme Court in *Buckley* (1976, 52), such as “vote for,” “elect,” and “defeat.”<sup>1</sup> In contrast, issue advocacy, by not including magic words,

---

Dorie Apollonio is a Legacy Postdoctoral Fellow at the University of California, San Francisco. Meg Carne is assistant professor of political science at Rhodes College. The authors are grateful for funding assistance from the American Legacy Foundation (Apollonio), and Soroptimists International and Oberlin College (Carne). They appreciate the helpful comments and advice of Bruce Cain, Rick Hasen, Thad Kousser, Todd Lochner, Daniel Lowenstein, and the anonymous reviewers.

---

<sup>1</sup> Subsequent court decisions have made it clear that the definition of express advocacy includes those communications that “provide in effect an explicit directive” to vote for a particular candidate. See, for example, *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* at 248–250. For a full review of this and other relevant cases, see Corrado et al. (2004).

TABLE 1. CHARACTERISTICS OF INDEPENDENT EXPENDITURES AND ISSUE ADVOCACY

	<i>Reporting requirements</i>	<i>Coordination with candidate campaigns</i>	<i>Restricted source of funds</i>	<i>Use of “magic words”</i>
Pre-BCRA				
Independent expenditures	Reported to FEC <sup>a</sup>	Not acceptable	Yes	Yes, by definition
Issue advocacy	Not reported	Acceptable	No	Not allowed
Post-BCRA				
Independent expenditures	Reported to FEC <sup>a</sup>	Not acceptable	Yes	Yes, by definition
Electioneering communication	Reported to FEC <sup>b</sup>	Not acceptable	Yes	Not allowed
Issue advocacy	Not reported	Acceptable	No	Not allowed

<sup>a</sup>Amounts larger than \$250.

<sup>b</sup>Amounts larger than \$10,000.

Source: Federal Election Commission (FEC).

avoids being treated as an independent expenditure.

Although advertisements funded by independent expenditures may use magic words, there are restrictions on independent expenditures that may require organizations to set up separate groups to make political expenditures, and commit groups to communicating regularly with the federal government, but not with candidates. Certain kinds of groups cannot legally make independent expenditures in their own names. For example, if a corporation or labor union wishes to make independent expenditures, it must form a separate political committee. Independent expenditure ads and other communications must be completely uncoordinated with candidate campaigns. There were no such coordination restrictions on the development or use of pre-BCRA issue advocacy communications. If an independent expenditure totals over \$250, the person or group making the expenditure must file a report of that expenditure with the FEC. Individuals and groups that engaged in pre-BCRA issue advocacy, in contrast, were not required to report their expenditures. Furthermore, groups that make independent expenditures must use funds that were collected from individuals, while corporations and labor unions that wished to engage in pre-BCRA issue advocacy were allowed to draw funds from their general treasuries. Overall, the government imposes costs on organizations that use magic words in the form of reporting requirements and re-

strictions on outside communications, source of funds, and legal status.

Political parties and interest groups turned increasingly to unregulated political spending, including pre-BCRA issue advocacy, in the late 1990s. There is some speculation that this change in behavior was a response to the decreasing real value of campaign contributions. Under the FECA restrictions of 1974, contributions to political candidates were capped at \$5,000 for political action committees (PACs), and these limits did not increase with inflation. In terms of purchasing power, a \$5,000 contribution in the year 2000 was worth only \$1,731 in 1974, when FECA limits were established (Bureau of Labor Statistics 2004). If the 1974 limit of \$5,000 had increased with inflation, PACs would have been able to contribute nearly \$17,500 to each candidate by the end of the 2000 election cycle. In the meantime, election spending continued to increase with inflation. Moreover, the federal elections between 1996 and 2002 were the first in twenty years in which the number of competitive seats in contention exceeded the number of seats needed to shift partisan control (Franz 2004).

Research on the 1996 elections suggested that spending on pre-BCRA issue advocacy reached a level roughly equivalent to a third of all spending by candidates themselves (Thurber 1998). The Brennan Center’s report *Buying Time* (Krasno and Seltz 2000) attempted to collect basic information on the use of issue advocacy. Based on analysis of thousands of candidate

advertisements and independently sponsored political advertisements, the authors argued that pre-BCRA issue advocacy was indistinguishable from advertisements that used magic words. Research by the Annenberg Center at the University of Pennsylvania reached similar conclusions, noting that the majority of pre-BCRA issue ads referred to specific candidates.<sup>2</sup> There were also claims that pre-BCRA issue advocacy was supplanting independent expenditures; the Campaign Finance Institute, for example, claimed increasing issue advocacy was “reducing both the incentive for, and relative importance of, independent expenditures.”<sup>3</sup>

In 2002, BCRA imposed restrictions on issue advocacy by splitting it into two categories. The subset of advertisements that referred to a specific candidate was redefined as “electioneering communication” and was subjected to additional regulation. The justification for this change was the belief that the existing magic words test did not make a meaningful distinction between advocacy intended to affect an election and advocacy that sought to communicate a more general political message. BCRA restricted corporations and unions from making electioneering communications from their general treasuries, and required that spending be reported to the FEC if it were made within thirty days of a primary or sixty days of a general election and if groups spent \$10,000 or more in a calendar year. As the Supreme Court later stated in *McConnell*, “The amendment coins a new term, ‘electioneering communication,’ to replace the narrowing construction of FECA’s disclosure provisions adopted by this Court in *Buckley*.” The court went on to state, “BCRA’s amendments to FECA . . . specify significant disclosure requirements for persons who fund electioneering communications” and to note that the Act “restricts corporations’ and labor unions’ funding of electioneering communications” (2003, 176–177).

### THEORETICAL EXPECTATIONS

Although research on issue advocacy is limited, there is enough information available to suggest that groups using it will behave in pre-

dictable ways. The claim we deal with specifically in this paper is the argument that the magic words test was “functionally meaningless.” Advocates for this position based their claim on two findings. First, they noted that candidates frequently do not use magic words in their own advertisements (Krasno and Seltz 2000). Given that candidate advertising is clearly directed toward electoral goals, namely electing the candidate, they believed this implied that magic words were not critical in elections. Second, they noted that individuals who viewed pre-BCRA issue ads felt that the ads were intended to change their votes (Krasno and Seltz 2000, Magleby 2001). They believed that if the targets of issue advocacy could not tell the difference between ads that used magic words and those that did not, there was no real difference.

The validity of these research findings is difficult to adjudicate, given that the authors did not submit their work to peer review. In addition, neither of these claims deals directly with the question of whether issue advocacy does in fact change the way that individuals vote. Measuring whether political advertising affects voting behavior would be difficult under the best of circumstances. However, the claim that the magic words test is meaningless can be tested against the behavior of interest groups that engage in political spending.

If independent expenditures that used magic words and pre-BCRA issue advocacy had equivalent effects, then no interest group should have both made independent expenditures and engaged in issue advocacy, because independent expenditures triggered restrictions on interest groups that pre-BCRA issue advocacy did not. Groups must in some cases

<sup>2</sup> For example, they found that in the 1998 election cycle, 53.4% of all issue ads named specific candidates, and this jumped to 90% close to the election (after September 1, 1998). As candidate mentions increased, ads that mentioned specific legislation or regulations (i.e., issues) decreased: such mentions appeared in 81% of issue ads pre-September 1, and in just 21.6% of ads thereafter. See [www.annenbergpublicpolicycenter.org/issueads](http://www.annenbergpublicpolicycenter.org/issueads). Verified on May 11, 2004.

<sup>3</sup> See [www.cfinst.org/studies/vital/commentary.html](http://www.cfinst.org/studies/vital/commentary.html). Verified on May 11, 2004.

form a separate legal entity to make independent expenditures, they must report nearly all of their expenditures, and they can use only restricted sources of funds. To make independent expenditures, groups must run a separate, uncoordinated campaign, which requires them to pay additional overhead costs. However, groups were not required to do any of these things if they engaged in pre-BCRA issue advocacy. The proposition that both forms of spending had equivalent effects therefore generates the following testable hypothesis.

*Hypothesis 1. No interest group will both engage in pre-BCRA issue advocacy and make independent expenditures*

In addition, given that pre-BCRA issue advocacy should be inherently more appealing if both forms of spending have identical effects, spending on pre-BCRA issue ads should have supplanted independent expenditures. The only kinds of organizations that would have made independent expenditures in lieu of pre-BCRA issue advocacy were those that were politically unsophisticated. Only interest groups that did not know better would commit the additional resources needed to make independent expenditures if pre-BCRA issue advocacy were functionally equivalent. On the individual level, this would be comparable to buying a widget for \$2 when an identical widget sitting next to it was priced at \$1. Groups that knew both options existed would never choose the more restrictive option. Hence, the following hypothesis applies.

*Hypothesis 2. Interest groups that make independent expenditures will be less experienced and less influential than interest groups that engage in pre-BCRA issue advocacy*

In generating these hypotheses, we presumed that groups are essentially rational and seek to spend their money effectively. These assumptions are consistent with the vast majority of research on organizational spending on campaigns and elections. We tested these hypotheses, which are implied by the existing literature on the magic words distinction, using the data described below and found that they were not supported. Interest groups did not be-

have in ways that implied that the magic words distinction was functionally meaningless.

## DATA AND METHODS

Our data on interest group activity and influence were drawn from three sources: reports of spending on independent expenditures and issue advocacy, interest group influence rankings, and interviews with organizations and consultants that had experience with independent spending. Limited information is available on interest groups that engaged in pre-BCRA issue advocacy in any given year. We chose to review spending in the 1998 election cycle because although the Brennan Center released reports on pre-BCRA issue advocacy in both the 1998 and 2000 election cycles, detailed information listing the individual groups that engaged in issue advocacy and how much they spent was only available for the 1998 election cycle.

Moreover, we believe that the decision to restrict our analysis to the 1998 election cycle offers certain advantages. In the wake of BCRA, which requires that organizations that make electioneering communications (previously a form of issue advocacy) report their spending, organizations may attempt to create separate entities, such as the now-common 527 organizations, to hide their political involvement. During the 1998 election cycle, when there were no disclosure requirements for pre-BCRA issue advocacy (including the subset of advertisements now classified as electioneering communications), there was no need to create shell organizations to hide the involvement of parent organizations—organizations that engaged in pre-BCRA issue advocacy had no expectation that their contributions would ever be made public. The Brennan Center research that attempted to identify these contributors occurred after the fact, and although organizations that knew about the 1998 report might have expected to be identified in the 2000 election cycle, there was no such expectation during the 1998 election cycle.

For information regarding spending on pre-BCRA issue advocacy, we relied on data gathered by The Brennan Center. Although the data

they provide regarding spending on pre-BCRA issue advocacy are not exhaustive, and do not cover the costs of developing political advertisements, they do cover 75 media markets estimated to reach 80% of the U.S. population (Krasno and Seltz 2000). The Brennan Center report for the 1998 election cycle gives detailed information on twenty organizations that accounted for 98% of all the spending they identified on pre-BCRA issue advocacy.

Our second set of spending data cover independent expenditures. Independent expenditures make up a small portion of all campaign spending, but they must be reported to the Federal Election Commission, and the data on spending by groups are considered to be reliable. For the 1998 cycle we took the top ten groups making independent expenditures or communication costs (the FEC classifies communication costs and independent expenditures similarly) but eliminated two groups because they only made expenditures on communications costs to members and were not relevant to our analysis. Consistent with results from other election cycles, the spending of these groups constituted over 85% of all independent expenditures made in 1997–1998.

This sample appears to constitute a small number of groups, but it contains nearly all of the relevant spending on independent expenditures and pre-BCRA issue advocacy for the 1998 election cycle. Only a small number of organizations made significant independent expenditures (8 groups) or engaged substantially in pre-BCRA issue advocacy (20 groups).

Next, we sought to determine the level of political sophistication of each group that had made independent expenditures or engaged in pre-BCRA issue advocacy. We defined groups as being experienced if they were widely accepted to be influential, using existing rankings of the top 100 organizations seeking to affect national politics as our measure of influence. We classified each group in the sample using the 1999 *Fortune* “Power 25” list of the most powerful interest groups in federal politics (which, despite the name, actually lists the 100 most powerful interest groups). In the *Fortune* study, groups were ranked based on a survey of individuals, which included every member

of Congress, Capitol Hill staffers, senior White House aides, and lobbyists.

Finally, one of the authors (Carne) conducted personal interviews with 18 interest group political directors and other staff. The independent spending levels of these groups ranged widely, as did their issue areas and their experience with independent spending. This sample of interest group representatives, however, did not include any members of the independent expenditure offices from either major political party, despite repeated requests for contacts. To compensate for the unwillingness of political parties to be interviewed, Carne also interviewed six political consultants and other political professionals. One consultant was chiefly Republican, three were Democratic, and one was a consultant for independent groups. In all, this research included 24 confidential interviews, which were done either by phone or in person between October 2001 and May 2002, prior to the implementation of BCRA.<sup>4</sup>

## RESULTS

We tested the first hypothesis, the claim that no groups would both make independent expenditures and engage in pre-BCRA issue advocacy, by reviewing the groups in our sample that made independent expenditures or spent money on issue advocacy in the 1998 election cycle. If, as expected, the magic words test is meaningless, and independent expenditures and pre-BCRA issue advocacy are functionally equivalent, then none of these groups should have both made independent expenditures and engaged in issue advocacy. As seen in Table 2, however, five of the twenty organizations (25%) that engaged in pre-BCRA issue advocacy also made independent expenditures. Furthermore, four of these groups were ranked in the top eight groups making independent expenditures.

---

<sup>4</sup> This research was approved in writing by the University of California, Berkeley, Committee for the Protection of Human Subjects on September 28, 2001. Both authors were affiliated with this institution at that time.

TABLE 2. TOP ORGANIZATIONS ENGAGING IN ISSUE ADVOCACY AND MAKING INDEPENDENT EXPENDITURES DURING THE 1998 ELECTION CYCLE (IN 1998 DOLLARS)

<i>Organization</i>	<i>Issue ad spending</i>	<i>Independent expenditures</i>	<i>Top IE org</i>
AFL-CIO	\$4,541,346	\$0	
Alliance for Limited Terms	\$880,067	\$0	
American Association of Health Plans	\$46,740	\$0	
American Medical Association	\$70,731	\$1,758,132	*
American Renewal	\$92,232	\$0	
American Values Organization	\$60,305	\$0	
Americans for Better Campaigns	\$59,722	\$0	
Americans for Fair Taxation	\$1,131,494	\$0	
Americans for Job Security	\$276,280	\$0	
Business Roundtable	\$851,743	\$0	
Campaign for America	\$125,366	\$0	
Campaign for Working Families	\$0	\$609,122	*
Committee for Common Decency	\$141,189	\$0	
Committee for Common Sense	\$165,373	\$0	
Committee for Fairness	\$140,639	\$0	
Democratic Senatorial Campaign Committee	\$0	\$1,329,000	*
League of Conservation Voters	\$301,535	\$1,335,733	*
National Abortion Rights Action League	\$0	\$576,743	*
National Education Association	\$57,078	\$1,380,931	*
National Rifle Association	\$0	\$1,676,808	*
National Right to Life Committee	\$46,309	\$1,290,349	*
People for the American Way	\$389,249	\$0	
Sierra Club	\$99,617	\$112,109	
Tort Reform United Effort	\$82,584	\$0	
We the Parents	\$476,796	\$0	

Although the AFL-CIO did not make independent expenditures in the 1998 election cycle, it did spend \$2.8 million in communication costs to its members, which are classified by the FEC with independent spending as a form of express advocacy (and allowed the use of magic words).

\*Organization was one of the top eight groups making the highest level of independent expenditures.

Source: Issue advocacy data drawn from *Buying Time*. Independent expenditure data drawn from Center for Responsive Politics 1998 *Summary Data*.

In addition, in every case where an interest group engaged in both kinds of spending, it spent several times more on independent expenditures than on issue advocacy. Even though the figures on issue advocacy probably understate actual spending, the differences are so great—in three cases, independent expenditures were more than ten times greater than spending on issue ads—that it is clear these groups preferred to direct the majority of their resources toward independent expenditures. As a result, we reject the hypothesis that no interest groups will both make independent expenditures and engage in issue advocacy.

Moreover, overall, pre-BCRA issue advocacy did not supplant independent expenditures. The Campaign Finance Institute, as noted earlier, claimed increasing issue advocacy was “reducing both the incentive for, and relative importance of, independent expenditures.”<sup>5</sup>

However, the evidence does not support this claim. It is true that since 1980, interest groups have not generally devoted large portions of their political budgets to independent expenditure campaigns, nor has independent spending accounted for a large portion of the money spent on federal elections. That said, a few trends in the pattern of independent spending are worthy of note. In the 2000 cycle, groups spent roughly \$26 million in independent expenditures, or about ten percent of the amount they spent on direct contributions to federal candidates. This is substantially more, in absolute and percentage terms, than in any other election cycle going back to 1988. Independent expenditures as a percentage of total campaign

<sup>5</sup> See [www.cfinst.org/studies/vital/commentary.html](http://www.cfinst.org/studies/vital/commentary.html). Verified on May 11, 2004.

spending also increased slightly in 2000, again to achieve their largest share of campaign spending since 1988. Finally, three of the four largest amounts ever spent independently in Congressional elections were in three of the four election cycles immediately prior to BCRA (1996, 1998, and 2000). Independent expenditures were increasing along with pre-BCRA issue advocacy spending, supporting the contention that groups did not view these campaign finance tools as interchangeable.

If it were true that only groups with limited experience and influence make independent expenditures, however, the finding that some

interest groups engage in both forms of spending would be less relevant. However, this expectation is not borne out. Table 3 shows that interest groups that spent money on both forms of spending were the most likely to be ranked as influential, with all groups ranked somewhere in the top 100. Their average influence ranking was less than 28 (groups are ranked from 1 to 100, with 1 being the most powerful). Next were groups that made only independent expenditures. Although only half were ranked in the list of powerful interest groups, that half was even more influential than the groups engaging in both forms of spending, with an av-

TABLE 3. ORGANIZATIONAL ACTIVITY AND INFLUENCE RANKING OF TOP ORGANIZATIONS ENGAGED IN ISSUE ADVOCACY AND MAKING INDEPENDENT EXPENDITURES DURING THE 1998 ELECTION CYCLE

	1999 Fortune power rank
Groups running issue ads and making independent expenditures	
American Medical Association	13
League of Conservation Voters	66
National Education Association	9
National Right to Life Committee	8
Sierra Club	43
Percent <i>Fortune</i> ranked	100%
Average ranking	27.8
Groups making independent expenditures only	
Campaign for Working Families	na
Democratic Senatorial Campaign Committee	na
National Abortion Rights Action League	42
National Rifle Association	2
Percent <i>Fortune</i> ranked	50%
Average ranking	22
Groups running issue ads only	
Alliance for Limited Terms	na
American Association of Health Plans	48
American Values Organization	na
American Renewal	na
Americans for Better Campaigns	na
Americans for Fair Taxation	na
Americans for Job Security	na
Business Roundtable	37
Campaign for America	na
Committee for Common Decency	na
Committee for Common Sense	na
Committee for Fairness	na
People for the American Way	na
Tort Reform United Effort	na
We the Parents	na
Percent <i>Fortune</i> ranked	13%
Average ranking	42.5

We excluded the AFL-CIO from the list of groups running issue ads only because it engaged in express advocacy (communication costs to members).

Source: List of organizations drawn from sources listed for Table 2. Interest group power rankings drawn from "Interest Groups that Influence U.S. Politics and Government," 1999.



erage influence ranking of 22.<sup>6</sup> The groups that engaged only in pre-BCRA issue advocacy were the least likely to be even ranked as influential; only 13% appeared on the top 100 list, and the average ranking of those two groups was 42.5, nearly twice the level of those groups making independent expenditures alone.<sup>7</sup> We cannot conclude that interest groups that made independent expenditures did so only because they were ignorant of superior alternatives.

Although the groups engaging exclusively in issue advocacy were the least influential and experienced, we considered the possibility that these groups grew into more powerful organizations over time. Because our data cover the 1998 election cycle, we were able to look for evidence that these groups constituted a new generation of organizations that were early adopters of a superior method of political communication. However, this hypothesis also appears to be false. Our research revealed that most of the organizations that had engaged in issue advocacy in the 1998 election cycle were no longer active by 2004 (for a complete list of the information we found on each organization, see the Appendix). Nine of the thirteen organizations engaging in issue advocacy appear to have disappeared. The two organizations ranked in the 1999 *Fortune* Power 25 remained influential, and one previously unranked organization moved onto the 2001 Power 25 list. The remaining organization is an industry front group that remains relatively ineffective.

Based on spending patterns alone, we conclude that groups making political communications, particularly influential interest groups, value independent expenditures more than they valued pre-BCRA issue advocacy. This evidence contradicts most of the theorizing about organizational behavior with respect to issue ads, which consistently argued that express advocacy and issue advocacy were indistinguishable. If this were true, interest groups should have directed their resources preferentially toward issue advocacy, rather than toward more resource-intensive independent expenditures. To determine why these organizations preferred independent expenditures, we interviewed representatives of several organizations making independent expenditures, or spending on both independent expenditures and issue advocacy.

The Supreme Court claimed in *McConnell* that, “Not only can advertisers easily evade the line [distinguishing express advocacy and pre-BCRA issue advocacy] by eschewing the use of magic words, but they would seldom choose to use such words even if permitted” (*McConnell v. FEC* 2003, 180). In our interviews, representatives of interest groups emphatically did not agree that pre-BCRA issue ads were equivalent to independent expenditures, or that they seldom chose to use magic words. They stated repeatedly that independent expenditures were superior to pre-BCRA issue advocacy because in making independent expenditures, organizations were allowed to use magic words. To quote one PAC representative:

There’s a couple of different big advantages [to independent expenditures] from our perspective. One is that we can tell people how we want them to vote. We can tell them that we like this candidate because he is good on [our issue] or we don’t like this candidate because he is terrible on [our issue] and then we can tell them that we believe that because of that they should vote a particular way.

A political director of a widely known and well-respected advocacy organization noted, “Maybe some people use issue advocacy to tell people how to vote, but we don’t. We never say ‘vote for,’ ‘vote against’ . . . With issue advocacy you can’t really close the loop.” Similarly, several groups mentioned that independent expenditures allowed them to be more direct, or

<sup>6</sup> The Democratic Senatorial Campaign Committee, which was not listed as an interest group in the survey of influence, might reasonably be excluded from this calculation. If it were, two-thirds of the groups that made independent expenditures only were ranked in the top 100 most influential groups. This is particularly noteworthy because very few organizations make independent expenditures, and they make up a small portion of all campaign spending.

<sup>7</sup> We excluded the AFL-CIO from the list of groups engaging only in issue advocacy because it also spent a substantial amount on communication costs to members, a form of express advocacy. Had we included the AFL-CIO, however, the results would change only moderately; 20% of groups would have been *Fortune*-ranked, and the average ranking would have been 30.

aggressive, with both their language and imagery. When asked about the advantages of independent expenditures relative to issue advocacy, one PAC political staffer noted:

You can just be much more direct [with independent expenditures] than you can with an issue advocacy campaign where you're doing public education on the issues and where the candidates stand on the issues. So there's elements of both that make them somewhat similar but in the end I think you can be a little more direct and a little edgier with an IEC [independent expenditure campaign] than you can with issue advocacy.

Another summarized why her group made independent expenditures in this exchange:

Interviewee: We just made the decision that because we have relatively limited PAC funds . . . that we wanted to use those funds to be, to give directly to the candidates. Or to do independent expenditures because we believe that for us those are the most effective things we can do to get the right folks elected.

Q: More bang for your buck?

Interviewee: Yeah.

In the experience of the most influential interest groups, advertisements that could not use magic words were a less effective way to communicate political messages.

These comments made by organizational representatives are consistent with research on groups that make independent expenditures. Most of these groups are advocacy or single-issue type organizations, primarily concerned with electing friends and defeating foes of their particular issues (Carne and Apollonio 2003). The majority of groups are primarily concerned with electoral goals, and it is not surprising that such organizations most value being able to instruct individuals how to vote.

Given these results, we reconsidered the research underlying the claim that independent expenditures and issue advocacy both consti-

tute a form of express advocacy. This conclusion does not reflect the local reality of organizations that actually engage in political spending. Review of the two claims underlying the argument that the two kinds of independent spending are indistinguishable made it apparent that neither claim objectively measures the distinction between issue advocacy and express advocacy. Candidates may not always use magic words in their own ads, but as we explain below, candidate ads are an inappropriate comparison for establishing electioneering intent. And although individuals may have believed that pre-BCRA issue ads were attempting to change their votes, this belief does not mean that pre-BCRA issue ads were effective in actually getting them to do so. Neither claim directly addresses the fundamental justification for the distinction between express advocacy and issue advocacy, which was the expectation that using magic words will affect electoral outcomes.

The argument that candidates frequently do not use magic words in their own advertisements is the major ground for the claim that the magic words test protecting pre-BCRA issue advocacy was meaningless. It is obvious that candidates are seeking election, and so their behavior was viewed as the "gold standard" for efforts to influence voting behavior. However, candidates campaigning for office are not simply begging relentlessly for votes, and their campaigns are not a good comparison case for express advocacy. Most candidates face the problem of gaining or regaining name recognition, and spend a significant portion of their campaigns introducing themselves to voters before they move to asking for their votes. A candidate that moves immediately toward pleading for votes before achieving sufficient name recognition risks alienating potential voters. Furthermore, a review of advertising by all candidates neglects the fact that not all candidates face serious opposition. Ample research suggests that high-quality candidates are drawn primarily to open seat races, while incumbents running for re-election typically face less serious candidates (Canon 1993, Jacobson 1997). However, incumbents seek re-election in the vast majority of Congressional races, and most can expect to retain their seats without

running a competitive campaign or necessarily using magic words.

Finally, an election happens at a specific time. Asking for votes too far in advance of the election is unrealistic, because people are not capable of voting for the candidate until the relevant day. Candidates that ask individuals to vote too far from the election at best waste valuable campaign resources, and at worst run the risk of confusing and annoying voters. As a result, a normal advertising campaign for a candidate should not use magic words until sometime near the election. This does not mean, however, that magic words are ineffective. If magic words were in fact ineffective, this would be observed when candidates in competitive races failed to use *any* magic words in the week prior to the election.

Groups that want to see a particular candidate elected or defeated have the same incentives. In one interview, an interest group representative volunteered that independent expenditures were important to the group because issue advocacy was most appropriate in the months long before the election, while independent expenditures were the best way to communicate a message to potential voters near the date of the election.

We tend to do [independent expenditure campaigns] I guess probably late. It just depends on where we are in the cycle and how things are shaping up. I think in part you want to wait to see how the race is breaking down. . . . Our issue advocacy program actually usually starts in late spring or early summer. . . . They do tend to start earlier than our IECs because of the different program.

Other interviewees echoed the sentiment that issue advocacy and independent expenditures were different tools, and most useful at different times in the election cycle. An analysis of the reports of independent expenditures of the ten highest spending groups filed with the FEC in 2000 confirmed data from the interviews. It showed that the vast majority of independent expenditure dollars were spent in the month preceding the general election. This finding suggests that the 30- and 60-day disclosure re-

quirements imposed by BCRA may have been gratuitous. However, BCRA’s other restrictions, such as the reclassification of some pre-BCRA issue advocacy into “electioneering communications,” may still have affected organizational behavior, though the justification for doing so—the belief that this advocacy had the same effect as independent expenditures—appears to have been tenuous.

Notably, the interviews suggest that even if magic words were in fact useless in affecting voting decisions, interest groups would still engage in independent spending because organizations believe (rightly or wrongly) that magic words are important. Nearly all the group representatives expressed the opinion that their organization’s involvement via independent expenditures could swing vote totals by two to three percentage points—the difference between winning and losing in highly contested races.<sup>8</sup> No serious candidate or interest group would be willing to be the first mover in giving up the use of magic words, because the risk of losing the election is too great. Pre-BCRA issue advocacy may also have affected voting behavior, but this does not suggest that independent expenditures and pre-BCRA issue advocacy were equivalent. Given the preference interest groups showed for independent expenditures, as seen by both their spending patterns and by direct testimony from their representatives, advertisements that use magic words were not equivalent to those that do not.

The second strand of research justifying the claim that pre-BCRA issue advocacy was equivalent to express advocacy relies on the opinions of potential voters, who stated that they believed pre-BCRA issue ads were attempting to influence their votes (Krasno and Seltz 2000, Magleby 2001). As a justification for restricting pre-BCRA issue advocacy, however, this argument is flawed on two levels. First, the perception that issue ads are an attempt to influence votes does not imply that they are effective in doing so. Get-out-the-vote (GOTV) drives are manifestly an effort to convince peo-

<sup>8</sup> Unsurprisingly, the small set of competitive Congressional races in each cycle attracts the most independent expenditures.

ple to go to the polls, and any individual contacted by one would identify it as such, but such voter contacts are nonetheless ineffective (Gerber and Green 2000, McNulty 2004). Sometimes nearly all the wine spills between cup and lip.

Second, the research that has attempted to determine the effectiveness of independent expenditures has found that they do in fact affect electoral outcomes (Engstrom and Kenny 2002). There is no comparable research on issue advocacy, but given the emphasis that groups place on using advertisements with magic words near the date of the election, it is unlikely that there would be a significant number of post-BCRA issue ads to test such a hypothesis. Even if magic words did not change electoral outcomes, however, it is difficult to imagine how to convince interest groups and candidates that it is worth taking the risk of not using them.

Organizational behavior is not consistent with the belief that the magic words test is meaningless. If the magic words were useless, experienced and influential groups would not have chosen to devote dramatically more resources to independent expenditures than they did to pre-BCRA issue advocacy. Interest groups learn as they gain experience (March and Olson 1984, Apollonio and La Raja 2004), and influential groups would not commit to one strategy when an equally effective but less restricted alternative was available. Our results suggest that political communications that used magic words were in fact more effective than pre-BCRA issue advocacy, even the subset of pre-BCRA issue advocacy that was subsequently redefined as electioneering communication. The Supreme Court claimed that the magic words test was “functionally meaningless,” but organizations engaged in political communications did not agree. Moreover, independent expenditures do appear to affect electoral outcomes.

## DISCUSSION

Our research suggests that the magic words test usefully distinguished between different kinds of political communication. The claim

that the magic words test was meaningless was used to impose restrictions on pre-BCRA issue advocacy. However, based on the interviews with advocates and a review of interest group spending and influence, these restrictions were unjustified. The Supreme Court stated in *Buckley* that issue advocacy should be protected under the First Amendment as political speech. Although the magic words test proposed by the court first appeared in a footnote, this method of distinguishing between different forms of advocacy withstands empirical review.

The research used to support the claim that communications that do and do not use magic words are identical in their effects is not well suited to measure the effects of different kinds of advocacy. Organizations themselves, despite the expectation that powerful lobbies were taking advantage of campaign finance “loop-holes,” did not abandon independent expenditures in favor of issue advocacy; rather, they increased their commitment to independent expenditures at the same time that spending on pre-BCRA issue advocacy increased. Although independent expenditures make up a small portion of most groups’ campaign spending, the most influential groups in particular spent dramatically less on pre-BCRA issue advocacy than they did on independent expenditures. Their rationale, which is consistent with empirical observation, was that the ability to use magic words in advertisements is too important to concede in exchange for the absence of regulation.

In contrast, the set of organizations that spent the most on issue advocacy consisted largely of groups that did not remain active in politics for more than a few years. This observation is consistent with other research suggesting that political spending that imposes few or no restrictions on groups may draw in a larger population of contributors than political spending that requires disclosure, imposes restrictions on behavior, and limits contributions (Apollonio and La Raja 2004). All forms of campaign regulation are onerous to some degree, and limit the population of contributors. Ironically, increasingly restrictive forms of campaign finance regulation may limit the field of contributors to only the most powerful interest groups, who already possess the ability to nav-

igate complex regulation. In contrast, less regulation appears to increase the population of contributors, which, in the light of perceptions that government is run by a few special interests, is probably politically valuable. Restrictive laws may lead citizens to conclude, correctly, that political spending is the realm of a few powerful special interests. Our research points to the need to consider such unintended consequences of a well-intentioned reform.

Moreover, the strong commitment shown by political organizations to independent expenditures suggests that attempting to restrict pre-BCRA issue advocacy by additional regulation was guaranteed to fail. Groups have a range of alternatives available to influence politics. Advocates who wish to limit the influence of interest groups or political parties in American elections should consider the critical questions of how to place restrictions on both independent expenditures and contributions to candidates, as well as post-BCRA issue advocacy, including advertisements run by 527 organizations.<sup>9</sup> In the end, BCRA appears to have rejected a reasonable method of distinguishing more effective from less effective advocacy, while leaving the existing system of political advertising, with all its flaws, largely unreformed.

## REFERENCES

- Adamany, D., and Agee, G. 1975. "Election Campaign Financing: The 1974 Reforms." *Political Science Quarterly* 90: 201–220.
- Apollonio, D.E., and La Raja, R.J. 2004. "Who Gave Soft Money? The Effect of Interest Group Resources on Political Contributions." *The Journal of Politics* 66(4): 1159–1179.
- Bipartisan Campaign Reform Act (BCRA). 2002. Public Law 107-155.
- Buckley v. Valeo*. 1976. 424 U.S. 1.
- Bureau of Labor Statistics. 2004. "Table 1: Consumer Price Index for All Urban Consumers." Available: [www.bls.gov/news.release/cpi.t01.htm](http://www.bls.gov/news.release/cpi.t01.htm). Accessed March 9, 2004. Verified April 7, 2004.
- Canon, D. 1993. "Sacrificial Lambs or Strategic Politicians? Political Amateurs in U.S. House Elections." *American Journal of Political Science* 37(Nov): 1119–1141.
- Carne, M., and Apollonio, D.E. 2003. "Independent Expenditures and Interest Group Strategy." Presented at the Annual Meeting of the Midwest Political Science Association, Chicago.
- Carney, E., Stone, P.H., and Barnes, J.A. 2003. "New Rules of the Game." *National Journal* 35(Dec 20): 3800–3810.
- Center for Responsive Politics. 1998. *Summary Data*. Available: [www.opensecrets.org/pubs/bigpicture2000/overview/issue.asp](http://www.opensecrets.org/pubs/bigpicture2000/overview/issue.asp). Accessed on March 8, 2004. Verified on April 7, 2004.
- Corrado, A., Mann, T., Ortiz, D., and Potter, T. 2004. *The New Campaign Finance Sourcebook*. Washington, D.C.: Brookings Institute Press.
- Drew, E. 1999. *The Corruption of American Politics*. New York: Overlook Press.
- Engstrom, R.N., and Kenny, C. 2002. "The Effects of Independent Expenditures in Senate Elections." *Political Research Quarterly* 55(4): 885–906.
- Federal Election Campaign Act. 1971. 2 U.S.C. 431.
- Federal Election Commission, United States. 1995. *Campaign Guide for Congressional Candidates and Committees*. Available: [www.fec.gov](http://www.fec.gov).
- Federal Election Commission, United States. 2003. *FEC Record* 29 (January). Available: [www.fec.gov](http://www.fec.gov).
- Federal Election Commission v. Massachusetts Citizens for Life, Inc.* 1986. 479 U.S. 238.
- Fortune*. 1999, December. "Interest Groups that Influence U.S. Politics and Government." Available: [www.twyman-whitney.com/americancitizen/politics/lobbies.htm](http://www.twyman-whitney.com/americancitizen/politics/lobbies.htm). Accessed on March 8, 2004. Verified on April 7, 2004.
- Franz, M.M. 2004. "Rules and Regulations Matter: Interest Groups Between FECA and BCRA." Presented at the Annual Meeting of the Midwest Political Science Association, Chicago.
- Gerber, A.S., and Green, D.P. 2000. "The Effect of a Non-partisan Get-Out-The-Vote Drive: An Experimental Study of Leafletting." *The Journal of Politics* 62(3): 846–857.
- Jacobson, G. 1997. *The Politics of Congressional Elections, Fourth Edition*. New York: Longman.
- Justice, G. 2004. "Even With Campaign Finance Laws, Money Talks Louder Than Ever." *The New York Times*, November 8, 2004.
- Krasno, J.S., and Seltz, D.E. 2000. *Buying Time: Television Advertising in the 1998 Congressional Elections*. Report prepared for the Brennan Center for Justice. Available: [www.buyingtime.org](http://www.buyingtime.org).
- Magleby, D.B. 2001. *Dictum without Data: The Myth of Issue Advocacy and Party Building*. Report prepared for Pew Charitable Trusts. Available: [www.byu.edu/outsidemoney/dictum/index.html](http://www.byu.edu/outsidemoney/dictum/index.html).
- March, J.G., and Olsen, J.P. 1984. "The New Institutionalism: Organizational Factors in Political Life." *American Political Science Review* 78:734–914.
- McConnell v. FEC*. 2003. 540 U.S. 93.
- McNulty, J.E. 2004. "Get Out the Vote Drives and

<sup>9</sup> The expanded use of 527 organizations in the 2004 national elections has been widely noted (Carney et al. 2003, Justice 2004). At last count, such organizations (excluding those organized by state candidates and political parties) spent at least \$452 million during the 2003–2004 election cycle. See [www.opensecrets.org/527s/527new.asp?cycle=2004](http://www.opensecrets.org/527s/527new.asp?cycle=2004). Verified on December 13, 2004.

- Turnout." Presented at the Annual Meeting of the Western Political Science Association, Portland, OR.
- Opensecrets.org. 2004. "The Big Picture: Issue Ads." Available: <www.opensecrets.org/pubs/bigpicture2000/overview/issue.asp>. Accessed on March 8, 2004. Verified on April 7, 2004.
- Opensecrets.org. 2004. "Total 527 Receipts and Expenditures, 2003–2004." Available: <www.opensecrets.org/527s/527new.asp?cycle=2004>. Accessed on December 10, 2004. Verified on December 13, 2004.
- Thurber, J.A. 1998. "Issue Advocacy and Issue Ads on the Rise in the United States." *Issues of Democracy* 3:2.

Address reprint requests to:  
 Dorie Apollonio  
 Center for Tobacco Control Research  
 and Education  
 University of California, San Francisco  
 530 Parnassus Ave., Ste. 366  
 Box 1390, Library  
 San Francisco, CA 94143-1390

E-mail: Dorie.Apollonio@ucsf.edu

---

#### APPENDIX: STATUS OF GROUPS RUNNING ISSUE ADS ONLY AS OF 2004

---

1. Alliance for Limited Terms  
No evidence it still exists.
  2. American Association of Health Plans  
Still exists. Ranked 41 on 2001 Fortune Power 25.
  3. American Values Organization  
No evidence it still exists.
  4. Americans for Better Campaigns  
No evidence it still exists.
  5. Americans for Fair Taxation  
Still exists; advocates a national sales tax. Ranked 84 on 2001 Fortune Power 25.
  6. Americans for Job Security  
Still exists, though not registered as a PAC; insurance industry front group.
  7. Business Roundtable  
Still exists. Ranked 26 on 2001 Fortune Power 25.
  8. Campaign for America  
No evidence it still exists. Founded by Jerome Kohlberg of LBO firm to advocate campaign finance reform.
  9. Committee for Common Decency  
No evidence it still exists.
  10. Committee for Common Sense  
No evidence it still exists. Founded by Christian conservatives in Maine in response to combat 1998 state gay rights legislation.
  11. Committee for Fairness  
No evidence it still exists.
  12. Tort Reform United Effort  
No evidence it still exists.
  13. We the Parents  
No evidence it still exists.
-