Regulation of Independent Expenditures by Non-Political Committees

All organizations have a First Amendment right to urge people to cast ballots for or against candidates.[147] But most groups do not exist solely for that purpose. From time to time, advocacy groups may want to speak or publish information to support or oppose the election of a candidate, even if such speech is not normally its primary goal. The First Amendment welcomes exactly this kind of diversity of speaker. Advocating for candidates cannot be reserved solely for groups registered as political committees.

Social welfare groups like the ACLU, labor unions like the United Auto Workers, and trade associations like state chambers of commerce all advocate for causes and policies that their members care about. People form these organizations to join together with like-minded others to promote shared ideas for mutual benefit. Occasionally, such groups will advocate independently for or against candidates. Such advocacy, usually known as "independent expenditures," should not be discouraged with onerous regulation or reporting requirements.

If an organization makes an independent expenditure, then it should not have to sacrifice its privacy or the privacy of its supporters. The more state law treats groups that make some independent expenditure like full-fledged political committees, the less they will engage in campaign speech.

Courts have recognized that occasional campaign speech cannot be regulated with the same strictness and severity placed upon organizations whose major purpose is candidate advocacy. The *en banc* Eighth Circuit struck down a law requiring independent expenditure funds to have "virtually identical regulatory burdens" as PACs.[148] In that case, "Minnesota ha[d], in effect, substantially extended the reach of PAC-like regulation to *all* associations that *ever* make independent expenditures,"[149] which the Eighth Circuit ruled unconstitutional. Typically, courts require PAC-like disclosure to be tied to groups that have "the major purpose" of political advocacy.[150] The Ninth Circuit recognized that "[t]his limitation ensures that the electorate has information about groups that make political advocacy a priority, without sweeping into its purview groups that only incidentally engage in such advocacy."[151] When state laws sweep too broadly, courts across the country have required *de minimis* limitations that exempt small groups or groups that only incidentally engage in politics.[152]

Types of Independent Expenditure Reporting Regimes

The Index categorizes the regulations that states impose on independent expenditures by non-political committees into five tiers. In total, twenty-six states fall into the first three more speech friendly tiers, while twenty-four states are in the more restrictive tiers; their laws on independent expenditures broadly chill such speech.

Speech Protective Regimes

The most speech-friendly states don't require any reporting of independent expenditures, allowing full and unfettered political speech. Speech that is independent of candidates or parties is the kind of expression that the First Amendment was meant to encourage. If citizens want to criticize their elected officials and call for them to be replaced, we should not first force them to report their speech to those very officials. If a government is abusive or corrupt, organizations speaking out to expose that corruption should not be required to provide a list of their activities and supporters to the corrupt actors. States like Indiana and Ohio,[153] for example, allow for the freest and most First Amendment-friendly approach to independent expenditures by not requiring such reporting.

A somewhat less speech-friendly approach requires groups to publicly report the independent expenditure, but does not require further disclosures by the organization. In particular, contributors to the group can remain private. Arizona is one such state.[154]

Donor privacy protections in this context are essential for two reasons. First, independent expenditures are disproportionately likely to be speech that is, in some way, unpopular, at least with certain government officials. The risk, therefore, of retaliation for such speech is higher. When the risk of retaliation rises, the likelihood of speech being chilled also increases.

Second, while many members join groups to promote a cause, that doesn't mean they will support every position a group takes, much less a candidate that might receive an endorsement. As a result, donor disclosure will often misinform by associating a member with an expenditure that, in fact, he or she does not agree with. This is junk disclosure. When a group that only dabbles in electoral politics receives a donation, it is misinformation to link every action of that group to every contribution. States that require only reporting of the independent expenditure respect the privacy of those who are independently speaking to their fellow Americans and avoid misinforming the public.

Some states do require public reporting of donors, but limit reporting obligations only to those who have earmarked their donation for independent expenditures. Michigan, for example, limits disclosure to "each person that contributed . . . to the expenditure,"[155] allowing donors who contribute solely to the general funds of organizations to maintain their privacy. This prevents junk disclosure, but still unnecessarily opens up speakers to harassment. Such risks can chill speech, particularly for groups that are not accustomed to political reporting regimes. It also makes it more difficult for speakers to raise funds to speak.

Speech Restrictive Regimes

The final two tiers contain state laws that are highly restrictive. Some states require general donor disclosure for any group that makes an independent expenditure. In Texas, for instance, groups are required to report "as if the person were the campaign treasurer of a [PAC] that does not file monthly reports."[156] As emphasized above, donor disclosure laws for non-political groups sending out the occasional candidate advocacy communication are particularly harmful.

To demonstrate the harm of this type of junk disclosure, consider an imaginary citizen, Sarah, who is concerned about climate change. Sarah contributes to candidate Smith, who supports

nuclear energy as a way to lower carbon emissions. Sarah also contributes to a pro-solar energy group. But the pro-solar group opposes nuclear power. The solar group then runs ads opposing candidate Smith. In states that mandate general donor reporting for any independent expenditure, the disclosure creates an absurd result; Sarah is listed as both a supporter and opponent of candidate Smith! If the purpose of disclosure laws is to inform the public, this type of disclosure misinforms.

Finally, some states force any group that speaks through an independent expenditure to register and report exactly as a political committee. New York[157] and Tennessee[158] are two examples of states with such burdens. While groups that spend all their time advocating for candidates are generally well-versed in such reporting requirements, these rules are devastating to non-political groups and significantly chill their speech. First Amendment principles hold that a state cannot impose full PAC-status burdens on a group for minimal electoral activity. Such rules show a complete disregard for free political speech and are constitutionally suspect.

Other Protections for Non-Political Speakers

If a state requires general donor disclosure for non-PACs that occasionally make independent expenditures, it can limit the damage to free speech and offer some privacy protection by maintaining a relatively high contribution threshold before disclosure is required. This ensures that smaller donors can avoid unwanted association with ads they may not support. Maryland, for instance, requires general donor disclosure for any group that makes an independent expenditure, but only requires donors who gave $6,000 or more to the group to be disclosed.[159] High thresholds do not eliminate the First Amendment harms from this type of disclosure, but they do prevent the harms from falling on smaller donors.

A small number of states provide a way for certain sophisticated donors or groups to avoid public exposure. These provisions are called "reverse earmarking" or "separate segregated funds." The former allows a donor to remain private if the donor specifically instructs the organization *not to use their money* for any independent expenditure. The latter allows groups to set up a separate account that is the only source of funds used to pay for independent expenditures. Only donors whose funds are deposited into that account are disclosed. Connecticut offers both options.[160] While burdensome for all but the most sophisticated organizations and supporters, these measures do allow some protection for private association.