Free Speech and Election Law

The Supreme Court and Campaign Finance

*By Allison R. Hayward**

In few other areas of law does politics touch the Supreme Court more directly than in campaign finance. Litigants regularly ask the Court to undo the rules set by politicians to govern campaigns, or to adapt old interpretations to new circumstances. At present campaign finance law reflects the preferences of elected officials uncomfortably coupled with the constitutional theories and statutory interpretation of judges.

Not surprisingly, the resulting stew of rules is opaque, incoherent, and satisfactory to no one. Rather than providing a rulebook citizens could easily follow to run for office, American campaign finance has become the special province of experts; no more accessible to ordinary Americans than the regulations governing steel imports or pollution control.

At one point in history, the Court might have declined to enter this political thicket. Until the 1960s, the Court avoided cases deemed to present "political questions" and had been reluctant to say much about campaign finance law.[1] But the rise of modern campaign law and the increased willingness of the Court to adjudicate questions of policy occurred at roughly the same time. After the landmark *Baker v. Carr*[2] and *Reynolds v. Sims*[3] decisions, the Court would be hard pressed to step back from review of other political issues. The era of judicial activism was followed in short order by the era of campaign finance reform.

The basic set of rules governing federal (and many state) campaigns dates to the 1974 Federal Election Campaign Act amendments.[4] This statute crafted contribution and expenditure limits, instituted public funding of Presidential campaigns, enhanced disclosure, and set up an enforcement agency. The Court's 1976 decision in *Buckley v. Valeo* set aside the 1974 law's expenditure limits, kept in place its contribution limits, and rationalized this result with a new principle: expenditures were entitled to full First Amendment protection and strict scrutiny, but contributions were not.[5] For this holding to have meaning, the Court also construed "expenditures" to be only those communications containing "express advocacy" of the election or defeat of a candidate.[6]

To place *Buckley* in context, recall that Justice Stevens, appointed by President Richard Nixon, had just replaced Justice William O. Douglas on the bench. The Court, under Chief Justice Warren Burger, was sifting through the doctrinal revolution that occurred under Chief Justice Warren, who had left the bench in 1969. Specifically, the Burger Court, in 1976, was working on the application of the landmark decision *Roe v. Wade*.[7] It was evaluating the constitutionality of the death penalty, after having found state death penalty statutes unconstitutional two years before.[8] It was wrestling with school desegregation and integration.[9] It was pulling back from Warren Court decisions that flirted with treating wealth discrimination as unconstitutional.[10] It was sorting out First Amendment and free speech holdings related to the press and obscenity.[11]

Had *Buckley* been argued several years earlier, when Chief Justice Warren and Justice Douglas were still adjudicating cases, the result would have been much different. One can imagine a Warren Court opinion on the heels of *Harper v. Virginia Board of Elections*[12] and *Shapiro v. Thompson*[13] endorsing a legislative scheme to level the financial playing field—a goal the Burger Court expressly rejected in *Buckley*.[14] In that era, the Court might have endorsed both contribution *and* expenditure limits, and approved of Congress's broad discretion to enact political restrictions.[15] But by 1976, the Warren-era momentum had abated. From the first modern campaign finance cases, the Court's makeup has had real consequences in campaign finance regulation.

In subsequent decisions, the Court concluded that *Buckley's* "express advocacy" standard applied also to the law barring corporations and unions from making campaign "expenditures" with treasury funds.[16] The Court also held that the federal disclosure requirements unconstitutionally burdened certain unpopular political groups.[17] But as the Court has protected some activities, it has endorsed regulation of others. The resulting sea-saw in doctrine has greatly complicated campaign finance regulation.

One striking illustration of the Court's confounding effect on campaign regulation, and the odd interplay of activism and restraint in this field, is with the twin decisions in *Massachusetts Citizens for Life* ("*MCFL*") (1986)[18] and *Austin v. Michigan Chamber of Commerce* (1990).[19] Both cases presented the Court with one issue that has vexed campaign finance regulators for decades—to what extent can federal law limit the political activity of independent groups and entities?[20]

In *MCFL*, the Federal Election Commission (FEC) penalized a non-profit "right to life" group for using its general treasury funds to publish a "special edition" newsletter. That newsletter urged readers to vote pro-life and identified candidates who agreed with *MCFL* on the abortion issue. The FEC said that this was election advocacy—and because the group was incorporated, that the newsletter amounted to an illegal corporate "expenditure."[21] The Court agreed with the legal analysis, but in an opinion written by Justice Brennan, concluded that this type of group was not the corrupt kind of organization that the law should prevent from making expenditures. Brennan's opinion rejected Congress's discretion to treat all corporations alike, and created an exception for policy or political groups that incorporate, not to amass wealth or invest in business, but for more mundane liability and tax reasons. Justices Marshall, Powell, Scalia and O'Conner joined in most of Brennan's analysis. Justices Rehnquist, White, Blackmun and Stevens demurred on key points.

MCFL divided the court into two camps, but within these camps justices had no consensus view of the law. The

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first camp included justices who were either willing to take a hard look at legislation generally or were persuaded in this context that legislation should be suspect. The second consisted of Justices who wanted to defer to legislative judgments in campaign regulation—either out of restraint, or a belief that the legislation is good policy. In *MCFL*, we can observe how vastly different judicial philosophies nonetheless aligned, here to craft an exception to the federal ban on corporate political expenditures.

Ditto for the Court's decision in *Austin v. Michigan Chamber of Commerce*.[22] In *Austin*, a nonprofit Chamber of Commerce group asserted that its expenditures could not be barred under state law, citing the Court's *MCFL* decision for support. However, in an opinion authored by Justice Marshall, and joined by Rehnquist, Brennan, White, Blackmun and Stevens, a different coalition of justices, some hostile to corporate political activity and others deferential to legislatures, upheld the expenditure ban. Liberal justices feared the corruption of politics by corporations; and some conservative justices embraced restraint. Justices O'Conner, Scalia, and Kennedy dissented, expressing their view that independent political activity deserved greater protection, even when the source of funding has ties to "corporate wealth." Again, an odd Court coalition formed to impose yet another wrinkle onto the regulation of campaign finance. Now groups would have to argue their similarities with the Massachusetts group, and establish dissimilarity with the Michigan group, to avoid the corporate expenditure ban.

One observes similar coalition shifting in a more recent set of cases, *Nixon v. Shrink Missouri Government PAC*[23] and *Randall v. Sorrell*.[24] In both these cases, the Court was asked to consider whether a contribution limit could be so low as to unconstitutionally burden donors, candidates or parties. In the *Shrink Missouri* decision, Justice Souter (joined by Rehnquist, Stevens, O'Connor, Ginsburg and Breyer) declared for the Court that contribution limits need not be justified by specific evidence of corruption, and would only be scrutinized for constitutionality if they *prevented* candidates and committees from engaging in effective advocacy. Justices Scalia, Kennedy, and Thomas dissented, concluding instead that contribution limits should receive strict scrutiny, and that in this case the state's interest was insufficient to sustain them. Again, a coalition of justices who support such restrictions as good social policy joined with justices who called for restraint.

When *Randall*'s challenge to contribution limits came before the Court, Justice Breyer authored the main opinion (joined by Chief Justice Roberts and Justice Alito). Breyer concluded that Vermont's contribution limits *were* unconstitutionally restrictive. Breyer observed that the Vermont limits were very low, but also that the record contained "danger signs" that justified the Court's closer scrutiny of this law.[25] In addition, Breyer noted that the limits applied per election cycle, not per election, as is more typical, that the limits imposed on parties were also very low, and that other aspects of the law imposed extreme burdens on volunteers and parties. Justices Kennedy, Thomas, and Scalia concurred with the result, but would revisit Court's campaign finance rulings and show much less deference to Congress or legislatures. Justices Stevens, Souter, and Ginsburg dissented. Souter defended his deferential *Shrink Missouri* analysis and contended that this claim should meet a similar fate.

A final pair of decisions involves the treatment of independent issue advocacy in *McConnell v. FEC*[26] and in *Wisconsin Right to Life v. FEC*. In *McConnell*, Justices Stevens and O'Connor jointly authored the main opinion on the Bipartisan Campaign Reform Act's "electioneering communications" law,[27] joined by Justices Souter, Ginsburg, and Breyer. Among other conclusions, that opinion held that the "express advocacy" standard was statutory, not constitutional.[28] That is, the Court has to invent "express advocacy" only because the underlying law was too vague. Accordingly, Congress could impose restrictions on certain "issue" communications within thirty days of a primary or sixty days of an election, because this new law was sufficiently definitive to pass muster. The *McConnell* opinion moreover emphasized its "respect for legislative judgment" when regulating the activities of incorporated entities in politics.[29] The Court here had no trouble adopting Congress's regulatory justifications (and derogatory vocabulary) for restricting "so-called issue ads."[30] That vocabulary can be seen as betraying the Justices policy preferences for regulation, even as the Court's opinion is packaged as one about deference.

Four years later, the Court heard a challenge to a specific issue advertisement in *Wisconsin Right to Life v. FEC*.[31] But there, Chief Justice Roberts, staking out the middle ground and writing for himself and Justice Alito, concluded that the electioneering communications law could only apply to communications that contained express advocacy or its "functional equivalent."[32] No longer is the communication's content standard merely a matter of clarifying a vague statute. Justices Scalia, Kennedy, and Thomas joined in the result, but would have reversed the Court's *McConnell* holding as well.[33] Thus, five Justices found for the advocacy group; two attempted to scale the result within the *McConnell* precedent and three would reverse that precedent. Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer, concluding in a tone reminiscent of *McConnell* that Congress should be allowed to regulate these political communications.[34]

The opinions of the various justices form a pattern over time that reflects something besides mere partisanship or ideology. At the outset of modern campaign finance law, a coalition of civil libertarians and classical liberals on the Court united to protect some political activity from regulation. Both camps seemed to respect the value of political participation even by entities the specific justices might not embrace. Accordingly, Justice Brennan joined the per curiam *Buckley* opinion and its "express advocacy" standard. Brennan authored the *MCFL* exception allowing political nonprofit corporations to make independent expenditures. Yet at the same time, a coalition of progressive justices and conservatives would defer to Congress's judgment in how to regulate campaign finance. Justices Rehnquist, Stevens, and White reliably deferred to legislative choices, Rehnquist for structural reasons, and Stevens and White because they liked Congress's policy preferences.

In the intervening years, many justices have left the bench, and have been replaced, yet the same interesting coalitions continue to form in these cases. Justice Souter and Stevens, both

Republican appointees (and generally liberal), are both highly critical of modern politics and very supporting of Congressional reform legislation.[35] Stevens's hostility to modern politics found voice most recently in his *Davis v. Federal Election Commission* dissent. There, he again invokes Justice White's support for greater campaign regulation, surmising that the quality of political debate would (somehow) *improve* if Congress could limit political expenditures.[36]

Justice Breyer's approach is more nuanced, and protective of some political activity especially when faced with laws restricting parties and candidates.[37] Breyer, however, is more critical of efforts by "outside" interest groups to fall outside the scope of regulation.[38] Breyer's willingness to explore rationales for saving some restrictions yet rejecting others is reminiscent of some of Justice Brennan's attempts to craft standards and exceptions. Whatever the intellectual appeal of their approaches for academics and Court-watchers, such efforts complicate the law, and encourage litigation.

Justices Kennedy, Scalia, and Thomas are plainly skeptical of the constitutionality of campaign laws. Chief Justice Roberts and Justice Alito were not on the bench for many of these cases, yet they have shown willingness to take a harder look at campaign finance laws than Justices Rehnquist and O'Connor, whom they replaced. Yet if *Wisconsin Right to Life* is an indicator, these two newest justices are less anxious to overturn precedent than their more skeptical colleagues.

If the recent *Davis* decision is another indicator, Roberts's and Alito's more aggressive scrutiny of these regulations will come through the inventive use of existing precedents. In *Davis*, for instance, Justice Alito's opinion concluded that the federal law increasing contribution limits for candidates facing self-funding "millionaire" opponents unconstitutionally burdened the self-funding candidate's freedom to spend his own money on his campaign.[39] The result required, in part, construing the law as a "spending limit" requiring strict scrutiny under *Buckley*.[40] The dissent in *Davis*, for its part, found no constitutional injury at all.[41]

Unfortunately, the present blend of court-crafted doctrine and Congress-crafted statute is complicated and irrational. Thus, attempting to scrutinize future cases within existing precedent will not help decrease the burden this conglomeration imposes on political activity. That complexity alone may raise a deeper legal question. Can complexity itself pose an unconstitutional burden on speech, association, or other protected activity? The inscrutability of the law has already provided an effective defense —the recent prosecution of a high profile campaign crime failed when the defendant persuaded his jury he *could not have known* that his activity was criminal.[42]

Now might be a good moment for justices to acknowledge the law's general failure to articulate clear standards that serve a rational state interest, due in part to the Court's decisions, and its substantial burden on communities and activists.

Whatever appealing qualities might attach to a justice's respect for precedent and restraint in ordinary circumstances, none are found here. It is vitally important that future justices appreciate the position the Court is in, and the power the Court has to improve the law. Rather than decry judicial activism, principled Court watchers need to allow for space for future justices to repair the mistakes of the past.

In campaign finance, once we acknowledge the conflict of interest with which Congress regulates politics, we should embrace the Court's close review of the laws politicians write to govern their own elections. In the end, Justice Burger, dissenting in *Buckley v. Valeo,* was right. Campaign finance regulation of any kind should be subject to strict scrutiny. The obvious favoritism incumbents bring to the process cries out for some other arbitrator (the Court) to evaluate closely their efforts. But in so doing, the Court should remember that ordinary Americans, not lawyers or consultants, must be able to understand the rules that result from the Court's analysis.

Endnotes

1 *See, e.g.,* Colegrove v. Green, 328 U.S. 549 (1946); United States v. CIO, 335 U.S. 106 (1948).

2 369 U.S. 186 (1962).

3 377 U.S. 1 (1964).

4 Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

5 424 U.S. 1 (1976) (per curiam). Chief Justice Burger dissented from the holding finding contribution limits constitutional. Id. at 241-42.

6 *Id*. at 41-44.

7 *See* Bigelow v. Virginia, 421 U.S. 809 (1975).

8 *See e.g.,* Gregg v. Georgia, 428 U.S. 153 (1976).

9 *See* Millikin v. Bradley, 418 U.S. 717 (1974).

10 Warth v. Seldin, 422 U.S. 490 (1975).

11 *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

12 383 U.S. 663 (1966).

13 394 U.S. 618 (1969).

14 424 U.S. at 17-20.

15 Justice White, dissenting in *Buckley*, would have so held. *See* 424 U.S. at 259-67.

16 Massachusetts Citizens for Life v. FEC, 479 U.S. 238 (1986).

17 Brown v. Socialist Workers Committee, 459 U.S. 87 (1982).

18 479 U.S. 238 (1986).

19 494 U.S. 652 (1990).

20 *See* Alexander Heard, The Costs of Democracy 130-32 (1960).

21 2 U.S.C. 441b.

22 494 U.S. 652 (1990).

23 528 U.S. 377 (2000).

24 548 U.S. 230 (2006).

25 548 U.S. at 249.

26 540 U.S. 93 (2003).

27 Bipartisan Campaign Reform Act of 2002 (BCRA) 116 Stat. 81, Title II, codified at 2 U.S.C. 434(f).

28 540 U.S. at 193-94.

29 540 U.S. at 205.

30 540 U.S. at 128-29.

31 127 S. Ct. 2652 (2007).

32 *Id*. at 2663-70.

33 *Id*. at 2679-84.

34 *Id*. at 2687.

35 *See* Randall v. Sorrell, 548 U.S. 230, 280 (Stevens, J., dissenting) ("I am firmly persuaded that the Framers would have been appalled by the impact of modern fundraising practices on the ability of elected officials to perform their public responsibilities.")

36 *Davis*, 554 U.S. ___ (2008)(June 26, 2008) (Slip Op. at 3) (Stevens, J., concurring in part and dissenting in part).

37 *See* Randall v. Sorrell, 548 U.S. 230 (2006).

38 *See* Transcript of Oral Argument, FEC v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007).

39 *Davis*, Slip Op. at 12 (Alito, J.)

40 *Id*. at 14.

41 *Id*. at 5 (Stevens, J., joined by Souter, Ginsberg and Breyer, dissenting).

42 *Ex-Kevorkian Lawyer Acquitted of Campaign Charges*, Associated Press, June 2, 2008.