

## SHIFTS IN SUPREME COURT OPINION ABOUT MONEY IN POLITICS

Before 1970, campaign finance regulation was weak and ineffective, and the Supreme Court infrequently heard cases on it. The Federal Corrupt Practices Act of 1925 was the campaign finance reform act in effect when Congress enacted the Federal Election Campaign Act of 1971 (FECA), but it was easily evaded and rarely enforced. It prohibited campaign contributions by corporations, and it required quarterly disclosure of contributions in excess of \$100 to multi-state candidate committees. In 1934, in *Burroughs v. US*, the Supreme Court sustained it against a claim that it violated Article 2 section 1 of the Constitution, which limited congressional authority over the appointment of presidential electors. The Court argued: “To say that Congress is without power to pass appropriate legislation to safeguard [presidential elections] from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection.”<sup>1</sup> Justice White cited *Burroughs* in his dissent in *Buckley v. Valeo*.

The only other Supreme Court cases to consider campaign finance reform before 1970 involved the Taft Hartley Act, which also prohibited labor unions from making campaign contributions or expenditures. The Court avoided First Amendment issues in all of the cases. In 1948, in *US v. CIO*, the Court dismissed an indictment against union officials for advocating the election of a congressional candidate in a union publication directed at union members holding that the article was not a campaign expenditure within the meaning of the act.<sup>2</sup> On the other hand, in *US v. Automobile Workers*, the Court upheld an indictment charging union officials with making prohibited campaign expenditures by unions when the expenditures paid for a commercial radio broadcast.<sup>3</sup> FECA specifically authorized and regulated the “communication costs” both corporations and labor unions incurred in advising their members, officers, employees, and shareholders about candidates for electoral office.<sup>4</sup>

In 1972, in *Pipefitters v. US*, the Court reversed a conviction of union officers because of erroneous jury instructions.<sup>5</sup> The indictment had charged that a PAC comprised solely of voluntary contributions made illegal campaign expenditures because the PAC was managed by union officials as part of the union’s general business administration. The decision came down after enactment of the FECA in 1971, which specifically authorized union and corporate PACs.

Campaign finance reform was under consideration in Congress for many years. FECA was enacted in 1971, and its limitations became obvious during the 1972 presidential campaign. Consequently, the act was amended so extensively in 1974 that FECA as amended is generally considered the beginning of the modern campaign finance regime. FECA as amended in 1974 limited contributions and expenditures, imposed spending caps, created the Federal Elections Commission, and established the Presidential Public Financing System. Supreme Court decisions on FECA disclosed inconsistent rationales and shifting majorities.

### Money and Speech

Enactment of FECA corresponded with a conservative resurgence, and in 1971 the American Enterprise Institute published a pamphlet by Yale law professor Ralph K. Winter that challenged campaign finance regulation as an infringement of free speech.<sup>6</sup> Immediately after enactment of

the 1974 amendments, Winter filed an expedited action seeking a declaratory judgment that most parts of FECA unconstitutionally infringed free speech rights guaranteed by the First Amendment. In addition to conservative Republican senator William Buckley, plaintiffs included the American Civil Liberties Union (ACLU) and liberal Democratic senator Eugene McCarthy. The ACLU argued for an absolutist interpretation of the First Amendment. McCarthy argued that he could not have successfully campaigned against President Lyndon Johnson and continuation of the Vietnam War in 1968 if campaign finance reform had been in existence; as an insurgent, he was dependent on a small number of big money supporters.<sup>7</sup>

First Amendment analysis typically asks three questions: is there a compelling governmental interest that justifies some limitation; is the limitation the least restrictive means of protecting that governmental interest; and does the limitation apply too broadly, to situations where the governmental interest is not in play?<sup>8</sup> In *Buckley v. Valeo* (1975), the DC district court sitting en banc upheld FECA by a 6-2 majority, with a minor exception, on the grounds that “there is a ‘compelling governmental interest, both as to need and public perception of need, that justifies any incidental impact on First Amendment freedoms’ that results from the statutory limitations.” The DC district court also said: “when ‘speech’ and ‘non-speech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms.”<sup>9</sup>

In 1976, the Supreme Court on appeal upheld FECA’s limitations on contributions, public financing, and disclosure provisions in *Buckley v. Valeo*. The contributions limitations were sustained on the grounds that preventing “corruption or the appearance of corruption” is a fundamental governmental interest that justifies some limitations on First Amendment freedoms. However, the Court largely adopted Winter’s First Amendment analysis and struck down limitations on self-funding, finding no link between the spending of money by candidates themselves and “quid pro quo” corruption. It also struck down the regulation of uncoordinated independent expenditures because there is no “gift” to the candidate and therefore no “quid pro quo,” which effectively made independent expenditures constitutionally protected as a matter of law. The Court’s majority rejected the DC district court’s reliance on a lower standard of review when speech and non-speech elements are combined, saying: “Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment”<sup>10</sup> The decision has come to stand for the notion that “money is speech.”

## **Corporations and the First Amendment**

FECA continued the ban on campaign contributions by corporations and labor unions, including “[express advocacy](#)” expenditures, but contained an exception for media corporations.<sup>11</sup> News stories, commentaries, and editorials made in the regular course of a media corporation’s business are not express advocacy under FECA.

In 1986, in *FEC v. Massachusetts Citizens for Life (MCFL)*, the Supreme Court created another exception for expenditures by nonprofit, non-stock corporations created for the purpose of political advocacy that do not engage in business activities. The Court noted that the justification for limiting corporate campaign contributions to separate PACS—concern over the “corrosive influence of concentrated corporate wealth” on the “marketplace of political ideas”—did not apply to corporations like MCFL. Whereas corporate wealth accrued in the economic marketplace bears no relationship to popular acceptance of the political ideas promoted by a for-profit corporation, MCFL accepted no contributions from business corporations or unions and its resources directly reflected popular support for its ideas. Chief Justice Rehnquist and Justices White, Blackmun, and Stevens dissented, agreeing with precedents holding that the special benefits of the corporate structure compelled special regulation of corporations in the campaign finance area. They argued that one of the reasons for campaign finance regulation of corporations, the need to protect minority interests from coerced political speech, exists in MCFL as much as in for-profit corporations and should require that campaign spending occur through PACs as in all other corporations.<sup>12</sup>

The Supreme Court had previously undermined prohibitions against corporate spending in political campaigns in *1st National Bank of Boston v. Bellotti* (1978). Banks wanted to make expenditures advocating against a proposed constitutional amendment authorizing a state income tax despite a Massachusetts statute that prohibited corporate spending in referenda elections not “materially affecting any of the property, business, or assets of the corporation.” The Court overturned the statute, saying: “The proper question...is not whether corporations “have” First Amendment rights, and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect.” In *Bellotti*, the Court expressly refrained from deciding whether for-profit corporations had a right to participate in the election of a candidate to public office.<sup>13</sup>

### **“Corruption” Justifying the Regulation of Speech**

In 1990, the Supreme Court upheld a Michigan ban on corporate campaign expenditures in *Austin v. Michigan Chamber of Commerce* relying on a distortion rationale. The Michigan Chamber of Commerce was a nonprofit corporation funded by annual dues from its members, most of which were for-profit business corporations. It maintained a well-funded PAC, but it wanted to make independent expenditures with its treasury funds, which was prohibited under Michigan law. The Court distinguished the Chamber of Commerce from MCFL because MCFL was more similar to a voluntary political association than a business firm, while the Chamber of Commerce was an association of for-profit business corporations.

In *Austin*, the Court relied on MCFL to argue that for-profit corporate campaign expenditures created a “different type of corruption in the political arena: the corrosive and distorting effect of immense aggregations of wealth that are accumulated with the help of the corporate form that have little or no correlation to the public's support for the corporation's political ideas...They reflect instead the economically motivated decisions of investors and customers.” The unfairness inherent in corporate campaign expenditures is compounded because business corporations receive significant economic benefits that other kinds of associations do not, “such as limited

liability, perpetual life, and favorable treatment of the accumulation and distribution of assets – that enhance their ability to attract capital and deploy their resources in ways that maximize the return on their shareholders investments.” The Court found that the prohibition on corporate expenditures was narrowly tailored to further the government’s compelling state interest in preventing corruption because business corporations’ political speech was not banned but merely channeled into PACs.<sup>14</sup> 659 (659-60)

*Austin* was decided by a 6-3 majority. The three justices in minority were by far the youngest members of the Court and included Justices Scalia and Kennedy. Justice Stevens was in the majority. By 2009 all of the other members of the Court had been replaced. In 2010, *Citizens United v. FEC* explicitly overruled *Austin*.

In 2002 Congress passed a new, more comprehensive Bipartisan Campaign Reform Act (BCRA), also known as McCain-Feingold. The act regulated contributions to and the sources of expenditures by political parties for purposes other than the election of candidates to national office (soft money) and barred independent [“electioneering communications”](#) made shortly before elections.<sup>15</sup> Senator Mitch McConnell immediately challenged the act in court, but in 2003, in *McConnell v. FEC* (2003), the Supreme Court upheld the key provisions of the BCRA in strong language. Justices Stevens and O’Connor spoke for the Court, recognizing “the Government’s interest in combating the appearance or perception of corruption engendered by large campaign contributions.” Furthermore, they said: “[i]n speaking of ‘improper influence’ and ‘opportunities for abuse’ in addition to ‘quid pro quo arrangements,’ we [have] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors,” and “[t]ake away Congress’ authority to regulate the appearance of undue influence and ‘the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.”<sup>16</sup>

In 2005, President George Bush appointed John Roberts Chief Justice upon the death of Chief Justice William Rehnquist, and in 2006 Justice Samuel Alito replaced retiring Justice Sandra Day O’Connor. The change in personnel altered the ideological balance of the Court and created a new conservative majority hostile to campaign finance reform. In *Wisconsin Right to Life v. FEC* (2007), the Court found in a 5-4 opinion that the BCRA was unconstitutional to the extent that it prohibited as “electioneering communications” issue ads by Wisconsin Right to Life, a 501(c)(4) corporation that named candidates and were broadcast during the relevant period prior to an election.<sup>17</sup>

In *Citizens United v. FEC* (2010), the same 5-4 majority found that corporate funded express advocacy was also protected speech under the First Amendment. Acknowledging that the government has a compelling interest in preventing corruption or the appearance of corruption, the majority stated that corruption could be found only in the case of a quid pro quo exchange and that cannot occur with an independent expenditure because there is no gift to the candidate. Furthermore, the Court specifically held that the government may only regulate the political speech of corporations by disclosure and disclaimer requirements; “it may not suppress that speech altogether...First Amendment protection extends to corporations.” In dissent, Justice

Stevens argued that this was a radical departure from established law, noting that although corporations “make enormous contributions to our society, they are not actually members of it.” Stevens argued that the limitations on “electioneering communications” at issue were mere “time, place and manner restrictions.”<sup>18</sup>

In *McCutcheon v. FEC* (2014), the same 5-4 majority of the Court struck down the aggregate contribution limitations of BRCA so long as a donor kept contributions to individual candidates within the act’s limits. Reaffirming its view that the only permissible ground for limiting speech in the form of campaign contributions is quid pro quo corruption, the majority expressed confidence that limits on individual contributions were sufficient to protect against the danger of bribing an individual candidate or appearing to do so.<sup>19</sup>

The current 5-4 conservative majority on the Supreme Court has also rejected any argument that Congress may regulate campaign finance in order to ensure a level playing field for candidates and political interests. In *Davis v. FEC* (2008), they struck down the so-called Millionaire’s Amendment to BRCA, which raised contributions for candidates who faced self-funded opponents if the opponents’ self-funding exceeded a certain limit, on the grounds that it burdened the self-funded candidate’s speech.<sup>20</sup> In *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett* (2011), they reaffirmed the constitutionality of public funding of political campaigns, but struck down an Arizona program that gave publicly funded candidates additional funds if expenditures by their privately funded opponent and independent expenditures on behalf of that opponent exceeded a certain level.<sup>21</sup>

## Conclusion

Current Supreme Court precedents allow Congress to limit contributions to candidates because they may lead to quid pro quo corruption; and express advocacy for or against particular candidates and independent expenditures which are coordinated with candidate campaigns are considered functionally equivalent to direct contributions. Supreme Court precedents also allow disclaimer and disclosure rules. The opinions that have done the most damage to the campaign finance regulatory scheme have struck down the regulation of uncoordinated independent expenditures by corporations, especially non-profit corporations.

The court’s decisions have revolved around three questions:

First, how does the First Amendment apply to the action in question?

Second, is the speaker entitled to First Amendment protection, and what level of scrutiny ought to apply to the regulation of the speech?

Third, what compelling government interests are implicated by campaign finance?

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<sup>1</sup> *Burroughs v. US*, 290 U.S. 534 (1934) at 545.

<sup>2</sup> *US v. CIO*, 335 US 106 (1948).

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<sup>3</sup> *US v. Automobile Workers*, 352 U.S. 567 (1957).

<sup>4</sup> FECA defines “communication costs” as expenditures incurred by labor unions, other membership organizations, and corporations in connection with educating their members, shareholders, executives, administrative staff, and families on election issues.

<sup>5</sup> *Pipefitters v. US*, 407 U.S. 385.

<sup>6</sup> Ralph K. Winter, “Money, Politics and the First Amendment,” in Howard R. Penniman and Ralph K. Winter, *Campaign Finances: Two Views of the Political and Constitutional* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1971); Ralph K. Winter, Jr., *Campaign Financing and Political Freedom* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1973).

<sup>7</sup> For in depth discussion of the history of campaign finance reform, including *Buckley v. Valeo*, see Robert E. Mutch, *Buying the Vote: A History of Campaign Finance Reform* (New York: Oxford University Press, 2014). Mutch argues that the stark difference between the district court’s decision and the Supreme Court’s decision in *Buckley v. Valeo* reveals the abruptness of the ideological shift in judicial thinking.

<sup>8</sup> Lloyd Leonard, “The First Amendment” (Appendix B in *Money in Politics: Developing a Common Understanding to the Issues*, LWVUS, 2014).

<sup>9</sup> *Buckley v. Valeo*, 519 F.2d 821 (DCDC 1975).

<sup>10</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>11</sup> FECA defines express advocacy as political communications that explicitly advocate for the defeat or election of a clearly identified federal candidate.

<sup>12</sup> *FEC v. Massachusetts Citizens for Life*, 479 US 238 (1986), 257-59, 267-69..

<sup>13</sup> *1st National Bank of Boston v. Bellotti*, 435 US 765 (1978), 768, 776, 787 fn 26. For an analysis of the history of corporate personhood in politics, see Leo e. Strine, Jr. and Nicholas Walter, “Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History,” Discussion Paper 2015-2 or the Harvard Law School Program on Corporate Governance (2015), available from The Harvard John M. Olin Discussion Paper Series, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2481061](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2481061) .

<sup>14</sup> *Austin v. Michigan Chamber of Commerce*, 494 US 652 (1990), 659-60. For additional discussion see Mutch, *Buying the Vote*, 157-61.

<sup>15</sup> FECA defines electioneering communications as broadcast, cable or satellite transmissions that refer to a clearly identified candidate, targeted to the relevant electorate and made within 30 days before a primary election or 60 days before a general election.

<sup>16</sup> *McConnell v. FEC*, 540 US 93 (2003), 143-44.

<sup>17</sup> *Wisconsin Right to Life v. FEC*, 551 US 449 (2007).

<sup>18</sup> *Citizens United v. FEC*, 558 US 310 (2010), 318, 342. 394, 419.

<sup>19</sup> *McCutcheon v. FEC*, \_US\_; 134 S.Ct. 1434 (2014).

<sup>20</sup> *Davis v. FEC*, 554 US 724 (2008).

<sup>21</sup> *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, \_US\_, 131 S.Ct, 2806 (2011).