White Papers

Campaign Reform as Censorship

by Craig R. Smith

[This white paper is a reduced version of a book chapter in my book *Silencing the Opposition: Government Strategies of Suppression* (State University of New York Press, 2011). The full chapter and other chapters on the Alien and Sedition Crisis, Lincoln's suspension of *Habeas Corpus*, Radical Reconstruction, suppression of unions, deprivation of rights for Native Americans, the Suffrage movement, the Red scares, censorship during the war in Vietnam, and restrictions imposed since 9/11 can be found in that book.]

On March 24, 2009, the Supreme Court heard a case regarding campaign persuasion, the kind of political persuasion the Founders most wanted to protect. During the 2008 presidential campaign, a "documentary" film, "Hillary: The Movie," was released that debunked Democratic candidate Hillary Clinton. Because the film was financed by corporate funds through an advocacy group known as United Citizens and because it was going to be shown on on-demand cable within 30 days of various primary elections, injunctions succeeded in stopping the broadcast of the film because it violated federal election laws.[1] A three-judge panel upheld the injunctions under the McCain-Feingold law (see below) ruling that the film was "electioneering communication" directed against a candidate. The judges said the film could not be shown within 30 days of a primary election and it must disclose who its donors were. In January of 2010 in a five to four ruling, the Supreme Court in *Citizens United v. FEC* overturned the ruling. The decision effectively restored the right of corporations to participate in campaign persuasion also overturning the precedent of *Austin v. Michigan Chamber of Commerce* (494 U.S. 652).

Attempts at Reform

In the wake of the Watergate scandal, a passel of requirements were added to the Federal Corrupt Practices Act of 1925 (passed in reaction to the Tea Pot Dome scandal of the Harding administration) and the Federal Election Campaign Act of 1971. Citing the threat of corruption, the reforms required that any contributor giving $10 or more to a federal campaign had to be included in the campaign's next quarterly report to the Federal Elections Commission (FEC); the name and address of the contributor must be listed. The new rules limited individual contributions to $1,000 per election, prohibited corporate contributions, but allowed employees to contribute to a campaign by forming political action committees (PACs) which could make maximum contributions of $5,000 per candidate per election. No individual would be allowed to give more than $5,000 to a PAC or $25,000 overall to federal candidates during a single election cycle. The new law also carefully monitored and limited what corporations or unions could "contribute in kind"—equipment, services, travel, and the like. However, for-profit (501c6) and non-profit (501c4, 501c3) organizations could provide advocacy advertisements favoring federal candidates or their issue-positions as long as such activity was not "coordinated" with that campaign. This provision opened a loophole in the law which allowed religious, environmental and other groups to campaign against candidates who did not endorse their agendas. It also allowed for the creation of independent action groups—designated as 527s—which are tax-exempt and can raise unlimited amounts of money for political activity and issue advocacy. The most infamous of these action groups may have been the "Swiftboat" advocacy group attacking presidential candidate John Kerry during the 2004 election. Loopholes in the law continued to allow for disguised candidate advertisements in the form of issue advocacy. In 2000, for example, over $500 million was spent by 130 "independent" groups on such ads.

Political parties were forced to allocate their contributions based on population formulas, but they could provide unlimited money to and in states for the purpose of "party building activities." This provision opened the law to what is called "soft money:" unlimited contributions given to the party for grassroots and party building activities were allowed under amendments to the Federal Election Campaign Act (FECA) passed in 1979. These activities were not subject to the limitations of the FECA or the regulations of the FEC. Nor were certain activities of corporations and unions including corporate communication to stockholders, labor communications to its members or their families, non-partisan voter registrations and get-out-the-vote activities, and creation of political action committees. Further, the law provided for public financing of presidential nominating conventions and for matching funds to help pay for presidential primary and general election campaigns. In return for accepting matching funds, presidential candidates were limited in how much they could spend overall. If they refused matching funds, they could spend all the money they could raise under the rules. Senator Barack Obama chose this latter course in the 2008 presidential campaign, while Senator John McCain accepted federal funding. Thus, following his convention, McCain was limited to spending only the $84.1 million the federal government provided to him, while Obama could spend all he raised and thus, vastly outspent McCain.

There were other problems with the law. First, the distribution of federal funds favored the two party systems thereby quashing the voices of third party candidates. Full matching funds were provided ONLY to those parties that scored 25% of the vote or more in the previous presidential election. Worse yet, the law funded the two parties' primary candidates, conventions, and election campaigns, while marginalizing third parties and their candidates. On top of that, by creating joint committees and joint fund-raisers, candidates could raise nearly $100,000 for their campaigns. Thus, candidates with a large party apparatus behind them had an advantage. The developer Alex Spanos, who owns the San Diego Charger football team, provided over $85,000 to the McCain campaign using this tactic prior to the Republican convention. The family of Carl Pohlad, the owner of the Minnesota Twins, gave $170,000 to the Obama campaign under the same scheme.

Second, each congressional district and state was treated equally under the law when it came to providing funds to

buy advertising in media markets. Though it is much more expensive to buy advertising time in New Jersey than it is in New Mexico, candidates from each state are under the same funding limits.

Third, to require disclosure of the membership in an organization is a violation of the rights of privacy and assembly. When the state of Alabama upheld the right of employers to fire employees who were found to members of the NAACP or who had not disclosed their memberships, the Supreme Court overruled the state on the grounds that membership in the NAACP was a form free assembly that should not be penalized. The Watergate reforms flew in the face of this precedent. Ironically, as recently as 1995, the Supreme Court reinforced this right of private assembly and did so in the political context. In *McIntyre v. Ohio Elections Commission*, the Court held in a 6-3 decision that an Ohio law prohibiting the distribution of anonymous tracts was unconstitutional. Mrs. McIntyre had been fined $100 for violating the law; the conviction was upheld by the Ohio Supreme Court, which relied on the disclosure provisions of federal law. However, in his majority opinion, Justice John Paul Stevens referred to the long tradition of anonymous political dissent going back to the American Revolution. For example, in the debate over ratification of the Constitution, Federalists and Anti-federalists used pseudonyms when publishing their editorials. Stevens claimed that anonymity is a "shield from the tyranny of the majority." This argument clearly implies the right to contribute anonymously to a political campaign.

Fourth, the reform favors incumbents since they don't need to spend money to attain name identification with voters and their opponents usually do. The less money available to candidates, the more incumbents have an advantage. By equalizing contributions and expenditures through arbitrary limits, the law virtually institutionalizes incumbents and marginalizes their opponents.

The Supreme Court Changes the Reforms

Only Justices William Brennan, Potter Stewart and Lewis Powell concurred in all parts of the decision in *Buckely v. Valeo*; other justices endorsed different parts of the ruling creating pluralities for one part or another. Basically, the Court was divided between those who believed in a need to reform in light of the Watergate scandal and those who believed the First Amendment afforded protection to political speech including anonymous association. Thus, a plurality claimed that contributions could be restricted and a different plurality claimed that expenditures should not be restricted. (Money does not equal speech in the former case; but it does equal speech in the latter.)

In a his dissent, Justice Harry Blackmun wrote that the Court could not make a distinction between contributions and expenditures on the basis of which was more vital to freedom of expression. Joined by then Associate Justice Rehnquist, Chief Justice Burger said in his dissent: "Contributions and expenditures are two sides of the same First Amendment coin...." One person's contribution is another person's expenditure. Burger also objected to disclosing small donors who might be retaliated against by employers. He opposed the public funding of elections because such funding favors the two major parties and undercuts representative democracy. Joined by Associate Justice Byron White, Burger also pointed out how the reform vastly favored rich candidates, who can rely on their own funds, over poor candidates, who had no choice but to raise funds from the public in small amounts.

While the Buckley decision was widely criticized for labeling money as speech when it was spent, but not as speech when it was donated, the Court did not overturn the decision when it had a chance and often supported the contradictory ruling with contradictory decisions. In *FEC v. Massachusetts Citizens for Life* in 1986, for example, the Supreme Court closed down a vital right in any political system. It ruled that the federal government could limit speech by organizations that "expressly" advocated FOR one candidate or FOR the defeat of another in federal elections, though these groups were still free to enter into issue advocacy.

In 1987, the Supreme Court denied certiorari in a Ninth Circuit case, *FEC v. Furgatch*, which established a three-part test to determine what constituted legitimate issue advocacy. To fall under the FEC's jurisdiction the speech must be "unmistakable and unambiguous" in its meaning. Second, it must include a "plea for action" not be merely informative. Third, the speech must be "express advocacy of the election or defeat of a candidate."

The Supreme Court itself clarified the *Furgatch* standard in two cases. In *Colorado Republican Committee v. FEC*, in 1996, the Supreme Court ruled that First Amendment prohibited the application of any provision of the FECA (1971, as amended 1979) to political party expenditures made independently. The majority argued that party advocacy was a core democratic value. The Supreme Court took up *FEC v. Colorado Republican Party* in 2001; a five-to-four ruling re-affirmed the prohibition on coordination between party organs and campaigns in federal elections.

However, while the Court moved to protect issue advertising, it also gave the states the right to issue the same restrictions the Court had upheld on the federal level with regard to contribution limits. In *Nixon v. Shrink Missouri Government PAC*, which was decided on January 24, 2000, the Supreme Court argued that *Buckley* is the authority for comparable state limits on contributions and those limits need not be pegged to the precise dollar amounts approved in *Buckley*. Justice David Souter, writing for the majority, claimed that the possibility of the appearance of corruption was enough of a compelling interest for the state of Missouri to restrict contributions in this case. That interest combined with states' rights overwhelmed, in Souter's opinion, concerns about restricting freedom of speech and association. The decision was a clear endorsement of efforts at reform on the state level but it also restricted the First Amendment rights of candidates at that level making the *Buckley* context and restrictions all the more pervasive.

New Reforms

All of these concerns along with the controversial presidential election of 2000, which was decided by the Supreme Court, led to the introduction in 2001 of more than 72 bills to reform the system. These included such unconstitutional content reform proposals as making the openings and closings in federal campaign commercials uniform, requiring candidates to appear in their commercials, and forcing stations that aired "negative ads" to grant free response time to attacked candidates. Emerging from this sea of legislation was a consensus bill, S. 25, authored initially by Senators John McCain (R-Ariz.) and Russell Feingold (D-Wis.). It became the Bipartisan Campaign Reform Act (public law no. 107-155) when signed by President Bush in March of 2002.

Like its progenitors, it contained controversial provisions. For example, it raised contribution limits to only $2,000

per person per candidate and not to exceed $25,000 for all candidates funded during any calendar year thereby retaining an unrealistically low ceiling on individual contributors, although pegged to inflation. Thus, the average citizen continued to be gagged when it came to expressing enthusiasm for a candidate through the symbolic gesture of giving funds. For example, if you contributed $2,000 to 13 candidates, you would exceed the federal limits.

Reporting to the FEC was now required of those who financed advertising for elections in excess of $10,000. The law also required that no party organ could solicit funds from or make donations to any organization that holds charitable or non-profit status. This provision was aimed at preventing further collaboration between non-profits and party organs.

Other provisions required that no candidate for federal office could receive any funds that did not meet FECA requirements. Accepting funding from foreign nationals was forbidden. State parties could create their own grassroots funds. "Express advocacy" was re-defined as communication that advocates the election or defeat of a candidate by containing the phrase "vote for," "re-elect," or words that in context can have no reasonable meaning other than to advocate the election or defeat of a clearly identified candidate. The law mandated that if a broadcast advertisement appears within 60 days of a federal election and refers to a "clearly identified candidate," it is considered an "electioneering communication" and prohibited because these ads are tantamount to campaign contributions. The law said that union members could not be required to pay full union dues if some of those funds were used for political purposes.

In order to obtain federal funding, the act compelled candidates to say they approved their own ads. However, it cleverly avoided violating the *Miami Herald* precedent against compelled speech by saying that if they did not identify themselves in their advertisements, they would not be allowed to advertise at the lowest unit rate; if candidates admitted that they did "approve" their ads, broadcasters were required to offer them the lowest unit rate on advertising. Furthermore, to protect incumbents, the lowest unit rate was also restricted to positive ads; to receive the rate, the law stated, candidates "shall not make any direct reference to another candidate for the same office." In other words, in such ads, one candidate could not criticize the record of his or her opponent.

While meaning to do good, the McCain-Feingold reform was damaging for many of the reasons rehearsed above. Nonetheless, the Supreme Court upheld a good deal of the provisions when it took up the law as a whole in *McConnell v. FEC*. Senator Mitch McConnell (R.-Kt.) was head of the National Republican Senatorial Campaign Committee and sought to weaken the McCain-Feingold law by pointing out its unconstitutional provisions. But for the most part, the Court ruled in favor the law. Congress could bar the collection of soft money by candidates for federal office and even forbid pre-election campaign broadcast advertising funded by unions or corporations. The Congress could restrict election cycle ads by special interest groups regarding federal candidates. (In 2007 in *FEC v. Wisconsin Right to Life*, the Supreme Court modified this provision by ruling that "core political speech" is protected by the First Amendment and therefore issue ads are permissible near elections. The division was five to four on the issue.)

Again, the McConnell ruling mainly crafted by Justices Stevens and Sandra Day O'Connor was five to four, which weakened its moral authority. The number of concurring comments took the ruling to 275 pages wherein the past arguments regarding *Buckley* again surfaced. In the end, the Court upheld Congress' right to regulate federal elections; the dissenters argued that the First Amendment had been violated and the two parties entrenched. Justice Antonin Scalia pointed out that the same court that afforded protection under the First Amendment to virtual pornography, tobacco advertising, and sexually explicit cable broadcasting had decided to restrict political speech, arguably the most valuable to a fully functioning democratic republic.

Citizens United v. FEC

Basically, in 2010 the Supreme Court ruled that in light of no compelling government interest, the Congress could not deprive corporations and union of First Amendment rights, including the right to participate in political campaigns by making commercials. By the narrowest of margins, the Court held the corporations and unions were composed of citizens who held First Amendment rights. The bare majority thereby eviscerated the many reforms contained in the McCain-Feingold reform of 2002, which had restricted corporations and unions from express communication about candidates, thereby opening political campaign floodgates to corporate and union funds.

As if to make up for this public policy conundrum, in two subsequent rulings, the Supreme Court upheld other provisions of the 2002 McCain-Feingold law. For example, on June 24, 2010 in *Doe et al v. Reed*, the justice voted eight to one that the public had a right to know who signed petitions for ballot propositions. In my opinion, while such a decision adds transparency to the process, it violates the spirit of the secret ballot and the historic position of the Founders, who often published under assumed names to maintain their secrecy and to avoid retaliation. The decision also overturns precedents set in the *NAACP v. Alabama* (357 U.S. 449, 1958), in which the Court claimed that the right of assembly also meant the right to assemble in secret. (In Alabama, when employees were found to be members of the NAACP, they were often fired. When the state of Alabama sought the NAACP membership lists, the NAACP sued for relief to protect the secrecy of its members. The Supreme Court sided with the NAACP and now has overturned that precedent.) In a second one-line ruling, the Supreme Court upheld the restriction on contributions to party organs. This so-called soft money was often re-distributed by the parties in the name of party building. However, the money was often used to advertise for or against candidates.

The bottom line is that corporations and unions can advertise for and against candidates, but they cannot give to political parties for registration drives and other party building functions. When you sign a petition or wish to belong in secret to a political organization, you are no longer protected by the First Amendment.

History of Corporate Regulation

One premise all parties seem to agree with is that political speech is the most important manifestation of the First Amendment. At the same time, the Supreme Court has consistently sought to maintain the legitimacy of the elections in this Republic. For example, I would remind Justice Antonin Scalia that while dissenting in 1991, he wrote that "no justification for regulation is more compelling than protection of the electoral process."[2] This tension has manifest itself in laws which restrict corporate participation in the marketplace of campaign rhetoric and in controversial

rulings by the Supreme Court on those laws.

In 1907, the Congress passed and President Theodore Roosevelt signed the Tillman Act which prohibited corporations from making campaign contributions in federal elections. The Federal Corrupt Practices Act was passed in 1925 in reaction to the Tea Pot Dome scandal and it was upheld by the courts. In 1947, Congress strengthened the 1907 prohibition and extended coverage to unions.

Another round of reforms came in the 1970s beginning with the Federal Election Campaign Act of 1971, which was followed a much overlooked oddity. In reaction to the 1971 law, a Richmond, Virginia lawyer named Lewis F. Powell urged the Chamber of Commerce to fight for corporate First Amendment rights using the courts as their vehicle. A few month later, Powell was nominated to the Supreme Court by Richard Nixon. Then in 1978, Powell wrote a five to four majority opinion which struck down a Massachusetts law that prohibited banks and other corporations from spending money to fight ballot measures.[3] Justice John Paul Stevens joined Powell in this ruling. This ruling in Bellotti will become important as we move forward in the events leading up to the Citizens United case.

However, I want to stop here and note that Bellotti in the midst of sea change with regard to the Supreme Court's attitude toward commercial speech. And this sea change in favor of commercial speech was led by Stevens. It began with *Bigelow v. Virginia* in 1975 when the Supreme Court overturned the conviction of a Virginia newspaper editor who was found guilty of running advertisements for a New York abortion referral service at a time when abortions were illegal in Virginia. One reason the Court decided to extend limited protection to these advertisements was because it believed that Virginians had a right to receive the information. Note that framing of the issue: the consumer's right to information. Stevens concurred.

He also concurred with the majority in the following year in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*. In *Virginia Pharmacy*, the Supreme Court rejected the idea that commercial speech "is wholly outside the protection of the First Amendment."[4] It repudiated "the highly paternalistic view that government has complete power to suppress or regulate commercial speech."[5] Once again the Court also recognized that consumers had a right to receive commercial information. Listen closely to the words with which Stevens concurred: "As to the particular consumer's interest in the free flow of consumer information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[6] The Court re-affirmed this line of thinking in *Central Hudson Gas* in 1980 and when the majority led by Chief Justice Rehnquist reversed this trend in the *Posadas* ruling, Stevens dissented bitterly arguing that "Puerto Rico blatantly discriminates in its punishment of speech depending on the publication, audience, and words employed."[7]

Justice Stevens was vindicated in a case where the state of Rhode Island tried to ban the advertising of beer, wine, and liquor prices. On May 13, 1996 the Supreme Court handed down a unanimous ruling on commercial speech in *44 Liquormart, Inc.v Rhode Island*.[8] Writing for the unanimous Court, Stevens ruled that "[a] complete ban on truthful non-misleading commercial speech" is unconstitutional. Said Stevens, "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what government perceives to be their own good." Stevens' defense of citizens right to information provided by corporations and his screeds against government patronization were not evident in his dissent in *Citizens United*. The only explanation I have for this reversal is that in 2010 Stevens re-framed his vision of corporate speech. That view, however, is not consistent with his decision on June 21, 2010, to join the five conservatives on the Court and restrict the free speech rights of humanitarian groups that advice political organizations that may have terrorist ties. In *Holder, Attorney General, et. al. v. Humanitarian Law Project et al.* (2010, June 21), Stevens applied a 1996 anti-terrorism law to legal advice given to these groups about how to appeal to the U.N.

Citizens United[9]overturned a number of previous assumptions in regnant law. First, it repudiated the premise that corporate speech is not human speech. Second, it repudiated the premise that corporations and unions have undo influence. Third, it ignored the argument that corporations and unions fund advertisements with other people's money. Fourth, it rejected the argument that corporations and unions should not be part of the political process. In short, *Citizens United* overturned over a century of legal decisions regarding this issue. Justices Scalia and Kennedy who had been in the minority in the Austin case were now in the majority in *Citizens United*. And they employed the right of association and the right of the citizen to be informed as premises for their rulings.

Thus, two frameworks can be found in the *Citizens United* case. The majority believes that corporations and unions have First Amendment rights barring a compelling government interest to prevent their participation in campaigns. It does not believe that the citizens needs to be protected from corporate speech; on the contrary it believes the citizen benefits from opening the political marketplace of ideas to corporate and union speech, as does the democratic process by giving these associations of citizens voice. The majority believes in a hands-off, laissez faire approach to political persuasion. As in his McConnell dissent, Justice Kennedy claims that "ingratiation and access ... are not corruption."[10] He argues that the voter can "think for" themselves. The minority believes in the opposite. They are offended by the appearance of corruption in the political marketplace. They believe that citizens can be overwhelmed by corporate speech and needed to be protected from it. Thus, they endorse Congress' right to regulate the system. Justice Stevens sees the threat of special interests to the integrity of the political process and the "faith" of the people in that system.

Where Kennedy sees participation, Stevens sees *quid pro quos*. Where Kennedy sees disclosure of contributions as a curative, Stevens sees it as only a start on the way to total reform.

The Supreme Court has revealed varying interests in campaign reform law. These include:

- First, a desire to eliminate the appearance of corruption, which is bad law because it presumes guilt and prohibits speech.
- Second, a desire to protect the act of ballot casting, which is bad policy because it is patronizing.
- Third, a desire to enhance participation in the democratic process which is contradicted by limitations on contributions, PACs, corporate and union participation.

- Fourth, a desire to provide information to citizens about elections which is also contradicted by the limitations in place before Citizens United.

One of the overlooked provisions of the McCain-Feingold reform was that it included an exemption for media corporations, ostensibly so they could comment on political campaigns. But also the exemption was put in the law so that Congress could not get into the business of favoring one medium over another, for example, by leveling the playing field between the *Washington Post* and the *Washington Times*. In his majority opinion, Justice Kennedy made clear that such a provision would have forced the courts to decide what was, and what was not, a media corporation, which is very bad law. Kennedy wrote, "With the advent of the Internet and the decline of print and broadcast media ... the line between the media and others who wish to comment on political and social issues becomes far more blurred."

Another provision of McCain-Feingold that slipped under the radar for a while was the provision called the "Millionaires Amendment." It allowed the federal government to try to remediate situations in which a candidate could use a personal fortune to fund a campaign. The candidate was given the choice of living inside certain limitation or facing an opponent who would receive more federal funds in order to level the playing field. If your opponent used more than $350,000 of his or her own money in a campaign for a House seat, you could receive more funds from your party. (The threshold for Senate seats was set on a formula.) However, when a House candidate challenged this provision of the law in 2007, the Supreme Court struck it down.[11] When the state of Arizona passed its own version of this law, the Supreme Court intervene with an emergency order in June of 2010 extending its federal 5-4 ruling to the states. Justice Kennedy issued the order, which does not disclose who voted for it, though such an order cannot be issued without the authorization of five members of the Court.

Thus, the Court has not only re-established corporate and union funding of elections, it has re-established on the federal and state level, the right of candidates to spend their personal fortunes to get elected. In June Republican primary for governor in California, Meg Whitman, the billionaire who headed E-Bay, spent over $70 million to win that election, a record, and she would continue to fund her campaign in the general election.

On the other hand, those who rely on original intent as a guide in reading the Constitution might have noted that the Founders could have had no idea how large corporations would get, let alone measure their impact on elections. On the other hand, unless a compelling harm can found to justify restrictions, the Supreme Court is right to remove them wherever they chill freedom of expression.

Endnotes

[1]. *Citizens United v. FEC* (2009). Oral arguments are available at: http://www.oyez.org/cases/2000-2009/2008/2008_08_205

[2]. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 379 (1995). See also *United States v. UAW-CIO*, 352 U.S. 567, 575 (1957).

[3]. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

[4]. 425 U.S. 748, 761 (1976).

[5]. 425 U.S. 748, 762.

[6]. 425 U.S. 748, 763.

[7]. *Posadas* at 4965.

[8]. Hereafter *44 Liquormart*. Text from 1996 U.S. Lexis, 3020.

[9]. No. 08-205, slip op. (U.S. Supreme Court, Jan. 21, 2010).

[10]. *Citizens United v. FEC.*

[11]. *Davis v. FEC* (2007). Sections 319 a&b of the law were held to violate Davis' First Amendment rights and to treat candidates unequally by placing different fundraising limits on the self-funded candidate.

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