Free Speech and Campaign Finance

On December 10, 2003, the Supreme Court handed down its decision in the McConnell v. FEC *case. The Court upheld key provisions of the McCain-Feingold campaign finance law, including a ban on soft money and restrictions on "issue ads" that mention a federal candidate in the weeks before an election. FEC vice chairman (now chairman) Bradley Smith and Stuart Taylor of the* National Journal *discussed the pending case at a September 17 Cato conference. John Samples, director of Cato's Center for Representative Government, analyzed the decision at a December 17 Cato Capitol Hill Briefing. Excerpts from their remarks follow:*

Bradley Smith: As a member of the Federal Election Commission, I am a defendant in the *McConnell v. FEC* lawsuit, and some of the plaintiffs, including the National Rifle Association, named me in my individual capacity as well. I should note that I am not today speaking on behalf of the commission. The views I'm expressing are my own. I don't feel too upset about expressing them, since before I was appointed to the commission I wrote a book in which I said that the types of reforms included in the McCain-Feingold bill would be unconstitutional.

I think the problem with this debate is its sense of surrealism. The plaintiffs' attorneys placed themselves at a disadvantage when they accepted the common tendency to look at the Constitution as a hindrance to government, rather than as a considered response to the problems of governance. People venerate the Constitution, and the Bill of Rights in particular, but they often feel they need to find ways of getting around it without admitting that that's what they're doing.

The problem of special interest influence was not unknown to the Founders. If you look through the constitutional debates, you see that both the federalist arguments and the anti-federalist arguments revolved consistently around the question: How do we make these members of Congress act in the public good rather than for selfish personal gain?

In the famous *Federalist* no. 10, James Madison's basic answer was that you have two choices: you can try to extinguish the liberty that gives birth to factionalism, or you can try to control it in other ways. Extinguishing liberty is exactly what we *don't* want to do, so he came up with a number of other suggestions. One was federalism. Despite the project of the Rehnquist Court to try to restore it a more robust federalism, we've pretty much swept federalism away. Another was the separation of powers among the three branches of government. That, too, has been largely eroded in recent years. Everybody now looks to the president to initiate the budgetary process, and agencies such as mine, the Federal Election Commission, blur the judicial, administrative, and

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legislative functions of government.

The third and perhaps the most important suggestion was to create the government of limited powers spelled out in the Constitution. That too is pretty much ignored nowadays. It's generally conceded—at least by anybody who is in a position to do anything about it—that if the federal government wants to dictate school uniforms, it can do that. If it wants to dictate the size of the hallways in your home, it can do that. It can dictate to whom you rent your apartments, whom you hire for your small family-owned business, and what you do with the corn that you grow on your land.

And that pushes all the burden of protecting our rights onto the Bill of Rights. In particular, we've put this tremendous burden on the First Amendment, which was an effort to restrain the abuse of government power simply by allowing free debate so that people could raise criticisms and expose corruption in government.

We Americans want big government. We want it badly. We want the government to give us prescription drugs, and we want government to do everything else it does.

But that presents us with a dilemma. Either we're going to have to accept a certain amount of influence peddling and factional control of government, or we're going to have to accept the loss of some of our civil liberties as well as our economic liberties. And one of the civil liberties under attack is the right to free speech. The fundamental principle behind campaign finance regulation is "We need to stop this First Amendment stuff."

The Court has justified that approach by suggesting that the federal government has a compelling interest in preventing corruption or the appearance of corruption. I would not deny that campaign contributions might influence how people on the Hill vote or carry out their activities. But I think virtually all the evidence we have shows that it's not terribly important.

Worse, the "appearance of corruption" rationale is a blank check for Congress to regulate whatever it wants. If you look at Gallup polling data from the late 1950s or the early 1960s, when confidence in government was at its absolute peak in this country, you find that well over a third of the population agreed with the statement that most members of Congress were corrupt.

Why did people think that? Maybe they think politicians are corrupt because they think, mistakenly, that elected officials can use their campaign contributions to buy themselves a fancy new car. Maybe they think people are corrupt because in politics you have to make deals, you don't always get to stand on pure, hard principle. Maybe people think politics is corrupt because they think candidates

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promise things they know they can't deliver. We don't know what people mean when they say they think things are corrupt. But, in any case, the appearance of corruption is always going to be there.

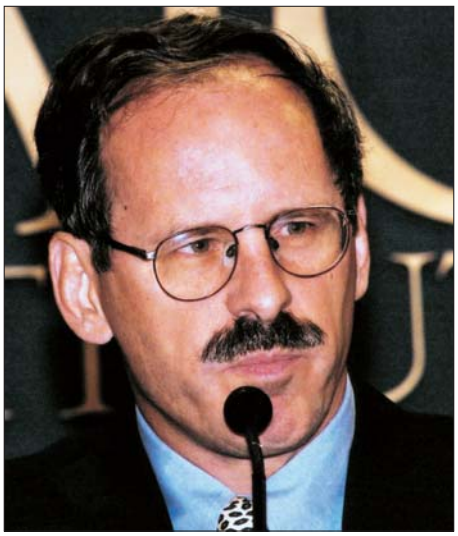
There are two problems once we give Congress a blank check to regulate speech. First, campaign finance regulation is inherently overbroad. In constitutional law, when we deal with fundamental rights like the First Amendment, we say that laws are subject to "strict scrutiny" in most cases. But in fact, the Court was presented with this challenge in *Shrink Missouri Government PAC v. Nixon,* decided in early 2000. And in that case the plaintiffs said to the state of Missouri: "Prove it! Give us some evidence of corruption." And the state of Missouri basically said: "We really can't prove it. We've got a couple of newspaper editorials where people talk about corruption in the capital, but that's really it." And the Supreme Court, recognizing that it couldn't uphold the law if it applied strict scrutiny, simply lowered the bar and said, "From now on, as long as your solution is narrowly tailored, that will be enough."

But is the solution narrowly tailored? Even if campaign contributions are sometimes given for the specific purpose of gaining access to a member of Congress, we must concede that the vast majority of campaign contributions are not made for that purpose. Most people, including megadonors and even corporations, give money because they believe in what the candidate stands for. That's what all the political science research tells us. So restrictions on campaign giving, even if they can be justified in principle by corruption concerns, are inherently overbroad.

The second problem is that they allow for tremendous manipulation. One point that Seth Waxman, attorney for the congressional sponsors of the McCain-Feingold campaign finance law, made repeatedly in oral arguments to Justice Scalia was essentially: "You're right, this isn't going to solve the problem; we may have to do more. But you can't make us solve the problem all at once. Congress is allowed to deal with parts of it at a time. You can't say that just because we weren't able to pass a comprehensive solution, we can't pass any partial solution."

What this does is to allow Congress to essentially pick on whomever they want. For example, the groups that do what is known as "bundling" best are Emily's List and the trial lawyers. Those are both Democratic constituencies, and they are good at it because their members have lots of money.

Bundling is not an effective strategy for some of the Republican-allied groups, like the Christian Coalition and Right to Life groups, whose members have below-average incomes and are not as politically aware, by and large. But these groups have an offsetting advantage—they have a great network for getting information out to people. So these groups like to distribute very biased voter scorecards to influence voters. That is an effective strategy for them.



Stuart Taylor: "The NRA and other organizations are reasonably efficient proxies for their members in terms of political advocacy and therefore, under the right of association, they should have a right to engage in such advocacy."

So if you ban scorecards, you hit the Republicans. If you ban bundling, you hit the Democrats. And that's why, when early versions of McCain-Feingold included bans on bundling, you lost the support of senators such as Dianne Feinstein (D-CA), a big supporter and supportee of Emily's List.

And in fact, sponsors of the bill spoke proudly about putting together a coalition: "If we ban this, we'll pick up this guy's vote. But if we drop this ban out of the bill, we'll pick up those three votes. If we nail that group, we'll get some votes over here. And we'll get more votes over here than we'll lose by nailing that group." It was very partisan and it was very open.

I would suggest that this is exactly what the First Amendment was designed to prevent. It was designed to keep the government out of decisions about whose ads are "sham" ads and whose ads are legitimate ads, and to keep government out of the position to pick winners and losers.

Stuart Taylor: I would like to explore a somewhat idiosyncratic corner of campaign finance reform that I've been puzzling over: the distinctions among individuals, nonprofit ideological corporations, business corporations, labor unions, and political parties, which are treated differently by the law. And the question that I've been puzzling over is: What justifies the difference?

I agree with the proposition—laid down in the Supreme Court's *Buckley v. Valeo* decision—that an individual does not have a constitutional right to make an unlimited contribution to a candidate because of the corrupting potential, but he does have a right to spend an unlimited amount on independent advocacy for that candidate, including what's called express advocacy. *Buckley* did not give that same right to corporations or unions.

I wrote in a recent column that unions and business corporations should be restricted more than nonprofit ideological corporations in spending money on election-related broadcast advertising. As I understand it, the original version of McCain-Feingold would have barred election-related ads within 30 or 60 days of an election if they mentioned the name of any federal candidate and were funded by a business corporation or by a labor union but would have allowed such ads funded by a nonprofit ideological corporation, such as the National Rifle Association, the Sierra Club, and the ACLU, if they were spending private contributions on it.

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"The constitutional vision is based on a distrust of political power and the people who possess it."

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What justifies the distinction? Well, I have, as many of us do, a 401(k) plan. And I have it invested in the Standard & Poor's 500 Index Fund. So I own a little chunk of all 500 of the biggest corporations in the country. I don't have any idea, or any motivation to find out, how they're spending my money, and the money of all the millions of other people who are similarly situated. There is a disconnect between the amount of money controlled by the corporation and spent on political advocacy and the support by the corporation's own shareholders for that spending. I think that is part of the justification for subjecting business corporations to restrictions that couldn't be imposed on a wealthy individual.

I think another reason is that when a business corporation gives political money—or, I should stress, when it spends on broadcast advertising for politics—it is typically engaging in rent seeking. That has nothing to do with the public interest. It's purely pursuit of a private interest that I think deserves less protection.

Why treat nonprofit ideological corporations differently? If you join the NRA, you pretty well are signing on to its political agenda. That doesn't mean you support every political candidate that it supports, but you know pretty much what's going to be done with your money. The NRA, the ACLU, NARAL, and the National Right to Life Committee are reasonably efficient ways of pooling the assets of a great many individual donors—people who couldn't have a voice without pooling their assets. And I think ideological corporations are better at doing that than the alternative of political action committees.

I struggled with this a little bit. I asked a lawyer for the NRA, "Why don't you just send a note to your members saying, 'We're reducing our dues from $35 to $25, but we have a little box we'd like you to check that takes that $10 we just saved you and puts it in our political action committee'?"

The lawyer said that not many people check that box. Which made me stop and think, "Well, is that because those people really don't want the NRA spending any of their money on this kind of political advocacy, or is it because something about the psychology of checking a box says I'm giving my money to a political action committee?" And I think it's the latter—that is, it's my guess that the reluctance of NRA members to check the "PAC" box does not warrant the conclusion that they would object to the NRA spending their membership dues on election-related advocacy.

I also think the NRA and all those other organizations are reasonably efficient proxies for their members in terms of political advocacy and that therefore, under the right of association, they should have a right to engage in such advocacy, subject to the restriction that they could spend on political advocacy only private contributions.

John Samples: The decision in *McConnell v. FEC* was 5 to 4. There was a deep division between the majority opinion and the dissents. And it seems to me that this division reflects divisions in society at large, and particularly among political elites. There are two visions of government in America, I think. One I call the constitutional vision, which was best expressed by the American Founders in 1787. The other might be called the progressive vision, and that is what finds voice in the majority opinion of *McConnell*.

The constitutional vision is based on a distrust of political power and the people who possess it. It's marked by a concern for the natural rights that Jefferson mentions in the Declaration of Independence. Government is both necessary to protect those rights and a danger to those rights. The American Founders sought to limit and control government as well as to empower it.

So in the Constitution you see all sorts of limits on political power. You see the separation of power between the branches. You see federalism, the division of power between the states and the national government. You see the doctrine of enumerated and limited powers. And you see the Bill of Rights. The constitutional vision is informed by a heavy presumption in favor of liberty and against government.

The progressive vision, on the other hand, says that government is to be trusted, that government should be empowered to do good. Progressives make a presumption for government and its beneficence and against liberty. They don't deny that Americans have a right to free speech, but they are much more willing to say that other values might override that right or that the right might be weaker. And this is the tone, I think, of the majority decision in *McConnell*—that freedom of speech is a privilege granted by Congress rather than a right against political power.

The Supreme Court, as well as Congress, has been willing to restrict liberty, particularly in the economic sphere. In fact, in a famous 1941 footnote, the Supreme Court said, in essence: "Henceforth, anything Congress does about economic liberty or private property will not violate the Constitution as long as it has a rational basis. However, we will oversee the political process to protect the natural rights to freedom of speech and to freedom of political activity."

The question for some time after that was, Do those political rights include the right to give money to candidates and causes in politics? The question was answered in 1976, in the famous case of *Buckley v. Valeo*. The Supreme Court held that the First Amendment covers the right to spend money on politics, on candidates, and on political causes, because money, in American society, is inevitably and ineluctably intertwined with freedom of speech.

Today, the connection between money and speech is widely derided by partisans of restricting campaign finance. But if you deny that money is tied to speech, imagine that the government mandated that the *Washington Post*'s budget for newsprint, for salaries, or for Internet employees were cut by 50 percent in the next year. Would that affect freedom of the press or freedom of speech?

Well, *Buckley* says, of course it would. You would get less speech. For that reason, *Buckley* said, freedom to spend is protected by the Constitution. On the other hand, *Buckley* said, contribution limits don't implicate freedom of speech as strong-

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ly. Therefore Congress might have other values that justify regulations. Namely, to prevent corruption or the appearance of corruption Congress could regulate contributions. *Buckley* struck down spending limits and affirmed contribution limits.

The *McConnell* majority is more trusting of government than the *Buckley* majority was. The new majority says, pursuant to *Buckley*, there is balancing to be done, but it defers to Congress's judgment in striking the balance between the limited free speech claim and the corruption rationale.

This is problematic because in *Federalist* 10 James Madison says, "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment and, not improbably, corrupt his integrity." Yet the Court has allowed Congress to be a judge in its own cause; Congress has an interest in the soft money ban in McCain-Feingold. Elections from 1995 to 2002 were marked by groups and individuals raising soft money that supported ads that were critical of members of Congress, in some cases harshly so.

Remember the NAACP ad in Texas that essentially accused candidate Bush of being complicit in the brutal murder of an African-American man? That was a soft money ad. The NAACP received a $9 million soft money gift in 2000 to run those ads. They were also doing it against members of Congress who do not like going through the experience of being attacked. It is no condemnation of Congress that it wanted to stop those ads. If you or I were in Congress, we too would want to stop such ads. That's why we have our Constitution: to stop the human tendency toward tyranny.

Now, of course, Congress could not simply ban the ads. What it did instead was to prohibit soft money fundraising by federal officials. Now, a member of Congress might say: "We didn't ban any ads; all we did was ban soft money fundraising. Groups and individuals are still free to run such ads. They just have to do it with money raised under federal contribution limits."

But if you can raise money, like the NAACP, in one $9 million contribution, or in $100,000 contributions, or if George Soros will give you $5 million, it's easy to raise money. It's certainly a lot easier to raise it than if you try to do it in $2,000 increments. Transaction costs are important to politics. If you make it harder to raise money under the limits, there will be less money raised. If less money is raised, there will be less money spent on ads.

And indeed, the remarkable thing about all of this is that this is exactly what was promised by Senator McCain to his fellow senators, that there would be less money for what were called attack ads.

Senator McCain, on the floor of the Senate, said: "If you cut off the soft money, you're going to see a lot less of that [attack ads]. Prohibit unions and corporations [from making soft money contributions] and you will see a lot less of that. If you demand full disclosure for those that pay for those ads, you're going to see a lot less of that."

John Samples: "There are two visions of government in America—the constitutional vision, best expressed by the American Founders in 1787, and the progressive vision, which finds voice in the majority opinion of *McConnell v. FEC.*"

Sen. Maria Cantwell (D-WA) agreed: "This bill is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves." Sen. Barbara Boxer (D-CA) too: "These so-called issue ads are not regulated at all and mention candidates by name. They directly attack candidates without any accountability. It is brutal. We have an opportunity in the McCain-Feingold bill to stop that."

People who supported the bill say forthrightly that the law would stop attacks on themselves. A soft money ban could be expected to lead to less criticism of incumbents, to less information about them in elections, to less competition for their jobs. Yet the Supreme Court is saying that Congress is the right institution to balance free speech against corruption or the appearance of corruption. The Court forgot what Madison said during his resistance to the Sedition Act: "The right of freely examining public characters and measures, and of communication is . . . the only effectual guardian of every other right."

A lot of independent groups like the NAACP ran ads. That money wasn't raised by members of Congress, members of national parties, national officeholders. And unfortunately for McCain-Feingold supporters, under *Buckley* the Court had said that you could regulate only ads that expressly advocated the election or defeat of a candidate. Yet McCain-Feingold required that money for any ad that mentions or clearly refers to a candidate for federal office that runs 30 days before a primary or 60 days before a general election has to be raised under federal election law. Clearly this ran against *Buckley,* which limited federal regulation to ads that expressly advocate the election or defeat of a candidate. So the Supreme Court had to overrule *Buckley* to accept McCain-Feingold. And that's not all that happened. The majority seems to say that Congress can regulate any ad that is intended to influence an election. If that is now Court doctrine, we no longer have constitutional limits on Congress's power to regulate electoral speech.

In 1788 Thomas Jefferson wrote to a friend: "The natural progress of things is for liberty to yield and for government to gain ground." In that sense, the decision in *McConnell v. FEC* is progressive, part of the natural progress of things, which is for liberty to yield and for government to gain ground. ■