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CONSTITUTIONALITY OF CAMPAIGN FINANCE LAWS

SUMMARY

The United States Supreme Court in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (*Arizona v. Bennett*) again struck down a public financing law aimed at combating political corruption. As a result, those provisions of New Mexico's recently enacted Voter Action Act that provide publicly financed candidates for the Supreme Court, Court of Appeals and Public Regulation Commission with matching funds based on the amount of money raised by their privately financed opponents are unconstitutional. Since the Watergate scandal, Congress and state legislatures have tried to eliminate the real or perceived coercive influence on the political arena of private money from special interests. Those laws came under constitutional attack from candidates and political organizations that felt that their First Amendment rights were undermined by campaign finance regulations. As such, the development of case law has restricted how states or the federal government may regulate campaign financing. As states develop new ways to combat political corruption, new constitutional arguments are proffered as to why these laws should stand or fall. The decision handed down in *Arizona v. Bennett* has further limited how states may regulate campaign finance.

PROTECTION OF POLITICAL SPEECH UNDER THE FIRST AMENDMENT

It is widely accepted that a major justification for the drafting of the First Amendment was to ensure an unrestricted exchange of ideas to allow people to influence social changes. The protection afforded political speech under the First Amendment reflects the United States' "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open".

N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Thus, protection of speech uttered during a campaign for political office receives the fullest and most urgent First Amendment protection. *Eu v. San Francisco County Democratic Central Comm'n.*, 489 U.S. 214, 223 (1989). Political speech is one of the few highly protected classes of speech recognized by the United States Supreme Court.

Laws that regulate political speech are subject to the highest level of judicial scrutiny. "To overcome [a] substantial burden on the exercise of free speech, the provision cannot stand unless it is justified by a compelling state interest." *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986). This approach places a heavy burden on states to justify regulations that encroach upon one's constitutional free speech rights. Due to this level of judicial protection, the Supreme Court has seldom recognized as legitimate the various state justifications for campaign finance regulations burdening political speech. States have attempted to justify campaign finance regulations under many different theories, including leveling the campaign playing field, preventing candidates from spending too much time fundraising or checking the skyrocketing costs of political campaigns and thereby opening the political system to candidates without access to large amounts of money. All have failed constitutional scrutiny, and, to date, "preventing [political] corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances". *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985).

CONSTITUTIONAL DISPOSITIONS OF CAMPAIGN FINANCE LAWS

The United States Supreme Court extended

First Amendment rights to spend money for political speech. In *Buckley v. Valeo*, the seminal campaign finance regulation case, the Court stated that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression". 424 U.S. 1, 19 (1976). The Supreme Court reasoned that in order to use modern means of mass communication that are necessary to modern campaigns, the expenditure of money is required. The *Buckley* case, still used as the controlling precedent, cemented the proposition that campaign spending (either by a candidate or a donor to a campaign) is a protected form of political speech.

The United States Supreme Court has identified campaign expenditures and campaign donations as the two main targets of campaign finance regulation. The Supreme Court has reasoned that, although regulation of either is intrusive on free speech rights, a limitation on the amount a political candidate could spend is a "substantial restraint" on the "quality and diversity of political speech". *Buckley*, 424 U.S. 1, 19 (1976). Relying on the logic in *Buckley*, the Court has gone on to invalidate subsequent regulations limiting campaign expenditures by candidates or independent groups.¹ The Supreme Court has yet to validate any regulation limiting the **expenditures** for political speech.

The United States Supreme Court is much more permissive of laws limiting **contributions** to political candidates, but it nevertheless holds that contributions are a form of political speech. In contrast, the Court upheld contribution limitations by reasoning that these limitations only imposed a "marginal" restriction on political speech. 424 U.S. 1, 20 (1976). By contrast

with limitations on campaign expenditures, "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the ability to engage in free communication". *Id.*, at 20. Contributions allow people to engage in the political expression of candidate support, and limiting that amount does not limit the quantity of communication of the contributor, as do limitations on expenditures.

Although contribution limitations are a justifiable way to combat real or perceived corruption, the United States Supreme Court has recently limited how stringently a state may regulate contribution limitations. In *Randall v. Sorrell*, the Court invalidated contribution limits of \$400 to \$600 as too restrictive, reasoning that "contribution limits that are too low also can harm the electoral process by preventing challengers from mounting effective campaigns against incumbent[s] ... thereby reducing democratic accountability". 548 U.S. 230, 232 (2006). The Court has iterated that it has "no scalpel to probe" the exact amount at which contribution limits are too low and will defer to legislatures in that regard. However, constitutional precedent does recognize the existence of some lower boundary where contribution limits "work more harm to protected First Amendment interest[s] than their anticorruption objectives could justify". *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 395-397 (2000). To date, \$1,000 is the lowest contribution limitation upheld.

ROBERTS COURT EXPANSION OF POLITICAL SPEECH PROTECTIONS

The Roberts Court, since 2005, has

increasingly expanded the constitutional protections of expenditures on political speech. In *Citizens United v. Federal Election Comm'n*, independent expenditures by corporations and political associations were given the same constitutional protections as expenditures by individual candidates. 130 S.Ct. 876 (2010). The majority in that case maintained the importance of political speech in a democracy and reasoned that it is no less true because the speech is by a corporation or political association. Similarly, in *Davis v. Federal Election Comm'n*, the Court held that certain provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) were unconstitutional because the law "imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right". *Davis*, 544 U.S. 724, 726 (2008). Under the BCRA, the so-called "Millionaires Amendment" allowed an increase of contribution limits to an individual campaigning against a self-financed candidate if the self-financed candidate spent over \$350,000 of personal funds for campaigning. The law was nullified due to the burden it placed on a candidate's First Amendment rights in that it "required a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations". *Id.* at 726. This decision marked a jurisprudential jump in the Supreme Court's protection of political speech, expanding constitutional protections when the law, no matter how slightly, could potentially burden a candidate's First Amendment right.

ARIZONA V. BENNETT

In a 2011 case, *Arizona v. Bennett*, the Supreme Court prohibited "matching

funds" provisions in an Arizona public campaign finance law. Under the Arizona Citizens Clean Election Act, a system of public financing was created to fund the primary and general election campaigns of candidates for state office. For candidates who opt to participate, the act provided for an initial lump sum of money to conduct a campaign. In order to make the program more attractive to candidates, those candidates who opt in are also granted additional matching funds if a privately financed candidate's expenditures, or expenditures on behalf of a privately funded candidate by an independent group, exceed the initial allotment. Once the matching funds provision is triggered, a publicly funded candidate receives a dollar-for-dollar allotment of what the privately financed candidate spends or raises, up to twice the initial allotment. The law was passed in the hope that more candidates for state office would be attracted to the system because it allowed a publicly funded candidate to run a competitive campaign, thereby further eliminating the real or perceived political corruption of private money.

In keeping with the decision in *Davis*, the Supreme Court declared the Arizona matching funds provision unconstitutional. The Court stated that the funding scheme substantially burdens political speech and is not sufficiently justified by a compelling interest to survive First Amendment scrutiny. Like the law in *Davis*, the Arizona law penalized candidates who exercised their First Amendment rights by making a privately funded candidate *choose* between exercising that right to expend for political speech or giving a political opponent an advantage. The Court reasoned that it was not the amount of money that is "constitutionally

problematic"; however, "it is the manner in which that funding is provided — in direct response to the political speech of privately financed candidates and independent expenditure groups". *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, No. 10–238, slip op. at 21 (S. Ct. Jun. 27, 2011). The majority rebutted the dissenting position that this law was a speech subsidy, and therefore constitutional, by reasoning that the law subsidized the speech of publicly funded candidates at the expense of burdening privately financed candidates First Amendment rights. *Id.* at 15. Under the current law, any restriction on the ability of a privately funded candidate to expend money in order to speak is constitutionally suspect.

IMPLICATIONS OF ARIZONA V. BENNETT

As a result of *Arizona v. Bennett*, portions of New Mexico's Voter Action Act are unconstitutional. In the same manner as Arizona's law, Section 1-19A-14 NMSA 1978 provides matching funds for publicly funded judicial and Public Regulation Commission candidates if a privately funded candidate spends or raises funds in excess of the publicly funded candidate's initial allotment of public campaign funds. New Mexico's law is identical to Arizona's law in every material aspect, and, therefore, it is in violation of the First Amendment under this recent Supreme Court ruling. In order to comply with federal law, New Mexico must amend the Voter Action Act, specifically Section 1-19A-14 NMSA 1978.

Although publicly funded campaigns are constitutionally protected, the current tenor of the Supreme Court has many believing that this system of campaign finance could be under attack. The Court in

Buckley held that public financing of election campaigns does not affect political speech unconstitutionally "but rather help[s] facilitate and enlarge[s] public discussion and participation in the electoral process". 424 U.S. 1, 93 (1976). Recent Supreme Court decisions have many constitutional scholars concerned that the traditional "lump-sum" financing scheme could come under attack if states begin to raise the amount of the initial lump-sum allotment in response to the Court's decision. These scholars argue that the Arizona law was nothing more than a lump-sum scheme divided in thirds, and if the Court found that law unconstitutional, the traditional lump-sum scheme would be next on the chopping block. Although the current Court is of the view that the First Amendment affords fewer restrictions on campaign finance, as it now stands, if a campaign finance regulation avoids burdening a privately funded candidate's First Amendment rights, then the law should pass constitutional inspection.

Endnote

1. In *Randall v. Sorrell*, 548 U.S. 230 (2006), the U.S. Supreme Court invalidated a Vermont law limiting campaign expenditures. In *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876 (2010), the Supreme Court invalidated part of the federal Bipartisan Campaign Reform Act of 2002, which limited corporate or group funding of independent political communication in elections.

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