Free Speech & Election Law

SpeechNow.org and the Paradox of *Buckley v. Valeo*

*By Paul Sherman**

The right to free speech, including the right to speak out about who should be elected to public office, is a fundamental American right, essential to democratic debate. So, too, is the right of individuals to band together and pool their resources to make their advocacy more effective. The Founders recognized this, and enshrined the rights to both free speech and association in the First Amendment.[1] But ever since the Supreme Court's seminal campaign-finance decision in *Buckley v. Valeo*, speakers have been forced to choose between these rights. Specifically, while an individual acting alone may spend unlimited amounts of their own money on ads that call for the defeat or election of federal candidates, groups of individuals may pool no more than $5,000 per person to run identical ads. You can speak freely, or you can associate freely, but you cannot do both. This paradox, an unintended result of the Supreme Court's first major campaign-finance ruling, has gone unconsidered for more than 30 years. But that is about to change, thanks to a legal challenge by a new citizens group, SpeechNow.org, which is on a fast track to the en banc D.C. Circuit.

What is SpeechNow.org?

David Keating founded SpeechNow.org on a simple idea: When politicians pass laws that violate the First Amendment, they deserve to be held accountable at the ballot box. Keating formed SpeechNow.org to give Americans a way to join together, pool their resources, and advocate for federal candidates who agree with them, against those who do not. The organization is meant to amplify the voices of individual Americans and maintain independence from candidates, political parties, corporations, and unions. It accepts contributions only from individuals, not from corporations or labor unions; nor is SpeechNow.org itself incorporated. It never donates to candidates or political parties and does not coordinate its speech with candidates or parties. In short, SpeechNow.org is Americans talking to Americans about an issue of vital public importance

The group is particularly concerned about protecting the right to speak freely about politics. Its members believe that without the right to speak freely about politics and politicians, the right to vote and to participate in the political system—the very right to self-government—is largely meaningless. Indeed, the U.S. Supreme Court has "long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas."[2] But that marketplace, to truly reflect the underlying principles of the First Amendment, must remain free and unregulated. As the Supreme Court has said, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[3] The notion that some voices may be limited, that some topics or terms are off limits, that citizens may discuss issues but not candidates, has no place in a free society. Instead, debate on all matters of public concern must be "uninhibited, robust, and wide-open."[4]

As a long-time political activist and leader of grassroots organizations, Keating has seen first-hand how burdensome campaign-finance regulations stifle the marketplace of political ideas. SpeechNow.org's strategy is to counter those regulations and secure greater protection for First Amendment rights by influencing elections. Keating believes the best way to send a message to politicians who fail to respect the First Amendment is to convince people to vote against them—and to elect more speech-friendly representatives. Advocating during elections increases public and media awareness on important issues at a time when people are most attuned to political debate.

But effective political advocacy does not come cheap. For example, at the time it was formed, SpeechNow.org wished to begin advertising in two races with an initial budget of $122,500 for production and airtime buys for television ads in two markets. The group's plan was to aim that initial advertising at two incumbents in Congress who had voted for restrictions on political speech, Republican Representative Dan Burton and Democratic Senator Mary Landrieu. To have greater influence on more congressional elections—or the White House—would take much more funding.

For citizens of more modest means acting alone, such as Brad Russo and Scott Burkhart, being heard is even more difficult. Brad and Scott believe in free speech and are opposed to campaign finance regulation, but lack the resources to reach a mass audience on their own. They can try to write or speak out alone, but their voices will likely be lost in the cacophony of an election. They can contribute money to political candidates, but candidates have their own agendas and may focus on issues other than the ones Brad and Scott care about. Brad and Scott would prefer to contribute to SpeechNow.org so that, in combination with others, they can advance the message of free speech.

SpeechNow.org can give citizens like Brad and Scott a stronger voice by pooling their limited resources with larger contributions. With seed funding from a few larger-dollar donors SpeechNow.org can start buying ads, getting more attention, and finding more supporters, who together can speak more effectively than any one could alone. Indeed, SpeechNow.org's model of political advocacy can be applied to any issue or set of issues a group of citizens cares about, such as the environment, health care or taxes.

Unfortunately, from the start, SpeechNow.org's efforts have been hampered by the very campaign finance laws it opposes. Under the Federal Election Campaign Act (FECA), any time two or more people pool their resources to support or oppose a federal candidate, they become a "political committee" subject to government regulations and limits.[5] By law, the

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group becomes a political committee once it accepts more than $1,000 in contributions or makes more than $1,000 in expenditures—barely enough to put up a website and register a post office box before government regulation kicks in, the most onerous of which is a contribution limit that prevents political committees from accepting any donation greater than $5,000 per donor per calendar year.[6] Political committees also must register with the government and make detailed reports of contributions and expenditures.[7]

If forced to organize and register as a political committee, supporters of SpeechNow.org would lose their associational rights guaranteed by the First Amendment. They could speak without limit only if acting alone. In an era where an ad in a major paper or a modest TV buy in a small market costs $50,000 or more, this would leave effective advocacy available only to the very wealthy. The ability of more modest donors to speak and be heard would be lost.

The contribution limit also denies groups like SpeechNow.org the seed funding they need to get off the ground, run initial ads, and attract more supporters. Raising enough for even a modest ad campaign in $5,000 or smaller increments is a nearly impossible challenge for a new group without any infrastructure or public visibility. Moreover, David Keating started and runs SpeechNow.org as a volunteer in his spare time, making complying with onerous administrative and reporting requirements an even bigger challenge. In short, for a start-up like SpeechNow.org, limiting its ability to raise funds quickly and imposing needless red tape practically guarantees failure before the group even starts.

The Advisory Opinion Process and the Lawsuit

To determine if SpeechNow.org had to register as a political committee, Keating sought guidance from the Federal Election Commission soon after creating the group. In recent years, the FEC has conducted lengthy investigations into the activities of many citizen groups, culminating in millions of dollars in civil penalties.[8] For SpeechNow.org, proceeding without an okay from the FEC could expose it to severe penalties, including fines and jail time, for its speech.[9]

SpeechNow.org argued to the FEC that because it is an independent group of citizens, it should not be regulated as a political committee. Unlike some so-called "527s," SpeechNow.org accepts only contributions from individuals; unlike most PACs, it never donates to or coordinates its activities with candidates or political parties. It will also report its donations and expenditures under the regulations that apply to "independent expenditures"—that is, expenditures on political speech that are made independently of political campaigns or political parties.[10]

Therefore, SpeechNow.org raises none of the concerns that, in the courts and in the court of public opinion, have been the basis for regulating political speech in the name of campaign finance reform. With no link to candidates or parties, there is not even a risk of the appearance of corruption. Corporate and union contributions are banned. And SpeechNow.org's contributions and spending will be fully disclosed to the public within 48 hours of spending $10,000 or more.[11]

Unfortunately, on January 22, 2008, the general counsel's office of the FEC issued a draft advisory opinion concluding that SpeechNow.org's proposed activities would make it a political committee.[12] However, David M. Mason, who was then Chairman of the FEC, wrote another opinion that found SpeechNow.org should be exempt from the contribution limits on political committees.[13] Lacking a quorum at the time, the Commission could not officially adopt the staff's draft opinion or the Chairman's opinion, nor could it approve SpeechNow.org's operational plan by the legal deadline of January 28, 2008. Under the FEC's rules, the failure to issue a binding advisory opinion by the deadline amounts to a denial of the request. That left SpeechNow.org without legal protection and therefore vulnerable to a future enforcement action if it spoke. With no other alternative, SpeechNow.org filed a lawsuit against the FEC on February 14, 2008.

Joining SpeechNow.org in the suit are five of the organization's individual supporters: David Keating, Ed Crane, Fred Young, Brad Russo and Scott Burkhardt. David Keating is the president and treasurer of SpeechNow.org, which he manages in his spare time. He has pledged $5,500 to SpeechNow.org. Professionally, he is the executive director of the Club for Growth. Ed Crane is a founding member of SpeechNow.org, and has pledged $6,000 to SpeechNow.org. Ed is also the founder and president of the Cato Institute. Unfortunately, under the FEC's ruling, both David and Ed's contributions would exceed the maximum contribution limit.

Fred Young is the former president of Young Radiator Company. He believes in SpeechNow.org's mission, and has pledged $110,000 to help get SpeechNow.org off the ground. Like both David and Ed, Fred is prevented from doing so by the $5,000 contribution limit. Fred's contribution also raises a different problem with the law. In addition to limiting how much an individual may contribute to any single political committee, the law also limits the total amount of individual contributions to multiple political committees and total contributions to political committees, parties and candidates.[14] Currently, these limits are set at $42,700 and $108,200 respectively every two years.[15]

Brad Russo of Washington, D.C., and Scott Burkhardt of Chapel Hill, N.C., are passionate supporters of free speech and opponents of campaign finance laws that curb it. Both believe in the mission of SpeechNow.org and want to support it financially, but lack the resources of wealthier donors. Brad found SpeechNow.org through word-of-mouth and Scott found it online. They want to join with SpeechNow.org's larger-dollar donors so that their contributions can effectively advance the cause of free speech.

An Unresolved Question

The Supreme Court has never squarely confronted the question raised by SpeechNow.org's suit, but the paradox itself can be traced back to the Supreme Court's seminal campaign-finance decision in *Buckley v. Valeo*, in which the court considered the constitutionality of the 1974 amendments to the Federal Election Campaign Act.[16] Among other things, those amendments placed limits on the amounts that individuals could contribute or spend in support of federal candidates. The Court struck down the expenditure limits, viewing them

as a direct restriction on the amount of political speech.[17] This holding, recently reaffirmed in *Randall v. Sorrell*, means that individuals may spend unlimited amounts of their own money on independent political advertisements.[18] At the same time, however, the Court in *Buckley* upheld contribution limits, not just to candidates, but also to "political committees" that themselves make contributions to candidates.[19]

The closest the Supreme Court has come to addressing the issue of contribution limits as applied to groups that make independent expenditures was in *California Medical Association v. FEC*.[20] In that case, the Supreme Court upheld the $5,000 contribution limit as applied to a political committee that made both independent expenditures and direct contributions to candidates. Crucially, however, the deciding vote was cast by Justice Blackmun, who wrote separately to note that "a different result would follow if [limits] were applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates."[21] Blackmun reasoned that the California Medical Association was "essentially [a] conduit[] for contributions to candidates, and as such . . . pose[d] a perceived threat of actual or potential corruption. In contrast, contributions to a committee that makes only independent expenditures pose no such threat."[22] As Justice Blackmun's concurrence makes clear, the constitutionality of contribution limits to groups like SpeechNow.org that exclusively make independent expenditures was not before the Court and, in any event, would not have secured a majority of the justices.

While the Supreme Court has never considered the constitutionality of FECA's contribution limits to groups like SpeechNow.org, two courts of appeals have considered similar issues involving state or local campaign-finance laws. In *North Carolina Right to Life, Inc. v. Leake*, the Court of Appeals for the Fourth Circuit invalidated a North Carolina law that imposed contribution limits on groups making only independent expenditures, holding that these contributions posed no risk of corruption.[23] North Carolina later amended its law and did not petition for certiorari to the Supreme Court.[24] The Ninth Circuit also had the opportunity to consider similar issues in *San Jose Silicon Valley Chamber of Commerce Political Action Committee v. City of San Jose*.[25] Unfortunately, that case was resolved on abstention grounds and did not reach the merits of the First Amendment arguments.[26] As a result, the Supreme Court still has not had an opportunity to answer the question SpeechNow.org's suit raises.

SpeechNow.org's Legal Argument

Under well-established U.S. Supreme Court precedent, the First Amendment guarantees individuals the right to speak without limit, so it should be common sense that groups of individuals—like SpeechNow.org—have the same rights. No one should have to sacrifice the First Amendment right to associate in order to exercise the First Amendment right to speak.

More than 30 years ago, the Supreme Court laid down the standard for evaluating individual contribution limits. In *Buckley*, the court held that limits on contributions made directly to political candidates or to groups that give money to political candidates could be justified as necessary to prevent *quid pro quo* corruption—the trading of political favors for campaign contributions.[27] While there is little evidence that such corruption is common, the Court held that even the appearance of *quid pro quo* corruption was enough to uphold contribution limits when money made its way directly into the hands of politicians.[28]

At the same time, the Court made perfectly clear that when individuals spend money independently of candidates, this spending does not create a risk of corruption. First, when the spending is independent, there can be no trading of favors for contributions. Moreover, as the Court held, "Unlike contributions [to candidates], such independent expenditures may well provide little assistance to the candidate's campaign, and indeed may prove counterproductive."[29] Candidates like to control the terms of the debate, and independent speech can change those terms. Indeed, that's why independent speech is so valuable: It brings issues into the debate that candidates might otherwise prefer to ignore.

Because independent expenditures pose no risk of corruption, individuals are allowed to spend as much of their own money as they want on independent ads.[30] So why should SpeechNow.org's independent ads be treated any differently? Independent speech does not somehow become "corrupting" when individuals pool their money to pay for it. Indeed, that is exactly what the FEC Chairman reasoned when he issued a separate opinion on SpeechNow.org's advisory opinion request.

Thankfully the Supreme Court has also long recognized the First Amendment right to association and the importance of like-minded people being able to band together for effective advocacy.[31] It has repeatedly held that when political spending does not raise the threat of corruption, groups have exactly the same right to speak that individuals have. In *Citizens Against Rent Control v. City of Berkeley*, for example, the Court struck down a California law that applied contribution limits to ballot initiative committees. Just like SpeechNow.org's activity, Citizens Against Rent Control's speech was completely independent of political candidates. To the Court, the First Amendment violation was obvious: "To place a Spartan limit—or indeed any limit—on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association."[32] This restraint, in turn, "plainly impairs freedom of expression."[33]

Buckley, *Citizens Against Rent Control*, and other campaign finance cases establish a presumption in favor of the First Amendment's guarantees of free speech and association, allowing only limited exceptions to prevent corruption or its appearance. SpeechNow.org is an independent group of citizens who simply want to advocate for or against candidates on the basis of their stand on free speech. And advocating for or against candidates isn't "corrupting," it is our constitutional right. Indeed, the whole point of political speech is to influence elections—to convince fellow citizens that on important issues, some candidates are better than others.

The FEC's Legal Argument

The FEC sees things differently. In their view, independent groups like SpeechNow.org poses precisely the same risk of corruption that the Supreme Court held justified contribution limits to political party committees in *McConnell v. FEC*.[34] This is not a risk of *quid pro quo* corruption, but rather the ability to engender the gratitude of political candidates in a way that leads to preferential access and influence. But there are at least two significant problems with this argument. The first and most obvious is that party committees, being composed of officeholders, are different in kind than independent groups like SpeechNow.org. Parties actually have the ability to grant preferential access to officeholders.[35] SpeechNow.org, by contrast, does not; indeed, it has gone to great lengths to insulate itself from officeholders.

The second problem with this argument, when applied to groups like SpeechNow.org that are totally independent of candidates, is that it amounts to saying that potential for gratitude created by independent expenditures is enough to justify regulation of groups making those expenditures. But this reasoning applies with equal force to independent expenditures made by individuals who are independent of candidates. Merely pooling money does not imbue it with corrupting powers, so it can be no less "corrupting" for one individual to spend $100,000 directly than it is for ten individuals to pool $10,000 each for an identical expenditure. Indeed, taken seriously, the FEC's argument would extend even further, beyond money and to all potential sources of disproportionate gratitude, including gratitude for endorsements by newspapers or celebrities. This would stretch the holding of *McConnell* beyond all reasonable bounds, and is certainly not required by the Court's previous campaign-finance decisions. As one commenter has noted, "the Supreme Court has never said that benefit to the candidate, with the inference that the candidate will be grateful for the benefit and will be tempted to provide favors accordingly, is enough to support regulation of campaign money. McConnell clearly held that benefit (even benefit followed by gratitude and temptation) is not sufficient to justify a campaign restriction."[36]

Alternatively, the FEC downplays the burden of contribution limits, relying heavily on the Supreme Court's pronouncement in *Buckley* that "the overall effect of [FECA's] contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression."[37] But the distinction between contributions and expenditures for "direct political expression" breaks down when contributions are used exclusively for independent expenditures. The Supreme Court itself recognized this only five years after *Buckley* when the Court struck down contribution limits as applied to ballot-issue committees, noting that such limits "automatically affects expenditures" and, in turn, "operate as a direct restraint on freedom of expression."[38] The relevant question, then, is not whether a transfer of money can be described as a "contribution," but whether that transfer of money creates the potential for corruption.

Finally, the FEC has argued that contribution limits are necessary to ensure that advertising disclaimers required by FECA are effective.[39] The theory behind this argument is that viewers reading an advertising disclaimer, which is not required to identify the individual donors who funded the expenditure, will be misled into thinking that the group paying for the ad enjoys broader support than it actually does. This argument ignores the fact that SpeechNow.org's donors will be disclosed to the FEC in independent-expenditure reports that will be freely available on the FEC's website. More fundamentally, this argument is remarkable because it justifies substantive limits on speech as a means of making disclosure more effective. But this is precisely backwards. Disclaimer requirements are justified as a means of making FECA's substantive limits on political activity effective, they are not an end in themselves.[40] There are also far more narrowly tailored ways to achieve the FEC's stated objective, namely, requiring the disclosure of large individual donors within the disclaimer. Indeed, both California and Washington already have similar requirements.[41]

The Future of SpeechNow.org

Thanks to a unique procedural provision in FECA, *SpeechNow.org v. FEC* is on the fast track to an en banc hearing before the D.C. Circuit. Under this procedure, the district court is limited to entering findings of fact and identifying questions of constitutional law, after which it must immediately certify the case to the court of appeals, which hears the matter sitting en banc.[42] Briefing on these issues has been completed and, at the time this article is being written, the case awaits certification to the D.C. Circuit.

The stakes in SpeechNow.org's case are high. If SpeechNow.org is silenced, it would be practically impossible for Americans to join together and speak effectively to other Americans about whom to elect to office. It would be clear that so-called "campaign finance" regulations are really "speech and association" regulations. Perhaps more troubling, defeat for SpeechNow.org would call into question one of the central holdings of *Buckley*: that individuals have an unlimited right to make independent expenditures for or against federal candidates. That would mark a revolutionary shift in the Court's political-speech jurisprudence and would vastly expand Congress's power to regulate the marketplace of ideas.

There is, however, every reason to hope that the D.C. Circuit will not let it come to that. Moreover, given the importance of the issue and the frequency with which the Supreme Court has reviewed campaign-finance laws in recent years, it is also possible that a bad decision by the court of appeals could be promptly corrected.[43] However it is decided, though, it seems likely that SpeechNow.org's case will finally resolve "one of the most important unanswered questions surrounding the constitutionality of campaign finance laws: does Congress have the power to limit contributions to committees that make only independent expenditures?"[44]

Endnotes

1 "Congress shall make no law... abridging the freedom of speech... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

2 Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981).

3 Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

4 New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

5 Federal Election Campaign Act of 1971 as amended by the Federal Election Campaign Act Amendments of 1974, 2 U.S.C. §§ 431-434, 441a (2007).

6 2 U.S.C. § 441a(a)(1)(C).

7 2 U.S.C. §§ 432, 433, 434(a).

8 Among those fined were: America Coming Together ($775,000), http://eqs.nictusa.com/eqsdocs/000061A1.pdf; Progress for America Voter Fund ($750,000), http://eqs.nictusa.com/eqsdocs/00005AA7.pdf; The Media Fund ($580,000), http://eqs.nictusa.com/eqsdocs/000066D5.pdf; Swift Boat Veterans and POWs for Truth ($299,500), http://eqs.nictusa.com/eqsdocs/00005900.pdf; League of Conservation Voters ($180,000), http://eqs.nictusa.com/eqsdocs/00005905.pdf; and Moveon.org Voter Fund ($150,000), http://eqs.nictusa.com/eqsdocs/000058F4.pdf.

9 *See*, *e.g.*, 2 U.S.C. § 437g(d)(1)(A) (2007) (/Any person who kno wingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure . . . aggregating $25,000 or more during a calendar year shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both/).

10 2 U.S.C. § 431(17).

11 2 U.S.C. § 434(c).

12 AO 2007-32 (SpeechNow.org), *available at* http://saos.nictusa.com/aodocs/966935.pdf.

13 Dissenting Opinion of Chairman David M. Mason in Advisory Opinion Request 2007-32, *available at* http://saos.nictusa.com/aodocs/967169.pdf.

14 *See*, 2 U.S.C. § 441a(a)(3); 11 C.F.R. § 110.5(b)(1).

15 Price Index Increases of Expenditure and Contribution Limitations: Notice of Expenditure and Contribution Limitation Increases, 72 Fed. Reg. 5294, 5295 (Feb. 5, 2007).

16 424 U.S. 1 (1976).

17 *Id.* at 39-51.

18 548 U.S. 230 (2006).

19 424 U.S. at 24-38.

20 453 U.S. 182 (1981).

21 *Id.* at 203

22 *Id.*

23 525 F.3d 274, 291-295 (4th Cir. 2008).

24 2008 N.C. Sess. Laws 150 (Aug. 2, 2008).

25 546 F.3d 1087 (9th Cir. 2008).

26 *Id.* at 1096.

27 *Buckley*, 424 U.S. at 26-29.

28 *Id.* at 27.

29 *Id.* at 47.

30 *Id.* at 47-51.

31 NAACP v. Alabama, 357 U.S. 449, 460 (1958) (recognizing that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . .").

32 Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 296 (1981).

33 *Id.* at 299.

34 540 U.S. 93 (2003).

35 *Id.* at 150 ("The record in the present case is replete with similar examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations.").

36 Richard Briffault, *The 527 Problem...and the* Buckley *Problem*, 73 Geo. Wash. L. Rev. 1701, 1745 (2005).

37 Buckley, 424 U.S. at 21-22.

38 Citizens Against Rent Control, 454 U.S. at 299.

39 2 U.S.C. § 441d(d)(2).

40 *Cf.* Buckley, 424 U.S. at 68 ("[D]isclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.").

41 Cal. Gov't Code § 84506(a)(2); Rev. Code Wash. § 42.17.510(2).

42 2 U.S.C. § 437h.

43 Citizens United v. FEC, 129 S. Ct. 594 (2008) (noting probable jurisdiction); Davis v. FEC, 128 S. Ct. 2759 (2008) (holding the so-called "Millionaire's Amendment" unconstitutional); FEC v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007) (granting as-applied exemption to BCRA electioneering communication provisions); Wisconsin Right to Life, Inc. v. FEC, 546 U.S. 410 (2006) (holding that McConnell did not foreclose as-applied challenges to BCRA); Randall v. Sorrell, 548 U.S. 230 (2006) (striking down state contribution and expenditure limits).

44 Rick Hasen, *More on SpeechNow.Org Advisory Opinion*, http://electionlawblog.org/archives/.

010106.html (Jan. 24, 2008), last visited Dec. 31, 2008.