May 3, 2010

Free Speech Through the Foggy Lens of Election Law

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WASHINGTON

From the perspective of classical First Amendment theory, some cases are easy. The government should not censor speech without a really good reason, and people should be allowed to make up their own minds about what they see and hear.

On that view, it was unsurprising that the Supreme Court last month struck down a law that made it a crime to sell videos of dogfights. Or that in January it held unconstitutional a law that made it a crime to broadcast a documentary attacking Hillary Rodham Clinton, at least if shown during the election season and paid for by a corporation.

That second case, Citizens United v. Federal Election Commission, was in some ways the easier of the two, at least under a conception of the First Amendment that is particularly skeptical of government censorship of political speech.

But you can also think about Citizens United through the lens of election law. Then things get foggier.

Ever since the Supreme Court's 1976 decision in Buckley v. Valeo, election law has relied on what many people think is an artificial distinction. The government may regulate contributions from individuals to politicians, Buckley said, but it cannot stop those same people from spending money independently to help elect those same politicians.

Why not? Contributions directly to politicians can give rise to corruption or its appearance, the court said, but independent spending is free speech. A $2,500 contribution to a politician is illegal; a $25 million independent ad campaign to elect the same politician is not.

Citizens United extended this logic to corporations. Corporate contributions to candidates are

still banned, but corporations may now spend freely in candidate elections.

The distinction between contributions and spending has not been popular in the legal academy.

“Buckley is like a rotten tree,” Burt Neuborne, a law professor at New York University, wrote in 1997. “Give it a good, hard push and, like a rotten tree, Buckley will keel over. The only question is in which direction.”

Professor Neuborne wrote that he would prefer reasonable government regulation of both spending and contributions. But he added that “any change would be welcome” and that even a completely unregulated system would be preferable to an intellectually incoherent one.

Theodore B. Olson, the lawyer who won the Citizens United case, was back in the Supreme Court last month, and he was still pushing on the tree that is Buckley.

Now he has filed an appeal on behalf of the Republican National Committee, which argues that the logic of Citizens United should allow unlimited contributions to political parties, now capped at $30,400 for individuals and forbidden for corporations, so long as they are spent on activities unrelated to federal elections. (The shorthand for this kind of contribution is “soft money.”)

The Supreme Court is quite likely to hear the case, perhaps even over the summer. It presents an interesting hybrid question that tests the limits of the corruption rationale and the meaning of independent spending.

In 2003, in McConnell v. F.E.C., the Supreme Court said there was “no meaningful distinction between the national party committees and the public officials who control them.” Large contributions to parties “are likely to create actual or apparent indebtedness on the part of federal officeholders,” the court said, and “are likely to buy donors preferential access to federal officeholders.”

That sounds like the sort of corruption-through-contributions that Buckley meant to prevent.

Or perhaps that has now changed.

In Citizens United, Justice Anthony M. Kennedy, writing for the majority, adopted a very narrow definition of corruption. “Ingratiation and access” are not enough, he said.

“The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt,” Justice Kennedy went on. “The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.”

That statement was in some tension with Justice Kennedy's majority opinion in Caperton v. A.T. Massey Coal Co., decided just seven months before Citizens United. In Caperton, Justice Kennedy said $3 million of independent spending to help elect a West Virginia Supreme Court justice could give rise to the appearance of a probability of bias.

The state judge, Justice Kennedy went on, should have disqualified himself from a case involving the coal executive who had spent all that money. The problem, he wrote, was that the judge might appear to feel "a debt of gratitude"

In Citizens United, though, Justice Kennedy suggested that politicians were made of sterner stuff. With politicians, he wrote, "there is only scant evidence that independent expenditures even ingratiate."

Mr. Olson was the lawyer who won the Caperton case, too. But he did not mention it in his recent appeal.

Instead, he told the court that bans on soft-money contributions to political parties "are no longer constitutionally tenable" in light of Citizens United. A lower court ruled against Mr. Olson's clients in March, but it seemed to be holding its nose as it did so, saying it was bound by the plain words of McConnell rather than the logic of Citizens United.

The argument in favor of allowing soft-money contributions "carries considerable logic and force," Judge Brett M. Kavanaugh wrote for a special three-judge panel of the Federal District Court for the District of Columbia.

"Under current law, outside groups — unlike candidates and political parties — may receive unlimited donations both to advocate in favor of federal candidates and to sponsor issue ads," Judge Kavanaugh wrote.

But he added that the arguments about a disparity that "discriminates against the national political parties in political and legislative debates" should be directed to the Supreme Court.

Mr. Olson can take a hint, and the tree that is Buckley continues to teeter, leaning more and more toward the deregulation of money and speech in federal campaigns.