

# UN-GAGGING POLITICAL SPEECH

## HOW A WISCONSIN CASE RESCUED THE FIRST AMENDMENT

DEB JORDAHL

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*

The year was 1791. Having won independence from a government that charged people with crimes for criticizing government officials, the Founders set out to ensure no American would ever again be prosecuted for speaking out against his government. The First Amendment of the Bill of Rights spelled out this protection in plain language to stand the tests of time. Or so they thought.

Flash forward to 2002.

The Bipartisan Campaign Reform Act of 2002 (BCRA), or McCain-Feingold, left anyone who understands the first amendment wondering, "Exactly what part of 'no law' doesn't Congress understand?" So it should come as no surprise that serious litigation occurred since this speech-inhibiting legislation became law, and following the U.S. Supreme Court decision in *Wisconsin Right to Life (WRTL) v. FEC* (Federal Elections Commission) last month,



more is certain to follow.

### McCain-Feingold's assault on the First Amendment

Before 2002, corporations, including non-profit grassroots organizations, labor unions, and trade associations could use their general treasury funds on broadcast advertising that referred to federal candidates by name, provided the ads did not

directly advocate the election or defeat of the candidate.

Ads referring to candidates by name but not including words like "elect," "vote for," or "support" were considered issue advocacy and free speech, therefore not subject to federal election laws. But as campaigns became increasingly negative and more expensive, and issue ads more prolific, incumbent politicians decided to end the unfettered exercise of free speech and our right to petition them for a redress of grievances, in the name of bipartisan campaign reform.

BCRA's electioneering provision made it a federal crime for corporations to broadcast any communication naming a federal candidate up

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for reelection within thirty days of a primary election and within sixty days of general election. So you can criticize them but only when people aren't paying attention.

This provision supposedly would rid the airwaves of so-called "sham issue ads," which reformers considered to be the functional equivalent of express advocacy. They argued banning these ads was a necessary sacrifice to prevent corruption or the appearance of corruption in elections; claiming these ads allowed evil corporations to spend large sums of undisclosed money to influence elections. Of course those groups couldn't possibly have any other intention like protecting their members from bad laws.

Groups from the AFL-CIO and the U.S. Chamber to NARAL and Wisconsin Right to Life believed the provision would criminalize genuine issue ads used by their organizations in grassroots lobbying efforts important to their members.

But the provision's authors insisted genuine issue ads would be protected. They argued the electioneering provision, "*will not affect the ability of any organization to urge grassroots contacts with lawmakers on upcoming votes,*" and the prohibition wouldn't apply to "*the genuine issue ads.*"

### **One man's issue ad**

But how do you define genuine? Since BCRA did not define the difference between sham ads and genuine ads it must be obvious to anyone, right?

Not to the so called campaign reformers and the Federal Elections Commission. They have gone to great lengths to blur any distinctions whatsoever.

Last year the FEC, in an Orwellian moment, actually told the Supreme Court that it would be very difficult to develop criteria to distinguish sham issue ads from genuine issue ads, and because the FEC believed most issue ads were *intended to influence* elections, therefore it was necessary to ban all corporate ads referring to candidates during the blackout period.

Congress is not disempowered to go after mixed ads that are—yes, they have a component of issue ads, but you bet they're intended to influence the election. (U.S. Solicitor General, Clement January 17 2006, Oral Argument Transcript page 50-51)

Does the FEC believe BCRA grants government the authority to police thought as well as speech?

Relying on the expert testimony of a political consultant, the FEC asserted that the WRTL ads were particularly effective because they discussed issues and refrained from telling people to vote for or against Senator Feingold.

An expert for the FEC in these cases relied on those observations to argue that WRTL's ads are especially effective electioneering ads because they are "subtl[e]," focusing on issues rather than simply exhorting the electorate to vote against Senator Feingold. App. 56–57. (*Federal Election Comm'n v. Wisconsin Right to Life, Inc.* Opinion of Roberts, C. J. page 18)

In *WRTL vs. FEC*, Justice Scalia rejected the premise that the potential effect of speech justifies its suppression.

You think Congress has the power to prohibit any First Amendment . . . conduct that might have an impact on the election? I mean, is that the criterion for whether it . . . can be prohibited? (Justice Scalia, January 17, 2006 Oral Argument Transcript page 31, lines 4-8)

### **Testing the waters**

During the summer of 2004, WRTL began airing radio and television ads criticizing unnamed U.S. Senators for blocking the confirmation of federal judicial nominees through filibusters. The ads encouraged listeners to "contact Wisconsin Senators Russ Feingold and Herb Kohl and tell them to oppose the filibuster."

Since McCain-Feingold bans corporate ads that merely mention a federal candidate by name, and Senator Feingold was running for reelection, BCRA required WRTL to either stop running their ads on August 15 (30 days before

the Wisconsin primary election), change their ads to exclude Senator Feingold's name, pay for the ads with political action committee (PAC) funds, or risk criminal prosecution.

Believing they had a constitutional right to air the ads, WRTL filed suit, asking the U.S. District court to bar the FEC from restricting their speech and declare BCRA unconstitutional as it applied to their ads.

#### Radio script for WRTL's ad "Loan"

LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We've reviewed your loan application, along with your credit report, the appraisal on the house, the inspections, and well . . .

COUPLE: Yes, yes . . . we're listening.

LOAN OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River in Waupaca . . .

VOICE-OVER: Sometimes it's just not fair to delay an important decision. But in Washington it's happening. A group of senators is using the filibuster delay tactic to block federal judicial nominees from a simple yes or no vote. So qualified candidates aren't getting a chance to serve. Yes, it's politics at work, causing gridlock and backing up some of our courts to a state of emergency. Contact Senators Feingold and Kohl and tell them to oppose the filibuster. Visit: BeFair.org. That's BeFair.org.

ANNOUNCER: Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee. Wisconsin Right to Life (2004)

The District Court denied the injunction, concluding that an earlier Supreme Court ruling on BCRA did not allow for any exceptions

to the ban. WRTL stopped airing their ads when the blackout period began and appealed its case to the U.S. Supreme Court.

#### Content vs. context

[I]f you focus in on this particular ad, you will see that whatever the true intent of the advertisers here, this is the kind of ad that clearly would have an impact on the election. I mean, it talks about—the filibusters in colorful terms, associates them with gridlock and with a state of emergency, and then associates it with a candidate." (U.S. Solicitor General Clement, January 17, 2006 Oral Argument Transcript page 30-31.)

According to the FEC, WRTL's ads were the functional equivalent of express advocacy and therefore prohibited by BCRA not because of what the ads actually said, but rather what the ads meant in the context of the upcoming election and of other WRTL activities.

Apparently it was irrelevant that the ads named both Wisconsin senators. Irrelevant that another context existed:

Congress was in session conducting its normal business, about which WRTL was commenting.

The FEC spent three years conducting what Attorney Jim Bopp called "*intrusive discovery into every aspect of their (WRTL's) organization for decades,*" and selectively amassed more context than you could shake a stick at.

For example, the FEC reported that WRTL's PAC had endorsed Senator Feingold's opponents each time Feingold ran for U.S. Senate, both WRTL and the Republican Party of Wisconsin had identified the Senate filibuster on judicial nominees as a campaign issue, and WRTL issued press releases on Senator Feingold's position on filibusters.

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None of this is relevant unless you presume, as Justice Souter does, that context trumps content when considering the permissibility of political speech.

Sadly Justice Souter believes that Senator Feingold's position on filibusters was common knowledge in Wisconsin even though this information was not included in the ads.

Witness the exchange between Justice Souter and Attorney Bopp during oral arguments in April of this year:

JUSTICE SOUTER: And just as presumably, you knew the position of Senator Feingold in these advertisements, and the people in the state knew because of your other—because of your other public statements.

MR. BOPP: Because of one or two press releases?

JUSTICE SOUTER: Why should those things be ignored?

MR. BOPP: There's absolutely no evidence that anyone in Wisconsin knew his position on the filibuster.

JUSTICE SOUTER: You think they're dumb?

MR. BOPP: No.

JUSTICE SOUTER: You have a web site. You have a web site that calls their attention, and you think nobody's going to it?

MR. BOPP: But we can't run the ads, we can't -

JUSTICE SOUTER: Nobody's paying attention to what the Senator is doing?

MR. BOPP: If we can't run the ads, we can't draw peoples' attention to the web site.

JUSTICE SOUTER: You think the only source of information about Senator Feingold is your advertisement?

MR. BOPP: No, but I don't -

JUSTICE SOUTER: Then if your advertisement is not the sole source of information, then why do you assume that no one in Wisconsin

knows what the Senator has been doing when he votes.

MR. BOPP: Look, polls show that a majority of the people don't even know who the Vice President of the United States is. So to suggest that they know a particular position -

JUSTICE SOUTER: So your position is that we ignore context because no one—because the voters aren't smart enough to have a context?

MR. BOPP: No that we be allowed to speak so we can give that information to the voters. (April 25, 2007, Oral Argument Transcript page 37-38)

If organizations like WRTL are prohibited from conduct because it could impact an upcoming election, should Congress be prohibited from engaging in taxpayer-funded conduct that might affect an election? Surely activities like town hall meetings, public service announcements, media advisories, and constituent newsletters are all intended to influence the outcome of an election.

Alternatively an incumbent congressman could be forbidden from running campaign ads that promote their voting records and conduct in office. After all, if you subscribe to Justice Souter's logic, voters already know everything they need to know about their congressman from watching CSPAN.

#### **Intent = prior restraint**

The freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. (*First Nat. Bank of Boston v. Bellotti*, 435 U. S., at 776)

In his majority opinion in *WRTL v. FEC*, Chief Justice Roberts rejects intent as a constitutional consideration, and says litigation resulting from intent-based tests "*constitutes a severe burden on political speech.*"

Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech

by opening the door to a trial on every ad within the terms of §203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. No reasonable speaker would choose to run an ad covered by BCRA if its only defense to a criminal prosecution would be that its motives were pure.” (*Federal Election Comm’n v. Wisconsin Right to Life, Inc.* Opinion of Roberts, C. J. page 14)

Roberts also admonished the FEC for using techniques to drown organizations like WRTL in discovery, putting campaign reformers on notice that future challenges must be a matter of law.

Consider what happened in these cases. The District Court permitted extensive discovery on the assumption that WRTL’s intent was relevant. As a result, the defendants deposed WRTL’s executive director, its legislative director, its political action committee director, its lead communications consultant, and one of its fundraisers. WRTL also had to turn over many documents related to its operations, plans, and finances. Such litigation constitutes a severe burden on political speech. (*Federal Election Comm’n v. Wisconsin Right to Life, Inc.* Opinion of Roberts, C. J. page 15 footnote 5)

### Timing isn’t everything

The Supreme Court opinion in *WRTL v. FEC* does not eliminate BCRA’s blackout periods for broadcast communications, but deems running ads during the blackout period is not enough to prove an ad is the functional equivalent of express advocacy. Further merely having an *electioneering purpose* is not enough to distinguish between genuine issue ads and the functional equivalent of express campaign advocacy.

Members of Congress often return to their districts during recess, precisely to determine the views of their constituents; an ad run at that time may succeed in getting more constituents to contact the Representative while he or she is back home. In any event, a group can certainly choose to run an issue ad to coincide with public interest rather than a floor vote. (*Federal Election Comm’n v. Wisconsin Right to Life, Inc.* Opinion of Roberts, C. J. page 19)

WRTL Attorney Bopp sums it up this way:

Incumbent politicians have no constitutional authority to quash criticism of their conduct in office. The American Revolution was fought, and the First Amendment enacted, precisely to protect the people’s right to criticize the government.

### The future of McCain-Feingold

In *WRTL v. FEC*, the Supreme Court did away with timing of an issue ad and its reference to candidates in determining whether the ad is the functional equivalent of express advocacy. But it stopped short of overruling

BCRA’s ban on ads found to be the functional equivalent of express advocacy, offering this test for future challenges:

[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

This seems to amount to a “you’ll know it when you see it” standard—and Justice Souter, hardly a veteran of campaigns and elections, believes he can spot it hundreds of miles away.

The good news is Justices Scalia, Kennedy, and Thomas find the “no reasonable interpretation” test too vague because it relies on the

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subjective perception of the public and it's not possible to devise a narrow test to define issue advocacy in the same way express advocacy is defined. (By the magic words such as "vote for," "elect," or "support").

It's interesting to note that just three weeks after the Supreme Court issued its opinion in *WRTL v. FEC*, the FEC agreed to settle a similar case involving another WRTL issue ad that went further, actually criticizing one incumbent for his position while praising another.

We have yet to see whether the FEC will create rules to guide the conduct of advocacy groups in the future or rule on a case by case basis. Regardless of which course of action they chose, the Court seems to have told the FEC they must begin with the premise that the speech in question is protected.

Former FEC Commissioner Brad Smith put it best.

The opinion is no blank check. Someone with some cojones will still need to test its parameters. That said, it is written in a tone that suggests a) the exemption should be treated broadly; and b) the court has great skepticism of government regulation in the area.

The legal battles over the first amendment will continue as long as there are politicians determined to protect their power at the expense of our rights, but first amendment fans of all political stripes should take heart. The Supreme Court has given the benefit of the doubt to protecting free speech, and thankfully groups like WRTL have the cojones to exercise it.