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Why *This* Supreme Court Can't Be Trusted

In previous columns, I have described why I thought it was not in the best interests of gun rights for the U.S. Supreme Court, at least with its current justices, to hear the *Silveira* lawsuit challenging California's assault weapon law on Second Amendment grounds. The Supreme Court decided not to hear that case—but one of the cases that they did hear, *McConnell* v. *Federal Election Commission* (2003), makes me all the more certain that we do not want *this* bunch to interpret the meaning of the Second Amendment.

The *McConnell* case, at first glance, sounds like a real yawner: campaign finance reform. Trust me, *McConnell* isn't just of interest to politicians and CSPAN junkies: it involves the right of the NRA (and other political organizations) to run political advertising. The way the Supreme Court decided *McConnell* sends a cold chill up my spine.

A while back, Congress passed something called the Bipartisan Campaign Reform Act of 2002 (BCRA), authored by Senators McCain and Feingold. This bill contained an enormous number of changes to federal elections law. Political parties, candidates, and various special interests had done a pretty effective job of finding loopholes in previous federal campaign contributions laws.

On the whole, much of BCRA was probably good, and Constitutional—but as the Supreme Court's decision explained, the goal of his new law was not just to prevent corruption of the political process, but also to prevent the *appearance* of corruption in the

political process.[1] Why else would elected officials pass a law that supposedly keeps money out of their campaigns?

One part of BCRA, however, was *clearly* unconstitutional. It specified that sixty days before a general election, and thirty days before a primary election, no organization could run "issue advocacy" commercials on radio or television if any of the money paying for those ads came from either corporate or labor union sources. Since almost all political action committees receive at least some money from corporate or union sources, this was effectively a ban on "issue advocacy" ads on radio or television.

What are "issue advocacy" commercials? These are commercials designed to persuade the listener or viewer that a particular policy is a bad idea. Such commercials do not (or at least, should not) encourage voting for or against a particular candidate, but promote a particular point of view. "Disarm criminals, not the law-abiding" would be one example. Another might be, "Let Congressman Smith know that you oppose gun control." Without question, some "issue advocacy" ads cross the line, even if they do not directly say, "Vote against Congressman Smith." Only a stupid person would not realize that the ad wants you to vote against Congressman Smith, because he supports gun control—but hey, it *is* free speech.

The idea that the federal government could prohibit groups from running "issue advocacy" ads just before the election was so *clearly* unconstitutional that I, along with many others, expressed confidence that the Supreme Court would strike it down. After all, burning a flag is protected free speech. So is *Hustler* magazine. So is an "artist"

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[1] *McConnell et. al.* v. *Federal Election Commission et. al.* (2003), majority opinion, 3, available at http://www.supremecourtus.gov/opinions/03pdf/02-1674.pdf; last accessed December 16, 2003.

rubbing chocolate sauce all over her naked body (with generous funding from the taxpayers).

What was the First Amendment supposed to protect? First and foremost, its purpose was to protect political speech. There have always been some gray areas on this, with questions as to what constitutes incitement to riot, what is obscenity, and what are the limits to libel. At least in the last few years, the Supreme Court has taken a very, very broad view of what is protected free speech. Last year, in *Ashcroft* v. *Free Speech Coalition* (2002), they ruled that virtual child pornography—that is, computer graphics depictions of sex involving children, but in which actual children do not appear—is protected by the First Amendment's freedom of the press.[2] Two years ago, the Supreme Court struck down a Massachusetts law regulating tobacco advertising within 1000 feet of a school, again, on free speech grounds. The law, among other problems, was "overbroad" in the speech that it prohibited.[3] In 1989, the Supreme Court ruled that burning of the American flag was constitutionally protected free speech.[4]

With decisions like this, BCRA's provision *prohibiting* political groups from running political ads should have been a no-brainer. Alas, it was a no-brainer: the majority of the Supreme Court did not use their brains. They decided that Congress has the authority to prohibit "issue advocacy" advertising on radio and television[5]—in effect,

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[2] *Ashcroft et. al.* v. *Free Speech Coalition et. al.*, 535 U.S. 234 (2002), available at http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=00-795; last accessed December 16, 2003.

[3] *Lorillard Tobacco Co.* v. *Reilly*, 535 U.S. 235 (2001), available at http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=00-596; last accessed December 16, 2003.

[4] *Texas* v. *Johnson*, 491 U.S. 397 (1989), available at http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=US&vol=491&invol=397; last accessed December 16, 2003.

[5] *McConnell et. al.* v. *Federal Election Commission et. al.* (2003), 85.

the right to tell the NRA, the ACLU, and dozens of other political groups, to shut up and sit down.

So what is the effect of this change in the law? There are groups that can still run radio and television advertising just before the election. The candidates themselves can do so. Oh yes, there is one other group that also gets to run "issue advocacy" ads—except this group doesn't have to pay for the ads at all. That's because they are called "news broadcasts." That's right. CBS, ABC, NBC, and CNN—four organizations that hate guns and hate gun owners—they get to broadcast news coverage for sixty days before the election, and their position on gun control is pretty obvious.

You can see why Justice Scalia wrote a very angry dissent on this decision. He pointed out that after finding all sorts of very questionable material protected by the First Amendment, the Supreme Court has now found one category of speech that is *not* protected: political free speech. He asks if anyone would have guessed that a Court that has found flag burning, virtual child pornography, and a host of other very arguable materials protected, would uphold "a law that cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government. For that is what the most offensive provisions of this legislation are all about. We are governed by Congress, and this legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice…."[6]

So, what can NRA do? It can become a broadcaster, of course! NRA is starting to discuss going into the broadcasting business. Unsurprisingly, existing news organizations covered this story, sometimes with a less than friendly tone. Other

journalists, however, acknowledged what should be obvious to everyone: the news business is already politically biased. As Randy Dotinga, *Christian Science Monitor* correspondent observed, "A move toward politicized news networks would be a blast from the past, harking back to the days when American newspapers didn't even pretend to be neutral."[7] I think that might be a good thing; at least on gun control, the mainstream news organizations today *pretend* to be neutral. Competition from pro-gun media might well cause the "mainstream" news organizations to be more obvious and unrelenting in their bias.

I know, from emails that I have received, that more than a few gun rights advocates do not agree with the decision the NRA made to discourage taking the *Silveira* case to the Supreme Court. When you look at decisions like *McConnell* v. *Federal Election Commission* (2003), I think you can see why many gun rights advocates thought we would be better off waiting for a simpler case—or a smarter Supreme Court.

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[6] *McConnell et. al.* v. *Federal Election Commission et. al.* (2003), Scalia dissent, 3, available at http://www.supremecourtus.gov/opinions/03pdf/02-1674.pdf; last accessed December 16, 2003.

[7] Randy Dotinga, "Latest path around soft-money ban: Buy a TV station," *Christian Science Monitor*, December 17, 2003, available at http://www.csmonitor.com/2003/1217/p02s02-uspo.html; last accessed December 17, 2003.