

*United States Senate*

REPUBLICAN POLICY COMMITTEE

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## *Congress Most Vulnerable Constitutionally When Regulating Speech*

### **How Much Campaign "Reform" Will the Constitution Tolerate?**

The Congressional Research Service maintains a list of those acts of Congress which the U.S. Supreme Court has held to be unconstitutional (whether in whole or in part). At the end of the Court's most recent term, that list showed 139 instances: The first was in 1803, in the momentous case of *Marbury v. Madison*, and the most recent was on June 27 when the Court held that part of the Brady Handgun Act was unconstitutional.

**The Supreme Court is especially skeptical of congressional enactments that restrain speech -- even if motivated by the best of intentions.** That constitutional skepticism is, of course, anchored in the text of the First Amendment, which reads in part, "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ." **Campaign "reform" acts are always motivated by the best of intentions; at the same time, campaign "reform" acts always involve First Amendment freedoms.**

The modern era of congressional campaign "reform" began with the passage of the Presidential Election Campaign Fund Act in 1971 and the Federal Election Campaign Act (FECA) in 1972. The first Supreme Court case reviewing those "reforms" was *Buckley v. Valeo* which was decided in 1976.

In an attempt to identify recent instances in which the constitutional vision of Congress clashed with the constitutional vision of the Supreme Court, we reviewed the CRS list and **found 24 decisions in which a post-1971 act of Congress has been held unconstitutional. A strong plurality of those rejections involved the First Amendment and a disproportionate number involved campaign "reforms."** **Congress is most vulnerable constitutionally when it is regulating speech, particularly political speech, and campaign "reform" laws are laws that regulate political speech.** Of the 24 instances, there have been --

- 9 constitutional rejections (38%) based on the 1st Amendment,
- 4 constitutional rejections (17%) based on Article I,
- 3 constitutional rejections (13%) based on Article III,
- 2 constitutional rejections (8%) based on the separation of powers,

- 2 constitutional rejections (8%) based on the 5th Amendment,
- 2 constitutional rejections (8%) based on federalism or the 10th Amendment,
- 1 constitutional rejection (4%) based on the 11th Amendment, and
- 1 constitutional rejection (4%) based on the 14th Amendment.

**Surprisingly, all of the nine First Amendment cases were speech cases.** There were no petition cases, assembly cases, press cases, or religion cases. (The one case that ostensibly was a religion case, *City of Boerne v. Flores* (1997) (striking down the Religious Freedom Restoration Act), was a Fourteenth Amendment case, not a First Amendment case.) **Of the nine First Amendment cases, five concerned political speech (which is at the "core" of the First Amendment) and four of those five were campaign "reform" cases.** The remaining four cases were more at the periphery of the First Amendment than at its core, but the congressional acts were found unconstitutional nevertheless.

## **Cases in Which the U.S. Supreme Court Held a Post-1971 Act of Congress Unconstitutional Under the First Amendment:**

### **I. Cases Involving "Core" Political Speech/Expression**

#### **A. Laws Involving Campaign "Reforms"**

- *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (FECA)
- *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) (Presidential Election Fund Act, enacted Dec. 10, 1971)
- *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (FECA)
- *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 116 S. Ct. 2309 (1996) (FECA)

#### **B. Other Laws**

- *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning)

### **II. Cases Not Involving "Core" Political Speech/Expression**

#### **A. Laws Regulating Speech/Expression by Government Employees**

- *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) (honoraria for certain Executive Branch employees)

#### **B. Laws Regulating Indecent Speech/Expression**

- *Sable Communications of California v. Federal Communications Commission*, 492 U.S. 115 (1989)
- *Denver Area Educational Telecommunications Consortium v. Federal Communications Commission*, 116 S. Ct. 2374 (1996)

- *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329 (1997)

As this analysis shows, **Congress is more likely to run afoul of the Supreme Court in the area of campaign finance "reform" than in any other area of the law.** Campaign "reform" laws always involve free speech/expression, but the First Amendment forbids Congress to make any law "abridging the freedom of speech" -- especially *political* speech.