Cato Handbook *for* Policymakers

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26. Campaign Finance: Fixing an Overregulated Marketplace of Ideas

Congress should

- repeal the prohibition on soft money fundraising in the Bipartisan Campaign Reform Act of 2002;
- repeal limits on spending coordinated between a political party and its candidates;
- repeal contribution limits in federal campaign finance law;
- carefully scrutinize the views of Supreme Court nominees about free speech and campaign finance;
- reject the future iterations of the DISCLOSE Act as well as other attempts to curtail free speech through onerous and unnecessary disclosure rules; and
- ensure that nonqualified agencies such as the SEC and the IRS are restrained from interfering with election-related spending.

The 107th Congress passed the most sweeping new restrictions on campaign finance in a generation, the Bipartisan Campaign Reform Act of 2002 (BCRA, also known as the McCain-Feingold Act). During the 108th Congress, the Supreme Court approved almost all of BCRA. Since then, the Court has become much more protective of free speech. In *Citizens United v. Federal Election Commission* (2010), the Court held that Congress could not prohibit corporations and unions from spending independently on speech supporting or opposing candidates. A lower court later followed *Citizens United* and found that individuals who form groups limited to independent spending could not be bound by contribution limits. Such "super" political action committees (PACs) have been important in recent elections. Although the courts have trimmed BCRA back, federal campaign finance law still limits free speech in important ways. Congress should supplement judicial efforts by eliminating restrictions on party funding and by removing contribution limits. Congress should also remain vigilant about challenges to these achievements during the 115th Congress.

Liberty and Corruption

The First Amendment to the Constitution prohibits governments from abridging the freedom of speech, and political speech receives the highest protection. In the seminal case of *Buckley v. Valeo* (1976), the Supreme Court recognized that restrictions on political spending abridge political speech:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Note that the Court did not say, "money equals speech." But just as a restriction on money that can be spent on an abortion is a restriction on abortion, restrictions on the raising and spending of money used to disseminate political messages are ultimately restrictions on political speech.

Some believe there is "too much money" in elections, implying the nation would be better off with limits on giving. But people spend money to try to persuade voters to go to the polls, to cast a ballot for a particular candidate, or to support a particular issue. If we believe that the nation is better off if voters cast a more informed vote, we ought to encourage, not restrict, campaign spending. John J. Coleman of the University of Minnesota found that campaign spending increases public knowledge of the candidates across all groups in the population. Implicit or explicit spending limits reduce public knowledge during campaigns. When more money is spent on campaigns, voters and society benefit by improving public decisionmaking.

But Congress does limit spending on federal campaigns. In *Buckley v. Valeo*, the Supreme Court upheld limits on contributions to candidates, concluding that limits on contributions served two important interests.

The limits prevent "corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." The Court defined corruption as exchange of large contributions for "a political *quid pro quo* from current and potential office holders." The Latin phrase *quid pro quo* means "something for something." This exchange, the Court continued, undermines "the integrity of our system of representative democracy." Representatives should respond to the wishes of a majority on most matters; quid pro quo arrangements imply that representatives respond to money.

It is difficult to determine when contributions are offered in exchange for favors. Scholars of campaign finance have found that individuals and groups generally give to candidates and causes that already support their views. That makes sense: Is it easier to support a candidate who already shares your views or to spend enough money to induce a candidate to change his or her mind? Perhaps quid pro quo corruption exists when money changes a politician's mind. Public officials might alter their vote about an issue in exchange for a contribution. But scholarly studies over many years find little evidence that contributions significantly affect policymaking once other factors (partisanship, ideology, and constituency preferences) are taken into account. In the name of countering the insignificant effect of contributions on politicians' behavior, Congress has taken a sledgehammer to political speech, making election-related speech more heavily regulated than pornography.

Critics of political spending often say that politicians trade access for contributions. Sometimes they mean that officeholders meet with contributors to discuss their concerns and proposals. Let's imagine, however, that a contribution goes toward advancing a candidate's campaign rather than toward getting him to support policies he would not otherwise support. If the Flat Earth Society gives a candidate $50,000 (which is currently illegal), and the candidate agrees to meet with them to hear their concerns, is that problematic or is it just normal politics? Isn't meeting with concerned citizens, even if they're the Flat Earth Society, an essential part of democracy? "Access" in itself does not seem to be the problem. Rather, access becomes a problem if it is part of a quid pro quo relationship involving money rather than politics.

Independent spending on speech for or against candidates exceeds money spent by candidates themselves. Some argue that public officials know about and reward such support, creating a kind of quid pro quo.

Evidence on this point is hard to come by. Those who spend large sums devote their efforts to one party or the other; such spending seems ideological or partisan, an expression of political commitment, rather than an attempt to buy policy favors.

The *Buckley* Court decision also said contribution limits were justified by "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." The appearance of wrongdoing, the Court suggested, would erode public confidence in representative government. By limiting contributions, Congress would support public confidence in government. Now, many people from both parties believe that Congress is "corrupt," but what they mean by "corruption" is usually difficult to discern. Sometimes "corruption" seems to be synonymous with "not enacting preferred policies"; thus, the lack of, say, single-payer health care is seen as evidence of corruption. In years past, however, when modern campaign finance restrictions were not in place, people tended to have much more trust in government. Our growing distrust of government seems to be a product of something other than political spending, such as the significant partisan divide currently in Washington.

Here is a summary of the relationship of contribution limits and trust in government. The United States had no limits on individual contributions during the era of highest trust in government. Trust in government and effective limits on donations have varied since that high point. In the era of no limits, trust rose until 1963 and then fell until 1974, when contribution limits were enacted. From 1974 until 1980, trust continued to fall. In 1980, the limits on giving to political parties were loosened; trust began to rise until 1986 when it plateaued and began to fall about 1989. Trust then started rising again after the middle of 1994 until the end of 2001. The McCain-Feingold law banned unlimited contributions to the parties in 2002; trust in government fell until about January 2010. *Citizens United* effectively removed limits on independent spending in early 2010; since then, trust has varied in a narrow range, but the trend is flat. No doubt many factors affected public trust over the years, but both limited and unlimited campaign contributions seem consistent with rising and falling confidence in government. In the states, scholars have found campaign finance regulations "are simply not important determinants of trust and confidence in government."

Contribution limits have another flaw. Individuals can donate only $2,700 to a candidate in an election; if they wish to give more, they must find a suitable super PAC. Looked at another way, contribution limits push some funding for political speech away from established channels and toward relatively new institutions (like super PACs) that exist because contribution limits curtail direct donations to candidates and because the First Amendment protects direct spending on speech. Many, but not all, donors would probably support speech through established institutions if they could, but the limits make that impossible.

Should federal law favor “outsiders” at a cost to “insiders”? Perhaps. Insiders might care too much about organized groups in the capital; outsiders can force the concerns of a broader public onto the public agenda. But, compared with parties, outsiders lack experience organizing and representing mass opinion. Resources may be wasted and civic-minded folks frustrated. Outsiders might also be more extreme in their commitments, a virtue or a vice depending on your point of view. Other arguments for and against insiders and outsiders come to mind. Which side should win the argument is not clear.

Let’s look at the issue in a different way. The voters are supposed to choose the government. If government favors one group over another, it helps choose itself. Election laws should instead be neutral toward those engaged in politics. Contribution limits are not neutral; they favor outside spending over established channels. Citizens, not public officials, should choose between insiders and outsiders. Removing contribution limits would mean that political spenders would not have a *legal reason* to favor outsiders over insiders. A given spender may have a personal reason for preferring one mode of spending to another, but the law should be neutral between the two.

The question of neutrality goes beyond individual donors. BCRA prohibited “soft money” contributions to the political parties in 2002. The courts have struck down much of BCRA, but this prohibition remains. In other words, individuals or organizations may give as much as they wish to super PACs but not to the political parties. This unusual preference for “outsiders” over “insiders” would end if Congress removed the soft money ban.

Last, but far from least, is the problem of electoral competition. Campaign finance regulation brings every member of Congress face-to-face with the problem of self-dealing—not only the self-dealing that the regulations are supposed to prevent but, more immediately, the self-dealing that is inherent in writing regulations not simply for oneself but for those who would challenge one’s power to write such regulations in the first place.

Put simply: elected officials are writing the rules by which they get chosen for office, and it may not be a coincidence that many of those rules disproportionately harm challengers over incumbents. Unseating incumbents is very difficult, and campaign finance restrictions only make it harder. Even in the "revolution" of 1994, which changed control of the House of Representatives, 90 percent of incumbents were reelected. In the Tea Party wave of 2010, 85 percent of House members and 84 percent of senators were reelected. The 2010 Tea Party elections were the first time the House reelection rate dipped below 90 percent since 1992.

Campaign finance restrictions may not fully explain the lack of competition for incumbents in American politics. But those restrictions encumber entry into the electoral market and thus discourage credible challenges to incumbents. A challenger needs large sums to campaign for public office, especially at the federal level. He needs big money to overcome the manifest advantages of incumbency—name recognition, the power of office, the franking privilege, a knowledgeable staff, campaign experience, and, perhaps most important, easy access to the media. Current law limits the supply of campaign dollars: an individual can give no more than $2,700 to a candidate, and a political party or a political action committee can give no more than $5,000. In a free and open political system, challengers could find a few "deep pockets" to get them started, then build support from there, unrestrained by any restrictions save for the traditional prohibitions on vote selling and vote buying.

Disclosure

Although disclosure of campaign spending was upheld in *Citizens United*, Congress should be wary of attempts to use onerous disclosure regimes as a backdoor to regulating speech. The Supreme Court has affirmed the right to anonymous speech (*McIntyre v. Ohio Elections Commission*) and anonymous association (*NAACP v. Alabama*), yet the precise contours of how far Congress or state legislatures can go in mandating disclosure are still unclear. Many lawmakers are trying to use that lack of clarity to hinder campaign spending.

In recent years, the Democracy Is Strengthened by Casting Light On Spending in Elections Act (DISCLOSE Act) has been the most significant attempt to impose demanding disclosure requirements. But those requirements have few benefits, and they greatly encumber free speech. In its various forms, the DISCLOSE Act seeks to mandate disclosure of independent corporate spending to voters, citizens, and shareholders. Although the vast majority of election spending is already disclosed, lawmakers and pundits still rail against so-called "dark money"—a term that usually describes spending by 501(c)(4)s and 501(c)(6)s.

Given the prevalence of the term "dark money" in political rhetoric, one could be excused for thinking that most election-related spending is "dark." Yet according to the Center for Responsive Politics, in 2014, "dark money" accounted for $175 million of the total $3.7 billion spent, or 4.7 percent. While the absolute amount of both disclosed and undisclosed independent spending has increased since 2000, "dark money" still represents a small part of election spending. The general increase in independent spending is likely due to the increased partisanship around politics and, in particular, around which party controls Congress and the presidency.

Disclosure advocates insist that voters "need to know" who is spending money in elections. This proposition is dubious in most circumstances. It's hard to imagine a situation in which a voter would need to know who donated $400 or even $4,000 to cast an informed vote. For voters committed to a party or an ideology, such knowledge is irrelevant; for marginal voters, studies have found that such information has little effect.

But disclosure can have a large effect on encumbering political speech, particularly in an increasingly partisan and volatile political climate. In 2014, for example, former Mozilla chief executive and founder Brendan Eich resigned after it was revealed that he contributed $1,000 to an anti-gay-marriage group. It is hard enough to support an unpopular cause, say gay rights in 1980 or opposition to gay rights in 2016, without adding the burden of having the names and addresses of supporters publicly disclosed and available on a website. Politics can create enemies of friends, and people should not be forced by the government to disclose to their neighbors what causes they support.

Until the Supreme Court weighs in on the proper balance between voter information and donor privacy, lawmakers at all levels should resist new disclosure laws that provide little benefit to the electorate and do much harm to free speech. Lawmakers should also be wary that disclosure laws are often proposed for the implicit, and sometimes explicit, purpose of dissuading political engagement through public shaming and other actions. Valid disclosure laws should be narrowly tailored to achieve a compelling government interest, and they should not be justified by mere hand-waving reference to "voter information."

Finally, in recent years, some have called on the Securities and Exchange Commission (SEC) and the Internal Revenue Service (IRS) to scrutinize election-related speech. When the IRS imposed onerous compliance requirements on conservative political groups, some evidence suggested that the agency had been pressured to scrutinize political speech. In 2013, the IRS proposed onerous new rules for 501(c)(4)s, which broadly defined "candidate-related political activity" in a way that could have threatened the continued existence of 501(c)(4)s. The IRS is not qualified to regulate political speech, and Congress should resist any future attempts to increase the IRS's regulation of political groups. Similarly, many have proposed that the SEC should ensure that the political activities of publicly traded companies are disclosed to shareholders. Again, regulating political groups and political speech, if it is to be done at all, is the province of the Federal Election Commission, not the SEC. Congress should continue to block any attempt to involve the SEC in campaign finance.

Judicial Nominations

Campaign finance has emerged as one of the most contentious issues of our time, and there is little indication that this will change. Both sides have coalesced around fundamentally irreconcilable visions of the First Amendment. Judicial nominees at the federal level should be heavily scrutinized on which version of the First Amendment they endorse.

On one side, campaign finance reform advocates view the First Amendment as empowering agencies and courts to make the "marketplace of ideas" more fair. On the other side are those who rightly resist any interpretation of the First Amendment that empowers rather than limits the government.

For 200 years, until *Austin v. Michigan Chamber of Commerce*, the Supreme Court viewed the First Amendment as limiting rather than granting government power. *Citizens United* overruled *Austin* and thus reestablished, in the words of Justice Antonin Scalia, "the central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the 'fairness' of political debate."

Today, many jurists and academics deny that central truth; they want the government to play an active role in regulating political debate for fairness. Yet there are no meaningful, objective standards by which an agency or a court could determine whether a political debate is fair, and any attempt to do so is sure to be imbued with bias. This is precisely why that interpretation of the First Amendment is not just wrong, it is dangerous. The "fairness" theory is not a modification of existing First Amendment doctrine, it is a fundamental shift away from over two centuries of liberalism, in the classical sense of the word. Congress should determine whether judicial nominees support that long liberal tradition of free and open politics and resist confirming those who do not.

Suggested Readings

Burrus, Trevor. "Three Things You Don't Know about Money in Politics." Forbes.com, April 11, 2014.

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