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The Trouble With Campaign Finance Regulation

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BRADLEY SMITH was appointed to the Federal Election Commission in May 2000. Prior to that, he was professor of law at Capital University Law School in Columbus, Ohio. His writings on campaign finance and other election issues have appeared in the *Yale Law Journal*, the *University of Pennsylvania Law Review*, the *Georgetown Law Journal*, the *Harvard Journal of Legislation*, the *Cornell Journal of Law and Public Policy*, and other publications. He has testified numerous times before Congress, and is a frequent contributor to *USA Today* and *The Wall Street Journal*. In his earlier career, Mr. Smith was a practicing attorney, U.S. Vice Consul in Ecuador, and general manager of the Small Business Association of Michigan. He received his B.A. from Kalamazoo College and his J.D., cum laude, from Harvard Law School.

The following is abridged from a speech delivered at a Hillsdale College seminar in Scottsdale, Arizona on October 16, 2001.

Back in 1996, I was on *The NewsHour with Jim Lehrer* with the president of Common Cause, who complained that “major interests that have an outcome in the election and an outcome in policy” are able to give money to campaigns. “They want access to influence in the political process,” she said. “It’s corrupting.” Think about that. What she was saying is that if you have a stake in government policy, it’s corrupt for you to try to influence who gets elected. Far from the motto of the American Revolution – “no taxation without representation” – the motto of campaign finance regulators seems to be “no representation if possible taxation.” If government is looking to tax you or regulate you, they argue, you ought to lose your ability to participate in democracy.

Let me give you an actual example of this. Former Michigan Senator Spence Abraham lost his bid for re-election in 2000, and I think it is fair to say that he probably lost because of his stand on immigration. The son of immigrants himself, Senator Abraham favored immigration. He had worked hard to keep the Republican Party in favor of it. And his pro-immigration position was supported by various high-tech companies in the U.S., who it turns out hire many of the foreign students who come here and train in computers and technology. For that reason, these companies supported Abraham’s campaign. But shortly before the election, supporters of campaign finance regulation began to complain about this support. A representative of the Center for Responsive Politics, for instance, said it was “unfortunate to see somebody leading on an issue, being supported by the special interest behind it.”

Regardless of what one thinks of the substance of Senator Abraham's position on immigration, one must acknowledge the strangeness of this complaint. Who exactly was supposed to support Senator Abraham, if not the people who agree with him on policy?

"Equal Influence"

BEHIND THE unusual understanding of corruption held by the supporters of campaign finance regulation is the notion that political equality demands something called "equal influence." I don't know about you, but one of the reasons that I became involved in politics is because I wanted to have *more* influence than other people. Indeed, if we all had equal political influence, none of us would have any political influence. In such a case, there would be no politics, because there would be no reason to participate in politics.

America's Founders, of course, were well aware of the dangers of corruption and were highly dedicated to political equality. James Madison, in the famous tenth *Federalist*, specifically addressed the idea of factions or special interest groups, and much of the Constitution is animated by the desire to control the kind of corruption caused by such groups. Most fundamentally, the Founders set up a system of limited government, with enumerated rather than plenary powers. They also divided the national government into three branches as a check on its power, and adopted the principle of federalism to divide power between the national government and the states. Of course, over the years, these checks have been eroded. And it's no coincidence that most of the people – not all, but most – who strongly favor campaign finance regulation are the same people who have favored this erosion and the resultant expansion of federal government power.

The Founders also supported the rights to assemble, speak and vote. These were the ultimate checks on corrupt and overbearing government – the ultimate means by which the people could defend themselves from special interest groups. The Founders' belief in the principle of political equality is reflected in their provision of what was, at the time, unprecedented suffrage. Based on their principles, suffrage in the U.S. has been expanded over the years until now it is nearly universal. Each person who is of a certain age is entitled to one vote at the ballot box, and the vote of

the richest and most powerful citizen is worth no more than the vote of the poorest and simplest. The thing that was very important to the Founders – and here again I refer to *Federalist* no. 10 – is that in seeking to control the corruption that can flow from special interests, we should not destroy the liberty that is essential to their existence.

The Founders didn't talk about "equal influence," and whatever it is that the supporters of campaign finance regulation mean by this, it is clearly a bit Orwellian. You will note, for instance, that such regulation does nothing to limit the influence of academics like myself, who have careers that allow us time to do things like write briefs in important legal cases. Nor does it do anything to limit the influence of people in the press. As one of the few newspapermen who opposes campaign finance regulation has written, "under McCain-Feingold there's only going to be a few people left to speak in this country on politics. And it might be me, but it won't be you." So, of course, it's not surprising that the backers of McCain-Feingold are the academics, the press, the people in think tanks, the people in big foundations, and so on. It is understandable that they support a system that would increase their political influence, while decreasing the political influence of the people they have chosen not to be – the businessmen, the professionals, and the other people out working in the economy.

A Day in the Life at the FEC

WHAT ARE the real effects of campaign finance regulation? Shortly after I joined the Federal Election Commission, we had a case called MUR 4978. ("MUR" stands for "Matter Under Review," and we use that term so that we don't have to think about the people involved.) It concerned a retired U.S. military officer and veterinarian who had served a term on his city council and decided to run for Congress in the Spring of 2000. In a four-way primary, he spent about \$40,000, of which about \$20,000 was his own money, and he came in fourth with 18 percent of the vote. In the course of this race, his campaign sent out a couple of mailers, one of which solicited donations. It listed the address and telephone number of this candidate's campaign, but it failed to comply with regulation 2 USC 441, requiring any piece of mail

expressly advocating the election of a candidate to have a disclaimer saying exactly who paid for that piece.

Well, sure enough, we had a complaint filed at the FEC. Most of the complaints we receive are filed by political opponents, not by people who are terribly concerned about corruption. I personally thought that we should fine the complainant, on the grounds that she filed the complaint rather than just calling up the campaign that had sent the mailer and asking if they paid for it. Instead, needless to say, the FEC fined the violator's campaign. And who's going to pay that fine? A little-known secret under the Federal Election Campaign Act is that the person who is liable for such violations is the campaign treasurer. I sort of looked at this fine as our little way of saying, "Thank you for participating in American democracy."

We also had a case where a coffee house chain decided to help get people fired up to vote. So in the days before the 2000 election, you could go there and order your latte in either a Gore mug or a Bush mug. They kept a running tally and customers were encouraged to talk politics. All well and fine, one would think. But the FEC got a complaint from a Ralph Nader backer, claiming that the fact that these coffee shops didn't have any Nader mugs amounted to an illegal corporate contribution to the Gore and Bush campaigns.

I love these stories! This is what we do at the FEC!

Letters From Constituents

I KEEP a file of letters we get at the Commission, and find them instructive. One is from the treasurer of a campaign committee that was fined \$600. "I have no background in election law," he wrote,

although for 33 years I was a high school teacher and thought I had some comprehension of how to proceed. From 1989 to 1999 I taught government and public issues to seniors in high school. I taught and believed that we have the best government in the world. I encouraged my students to get involved and to vote. I assisted them in filling out voter registration forms to ensure their right to vote. I've always believed strongly in free elections and was happy to be part of the process. I made every attempt to comply and now I am being fined \$600 for misunderstanding.

Another letter is from a doctor who ran for public office. "Kindly consider," he says, "that I've never participated in a federal campaign before or held office. I had no political associates from whom I could assemble a staff with federal campaign experience." Describing his staff as "nice people," he says that they

volunteered to help because they felt strongly that my background in health care, agriculture, veterans affairs and child advocacy would apply directly to public need. They are not people who would commit willful wrongdoing. They cannot afford to, nor would I ask that they pay any part of a penalty. Equally important as a penalty is the adverse publicity that will surely result. These people have great concern for their employment and reputations within the community. I will do everything to prevent them from being hurt and will take full responsibility.

Finally, let me quote a letter from a Certified Public Accountant. She writes,

I would like to point out that I consider myself to be working as a volunteer. I acted as campaign treasurer because I strongly believed in the candidate and I wanted to participate in the political process. I had no previous experience of campaign finance or campaign filings. As you know, the campaign is in debt. We have no remaining funds. For what it is worth, I will never be acting as treasurer again. It is clear from the complexity of the rules, the quantity of literature sent and expected to be read and understood in its entirety, and the size of the penalties, [that] it could never be intended that anyone other than a specialist act as a treasurer in a campaign.

Campaign finance regulation is driving ordinary Americans out of politics. Jim Buckley says that when he first ran for the U.S. Senate in 1970, he would sometimes go into little towns in upstate New York and he would see "Buckley for Senate" headquarters that the campaign hadn't known existed. This was prior to the enactment of the Federal Election Campaign Act, so citizens felt free

to campaign for candidates they supported. They'd print their own literature, hold rallies, and so on. But now to do that, they'd first have to organize a committee and name a treasurer; and if they take cash contributions they risk running afoul of the law. So that kind of grassroots politics is no more.

Socialism or Constitutionalism?

WHAT IS all this, really? It's an effort to socialize political speech. In my lifetime, we've been fortunate to see socialism die as an

economic theory. Outside of our universities, it's hard to find people who say that they believe in government ownership of the means of production. But the socialist impulse to control and regulate human activity remains strong, and in the area of political campaigns and elections this impulse is especially destructive. We know from experience that socialist societies became more corrupt, not less, as power is centralized. The solution to political corruption, then, is to return to the Constitution, not to depart from it even farther than we already have. 🇺🇸

Was Madison Wrong?

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EDWARD J. ERLER, professor of political science at California State University, San Bernardino, received his Ph.D. from Claremont Graduate School. He is the author of *The American Polity: Essays on the Theory and Practice of Constitutional Government* (Crane Russak, 1991) and numerous articles in political philosophy and constitutional law. Among his most recent published articles are “From Subjects to Citizens: The Social Contract Origins of American Citizenship”; “Crime, Punishment and *Romero*: An Analysis of the Case Against California’s Three Strikes Law”; and “Californians and Their Constitution: Progressivism, Direct Democracy and the Administrative State.” Dr. Erler has been a member of the California Advisory Commission on Civil Rights since 1988 and served on the California Constitutional Revision Commission in 1996. He recently traveled to Iran.

The following is abridged from a speech delivered at Hillsdale College on February 7, 2002, at a seminar co-sponsored by the Center for Constructive Alternatives and the Ludwig von Mises Lecture Series.

In 1792, Madison wrote that the natural right to property was the most comprehensive of all the natural rights that provided reservations against governmental sovereignty. “In its larger and juster meaning,” Madison wrote,

the right to property embraces everything to which a man may attach a value and have a right; and *which leaves to every one else the like advantage*. In the former sense, a man’s land, or merchandize, or money is called his property. In the latter

sense, a man has a property in his opinions and the free communication of them. He has a property of a peculiar value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

Madison thus viewed the right to property as the comprehensive right which assumed a kind of priority in the political community.

The right to property, of course, is not mentioned in the Declaration of Independence. It is a part of the “pursuit of happiness.” Here I use an Aristotelian formulation to explain the

Framers' understanding of the relation between property and happiness. Property is a necessary but not a sufficient condition of happiness. Happiness requires property, but the possession of property is not the sum total of happiness.

Life and liberty, of course, can be maintained if property is lost. Property lost can be regained; liberty lost can be regained only with the greatest exertions. Thus it is wise to take alarm at the slightest inroads upon the rights of property. The right to property thus serves as a kind of "early warning system" to invasions of life and liberty. Madison's emphasis on the right of property stems from his awareness that life and liberty are mainly jeopardized through the violation of property rights – that government's demands on the citizens bear most immediately and visibly on their property, whether through direct taxation, confiscation of property, or regulation of the use of property. It is therefore prudent, Madison reasoned, to make property the test and measure of liberty.

Campaign Finance Regulation and the Administrative State

THE CAMPAIGN finance reforms currently under debate in Congress constitute a massive assault on both freedom of speech and property rights. If passed, these reforms will go far in the direction of consolidating the power of the administrative state. Free elections, of course, are the hallmark of republican government; and the electorate has proved resistant to attempts to extend the power and reach of the administrative state. Indeed, in recent years, the electorate has expressed a decided preference for smaller and more limited government. This recalcitrance on the part of the electorate, I believe, has been a great spur to reform efforts on the part of the minions of the administrative state.

Richard Gephardt, the minority leader in the House of Representatives, recently made this startling announcement: "What we have here is two important values in conflict: freedom of speech and our desire for healthy campaigns in a healthy democracy. *You can't have both*" (emphasis added). For Gephardt and the supporters of reform, a "healthy" campaign is one where campaign expenditures are limited in the name of "fairness." As a matter of fairness, we

are told, those who are wealthy should not have greater access to political speech. Cass Sunstein, a prominent academic advocate of reform, remarks that "laws that restrict expenditures on campaigns have been justified as an effort to promote political deliberation and political equality by reducing the distorting effects of disparities in wealth."

Thus supporters of reform dismiss First Amendment concerns with unabashed casualness. The highest imperative of the administrative state, of course, is not liberty, but rather a complete regime of regulation. Campaign finance reform shows the administrative state at its worst, working by indirection and deception.

Government vs. Faction

IT IS said that the goal of campaign finance regulation is two-fold: to reduce corruption or the appearance of corruption, and to equalize the relative abilities of individuals to influence the outcome of elections. Reformers believe that any system of private campaign financing will be corrupt, because it translates inequality of wealth into inequality of political power and influence. Thus public financing of elections, or severe limits on campaign spending, are said to be imperative to deliberative democracy. Reform will increase access to electoral politics, we are told, and will give a more egalitarian cast to the electoral process. And to the extent that it is more egalitarian and less corrupt, it will be more just.

No system of private campaign financing can be egalitarian, of course, because in a free society there will inevitably be wealth disparities. Because "healthy" campaigns will not reflect the influence of wealth, such campaigns will themselves eventually become a factor in the redistribution of wealth. Thus in the eyes of campaign finance reformers, the exercise of the right to property is antithetical to the right to liberty. In their eyes, Madison was wrong when he argued that there was no incompatibility of the two rights, and that every individual, in addition to a natural right to property, had a property in his rights, especially the free communication of ideas.

Government control over campaign finance will inevitably mean government control over politics. Government regulation of campaign finance is inseparable from govern-

ment control of the electoral process itself. In this sense, government will not be just a neutral regulator, but a faction with an interest to promote – the extension and perpetuation of the administrative state.

The Court's Role

IN 1976, the Supreme Court heard a challenge to the Federal Election Campaign Act of 1971. In *Buckley v. Valeo*, the Court invalidated portions of the act that put spending limits on the direct expression of political opinion, but upheld contribution limits unrelated to direct expression. The Court reasoned that “every means of communicating ideas in today’s mass society requires the expenditure of money.” But the Court noted that it violated the core principles of the First Amendment to “restrict the speech of some elements . . . in order to enhance the relative voice of others.” Indeed, the Court said,

the First Amendment denied government the power to determine that spending to promote one’s political views is wasteful, excessive or unwise. In the free society ordained by our Constitution, it is not the government but the people – individually as citizens and candidates and collectively as associations and political committees – who must retain control over the quantity and range of debate on public issues in a political campaign.

While the Court was undoubtedly right in this statement of general principle, it is difficult to justify the distinction it made between campaign contributions and campaign expenditures. The Court said that there could be no restrictions on the amount of money a candidate spends on his own behalf or on the amount an independent organization spends on behalf of a candidate. The Court ruled that in these instances, First Amendment liberties were implicated because the money was spent directly on expressive activities. Contributions, on the other hand, are used to promote the speech of someone else and can therefore be limited and regulated. The precise distinction made here by the Court utterly escapes me. I believe that contributions to finance the speech of those with whom you agree or wish to promote are no less speech activities than if you use the money for your own speech. If I give money to someone – say,

a young and relatively unknown successor to Abraham Lincoln – who can articulate my political ideas better than I can, these are no less my political ideas than if I gave voice to them myself. The distinction between spending and contributions is not mandated by any known principle of First Amendment jurisprudence and is certainly alien to the Framers’ understanding of both property rights and political liberty. Subsequent court cases, however, have *extended* the reach of allowable prohibitions and restrictions. Those who confidently predict that the Supreme Court will strike down the current proposal on First Amendment grounds may be unreasonably optimistic.

Gainers and Losers

FAR FROM equalizing access to the electoral process, spending limits work in favor of those who already hold office and make challenges difficult. Incumbents have name recognition and can use all the advantages of office-holding to keep themselves in power. Complex election regulations and reporting requirements make it difficult for challengers: the start up costs are enormous and much of the limited spending must be used for high administrative costs. Nor are incumbents unaware of the advantages of campaign finance regulations – why else propose that most political advertising be banned sixty days before the election, i.e., at the time when it matters most?

Under current reform proposals, the media will be the largest beneficiary. The media will exercise its First Amendment freedoms without restrictions and will endorse candidates, both openly through editorials and deceptively under the guise of news analysis. Thus the press favors campaign finance reform as much as incumbent politicians. How else can we account for the media’s fawning over John McCain in the last primary season?

Only a few politicians dare to point out the First Amendment implications of reform – Gephardt was unusually honest (or unusually confident) when he called for the repeal of the First Amendment’s protection of political speech. After all, the surface attractions of campaign finance reform seem to be popular; what reform promises, however, it simply cannot deliver. Reform works to the advantage of incumbency, and a career in politics may be a

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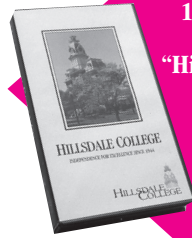
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greater spur to corruption than campaign contributions.

Campaign finance reform co-opts politicians into the administrative state. In return for powerful incumbency protection, politicians are eager to transfer a significant por-

tion of First Amendment liberties to the regulators who populate the administrative state. As Madison might have argued, this is a cure that is worse than the disease. 

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