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CAMPAIGN FINANCE AND THE CONSTITUTION

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The United States Supreme Court has intervened more actively and more decisively in the regulation of campaign finance than in any other aspect of the political process, excepting only legislative districting. Yet, prior to the enactment of the 1974 Federal Election Campaign Act (FECA) amendments, the Court had gone to great lengths to avoid deciding whether or to what extent the Constitution protects the raising and spending of money in election campaigns.

Prior to the 1970's, regulation of campaign finance consisted primarily of (1) prohibition of campaign contributions by corporations and labor unions (largely ineffective), and (2) disclosure requirements and limits on spending (totally ineffective). Federal election laws, particularly those restricting labor unions, were challenged repeatedly, but in each case the Supreme Court dodged the constitutional question. *United States v. CIO* (1948); *United States v. UAW-CIO* (1957); *Pipefitters v. United States* (1972).

In 1971, Congress enacted the original FECA. Although this Act contained several novel provisions, only newly-strengthened disclosure requirements were destined to go into effect. The Nixon reelection committee's scramble to raise money prior to the effective date of these requirements constituted a major element of the Watergate scandal, which in turn prompted Congress to enact the 1974 FECA amendments.

In addition to the disclosure requirements, the amended FECA limited the amount that could be spent in campaigns for federal office; limited the size of contributions to federal candidates (\$5,000 for contributions by "multiple-candidate committees," more popularly known as political action committees, or PAC's; larger amounts for political party organizations; and \$1,000 for other organizations and for individuals); limited the amount that candidates could spend from their personal funds in their own behalf; limited amounts that could be spent independently to support or oppose a federal candidate; and provided for public financing of presidential campaigns. The prohibition of contributions and expenditures by corporations and labor unions was carried over from previous law. Finally, the 1974 amendments created the Federal Election Commission (FEC) to administer the Act.

Buckley v. Valeo

Congress has made relatively minor adjustments, but since 1974, the direction of change in campaign finance regulation has been set primarily by the Supreme Court. The first and still the most important campaign finance decision was *Buckley v. Valeo* (1976). In sharp contrast to its earlier efforts to avoid constitutional decision-making regarding campaign finance, in *Buckley* the Court was willing to consider every challenge presented against the FECA. This was all the more striking given the abstract setting, none of the provisions under challenge having yet undergone the practical test of being applied in an election.

The resulting treatise in the guise of a judicial opinion was prepared under unusual time pressure, resulting from the perceived need to decide the case in time to permit the candidates in the 1976 election to know the ground rules, and to permit the public financing machinery to go into effect. Running to 138 pages, *Buckley* is probably the longest *per curiam* decision in the Court's history. (This is the term used to describe an opinion "by the Court," i.e., not signed by any one Justice. Appendices, notes, and separate opinions by five Justices, each of whom dissented from one or another portion of the *per curiam* decision, brought the grand total to 294 pages.)

One portion of *Buckley* required a restructuring of the FEC, on grounds that as originally constituted it violated the principle of separation of powers. Beyond this, and despite vigorous argument to the contrary from defenders of the legislation (Wright, 1976), *Buckley* established that regulation of the contributing and spending of money in election campaigns affects rights of speech and association protected by the First Amendment. Such regulation is therefore subject to judicial review, although it will be upheld if the government's reasons for regulating are sufficient. The Court's campaign finance doctrine, as laid down in *Buckley* and in subsequent cases -- the limits within which the Court will permit regulation of campaign finance at the federal, state, and local levels -- may be stated fairly simply, though there remain some unanswered questions and, as is usually the case with constitutional doctrine, even the answers that have been provided are subject to change.

Provisions that do not directly restrict the flow of campaign money -- in particular, disclosure requirements and public financing of election campaigns -- are relatively free of constitutional limitation. The Court did express a willingness in *Buckley*, and acted upon it in *Brown v. Socialist Workers '74 Campaign Committee* (1982), to intervene when there is a concrete showing that such provisions impose serious hardships on third parties or independent candidates. This has not prevented some commentators (e.g., Nicholson, 1977) from criticizing the Court for insufficient protection of minor candidacies. So far as non-restrictive campaign finance provisions affect the major parties, the Court has given Congress and the state legislatures a free hand.

Contribution and Expenditure Limits

In the case of direct restrictions on the flow of campaign money, the Court has relied on what the majority of the Justices have seen as three sharp distinctions. The first and most fundamental, originating in *Buckley*, differentiates between restrictions on expenditures and restrictions on contributions. The *Buckley* Court stated that limits on the size of contributions were

permissible so long as they could be justified as measures to prevent corruption or the appearance of corruption. On this basis, the contribution limits in the 1974 FECA amendments were upheld. Expenditure limits were struck down across the board -- not only the overall campaign spending limits, which were said to be redundant of the contribution limits so far as the prevention of corruption is concerned, but also the limits on spending of candidates' personal funds and on independent spending.

Limits on contributions were found in *Buckley* to restrict rights of association protected by the First Amendment, but limits on expenditures were a direct restriction of speech, and therefore more suspect. In comparison with the spending of money in a campaign, a contribution was merely "speech by proxy," as Justice Thurgood Marshall later said (*California Medical Assn. v. Federal Election Commission*, 1981). The Court dismissed rather casually the objection that a candidate's ability to spend, and therefore under the Court's premises, to speak, would be limited to the extent contribution restrictions limited his or her ability to raise funds. In addition to their lesser infringement on First Amendment rights, contribution limits were favored by the Court relative to spending limits because they limit undue influence of large contributors over public officials.

Informed observers have disagreed about the seriousness of corruption resulting from campaign contributions (compare, e.g., Sorauf, 1988, at 307-17, with Drew, 1983). The electoral advantage that derives from the ability to raise large amounts of money is complex but real (Jacobson, 1980). Accordingly, those who would deny the pressure that campaign contributors can bring to bear on officials must maintain either that officials are indifferent to their prospects for reelection, or that they consistently set aside their political ambitions when engaging in their official activities. Generally, political science has proceeded on opposite assumptions (e.g., Mayhew, 1974). In any event, the *Buckley* Court sought to avoid this question by asserting that it would be sufficient justification for contribution limits that they avoid the mere appearance of undue influence.

In contrast, the *Buckley* majority maintained, the various expenditure limits could not be justified as anti-corruption measures. This was clearest in the case of limits on spending of candidates' personal funds. The majority did not entertain the suggestion that such a limit might overcome the unfair advantage contribution limits give to a wealthy candidate whose less fortunate opponents must raise funds in small increments.

The anti-corruption potential of limits on independent spending was more controversial. Supporters of FECA had regarded these limits as a corollary to the contribution limits, but the *Buckley* Court maintained that independent spending did not have the same potential as contributions for undue influence. The Court's observation that spending uncoordinated with the candidate's own campaign may not be helpful to the candidate is true but of dubious relevance, since the reformers were concerned about influence in the cases where the independent spending is helpful. The Court's argument that corruption was unlikely because by definition the independent spender was not able to consult with the candidate in advance is also flawed, since corrupt influence is possible without any advance agreement (Lowenstein, 1985).

Whatever the merits of the Court's logic, it is doubtful that widespread independent spending has been used as a means of evading the contribution limits, as some reformers had feared. True, the success attributed to conservative independent spending committees in defeating several incumbent Democratic Senators in the 1978 and 1980 elections stimulated controversy and renewed

attempts to establish the validity of regulating at least some independent spending. However, these committees were more ideological than interest-based, and their money came primarily from small contributors. Concern over the issue subsided after most of the incumbents targeted by the conservative committees in the 1982 elections were reelected, and the Supreme Court reaffirmed the immunity of independent spending from limitation in 1985 (*FEC v. National Conservative Political Action Committee*) (*NCPAC*).

Independent spending is unlikely to reemerge as a major constitutional issue until and unless business and professional groups turn to independent spending in behalf of candidates as a means of gaining influence over elected officials. Significant subsidiary questions, especially regarding how much coordination with the candidate's campaign may exist before spending loses its character as "independent" and is treated as an in-kind contribution subject to limitation, have gone unresolved, primarily because of the FEC's passive enforcement policies.

Finally, the Court found that overall limits on how much a candidate's campaign could spend were unnecessary for the prevention of corruption or its appearance. Congress had limited contributions to a size that would pose no such danger, the Court reasoned. Given such limits, the ability of a candidate to raise large amounts of campaign funds would reflect widespread support, rather than posing a danger of undue influence.

The Court's reasoning fails to recognize that Congress had to trade off conflicting goals when it enacted and amended the FECA. Contribution limits could not be set single-mindedly with the intent of preventing the possibility of corrupt influence, because setting the limits too low might make it impossible for candidates to mount sufficient campaigns (Note, 1978, at 461 n.52). Contribution limits would prevent the most flagrant instances of corruption, but expenditure limits would eliminate the need for candidates to raise large amounts, and thereby reduce the pressure deriving from contributions generally and from any particular contribution.

Despite its assertions that expenditure limits infringed greatly on First Amendment freedoms and served no legitimate purpose, the *Buckley* Court added in a footnote that the government could validly require that a candidate accepting public financing agree to limit his or her overall campaign spending (424 U.S. at 51 n.65). The Court offered no explanation of why, if expenditure limits were so grave an intrusion against freedom of speech and so lacking in justification, their imposition was not an unconstitutional condition on receipt of public financing (Van Alstyne, 1968). Perhaps some members of the Court hoped that in order to preserve spending limits, Congress would adopt public financing in House and Senate races. If so, these hopes have not come to fruition. Political scientists have found that challengers tend to gain relative to incumbents as more money is spent in a campaign (Jacobson, 1980). By prohibiting spending limits in the absence of public financing, the Court, purposefully or not, may have deprived incumbent legislators of one potent means of guaranteeing their own self-preservation.

Ballot Measure Elections

The second of the major distinctions the Court has drawn in campaign finance cases is that between elections for public office and ballot measure elections. *Buckley* was limited to the former, since the statute under challenge, the FECA, applied only to federal elections, while ballot measure

elections occur only at the state and local levels. Nevertheless, many states and localities have applied their campaign finance restrictions to ballot measure elections, and these were brought before the Court in *First National Bank of Boston v. Bellotti* (1978) and *Citizens Against Rent Control v. Berkeley* (1981) (*CARC*).

Bellotti was a challenge to a Massachusetts statute prohibiting corporations from contributing to certain ballot measure campaigns (Schneider, 1986), and *CARC* to a local ordinance limiting to \$250 the contributions that anyone could make to a ballot measure campaign committee (Nicholson, 1981). Despite the favorable reception given by the Court to contribution restrictions in *Buckley* and in *California Medical Association*, the restrictions in both *Bellotti* and *CARC* were struck down.

The infringement of First Amendment interests resulting from restricting contributions to ballot measures is neither greater nor less than when contributions to candidates are limited. Therefore, the results in *Bellotti* and *CARC* must be explained on the basis of the strength of the state's interest in imposing the restrictions. In *Buckley*, the Court had upheld the restrictions as a means to avoid corruption or undue influence on elected officials. The same state interest could not be asserted in *Bellotti* and *CARC*, since there was no candidate to be corrupted.

The argument in favor of controlling contributions in ballot measure elections is that the political system is distorted, if not "corrupted," not only when undue pressure is brought to bear on candidates via campaign contributions, but also when enormous corporate contributions, unrelated to any widespread popular support for the corporate position, can skew election results by sponsoring an unfair and one-sided public debate. The Court proved unreceptive to this sort of argument in *Bellotti* and *CARC*, but hedged its position by relying in part on the lack of evidence in the record of each case that any such skewing actually exists. Precisely what evidence, if any, could have persuaded the majority in *Bellotti* or *CARC* to uphold the restrictions is uncertain (Shockley, 1985), but some research suggests that one-sided spending resulting from corporate contributions in certain ballot measure elections, especially in opposition to measures, can be extremely potent (Shockley, 1980; Lowenstein, 1982).

Restrictions on Corporations

The third and last major distinction in the Court's campaign finance doctrine emerged later than those between expenditure and contribution limits and between candidate and ballot measure elections. In recent cases, the Court has made it clear that restrictions may be imposed on business corporations that would not be permitted against individuals or other kinds of organizations.

It is true that in *Bellotti*, the Court had upheld restrictions applicable only to corporations. Confronted with the assertion that corporations are not protected by the freedom of speech guarantee of the first amendment, the majority responded, somewhat evasively, that it was sufficient that the speech itself was directed to current political issues and deserved protection. Relying on the distinction between ballot measures and elections for public office, the majority stated it was not ruling on the validity of bans on corporate participation in elections for public office (*Bellotti*, n.26).

The Court first confronted the latter question in *FEC v. National Right to Work Committee* (1982), in which it upheld the federal prohibition on corporate contributions. As in *Buckley* and

California Medical Association, the Court relied on the government's purpose of preventing corrupt influence.

More far-reaching in its implications was *FEC v. Massachusetts Citizens for Life* (1986) (*MCFL*), which involved the federal prohibition of independent spending by corporations. The Court previously had barred limits on non-corporate independent spenders, even in behalf of a candidate who accepts public financing (*NCPAC*). The independent spender in *MCFL* was a non-profit corporation formed primarily for the purpose of political advocacy. The Court held that independent spending by such a group was protected by the Constitution. This holding in itself was unremarkable, although four justices dissented from it. More significant was an extended dictum in which the majority stated that the prohibition of independent spending would be upheld as applied to business corporations operated for profit.

We may now summarize the Court's current campaign finance doctrine, bearing in mind the three major distinctions around which it has been organized:

1. Nonrestrictive interventions into the campaign finance system, such as disclosure requirements and public financing, are valid except to the extent they are shown concretely to prejudice seriously the interests of third parties or independent candidates.
2. Limits on the size of contributions to candidates for public office are generally valid, if they can be justified reasonably as efforts to prevent undue influence of officials or the appearance of such undue influence.
3. Subject to the single exception in the next paragraph, all limits on spending in connection with elections for public office are unconstitutional. This applies to overall campaign expenditures, independent spending in behalf of a candidate, and spending of the candidate's own money in his or her behalf.
4. Restrictions on spending in behalf of candidates by business corporations operated for profit are constitutional.
5. In ballot measure campaigns, limits on both contributions and expenditures, even those of business corporations, are unconstitutional in the absence of a showing, the requirements of which are vaguely defined, that the practices in question jeopardize the democratic process.

Unanswered Questions

As major areas of constitutional law go, doctrine in the campaign finance area is thus reasonably well elaborated, whatever may be said for or against the doctrine as a matter of logic or policy. Nevertheless, a number of questions remain. Among the more important issues likely to be presented to the Court in the foreseeable future are the following:

1. *Will the Court's tolerance for regulation of campaign finance activity by corporations be extended to labor unions?* Much of the Court's rationale for singling out corporations is either inapplicable to unions, or applicable to them to a much lesser extent. For example, in *MCFL* the majority relied in part on "the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." The same prospect does not exist in the case of unions, especially since the Court does not permit the union dues of objecting

members to be used for political purposes (*Abood v. Detroit Board of Education*, 1977). Furthermore, it is feasible for affluent corporate managers to make substantial political contributions as individuals, while union members may need the collective vehicle of the union if they are to contribute effectively at all.

On the other hand, it has been the tradition for half a century at the federal level and in many states to apply similar restrictions to corporations and unions. Constitutionally mandated differential treatment may be perceived as unfairly favoring the economic and ideological position of labor against that of business. In addition, many would regard it as unfair from a partisan standpoint to provide constitutional protection to the political activity of a traditionally Democratic group while withdrawing such protection from a more Republican group.

2. *Will the Court permit "aggregate" contribution limits?* In recent years reform proposals have sought to restrict the aggregate amount a candidate may accept from sources or in amounts likely to represent "special interests." These may be defined variously as contributions from PAC's, from any source other than an individual, or from any source in an amount above a specified figure.

Aggregate contribution limits may be vulnerable to constitutional attack on the theory that once the recipient has reached the limit, new would-be contributors are completely barred from contributing, rather than merely being limited in amount. Furthermore, the connection between an aggregate contribution limit and the amount the candidate can spend might seem more direct to the Court than in the case of the individual contribution limits that were upheld in *Buckley*.

Nevertheless, where public financing and the concomitant possibility of expenditure limits are not politically feasible, aggregate contribution limits may be the only effective means of limiting political pressures generated by campaign financing. Their constitutional prospects may be enhanced by the fact that in form, at least, they are contribution limits rather than expenditure limits, and that only specified types of contributions come within the aggregate limits. The possibility of a candidate with widespread support spending an unlimited amount is therefore retained.

3. *What are the limits on the incentives that may be created to induce candidates to accept spending limits "voluntarily"?* In *Buckley*, as we have seen, the Court offered no explanation for its conclusion that expenditure limits could be imposed on a candidate as a condition of his or her accepting public financing. This lack of explanation makes it especially difficult to predict whether additional incentives for the voluntary acceptance of spending limits would be acceptable. For example, would it be constitutional to impose contribution limits, but waive them for Candidate A if his or her opponent, Candidate B, refused to agree to spending limits? The "benefit" offered to Candidate B on the condition of assent to expenditure limits would consist not of public funding, but of the imposition of a limitation on Candidate A. If such an arrangement were unconstitutional, would the result change if by agreeing to the expenditure limits, Candidate B would receive public financing in addition to contribution limits being made applicable to Candidate A?

Elected legislators tend to favor expenditure limits, and particularly fear possible opponents who can spend unlimited amounts from their own personal funds. Given the reluctance of legislatures to adopt public financing, or if they adopt it to fund it to the point that they can be confident all candidates will accept it, it is likely that experimental new incentives to accept spending limits will arise, and sooner or later will be tested in the Supreme Court.

Competing Visions

In addition to noting the existence of these and other unanswered questions, one may question the long-term stability of the Court's campaign finance doctrine. The three central distinctions upon which the Court has relied have generated answers to the questions the Court has had to decide, but none of them have such far-reaching validity that they easily support the weight the Court has placed on them.

Thus, the Court's distinction between contribution limits and expenditure limits is supported by recognition that contributions are the direct source of the political pressure that the regulator seeks to control, while the expenditure is directly associated with the political expression that the civil libertarian seeks to protect. Nevertheless, neither contributions nor expenditures have meaning without regard to the other. It is the need or the desire to spend that creates the demand for contributions. So long as we continue to finance campaigns privately, we cannot enjoy the benefit of unlimited speech without the social cost of considerable corrupt influence, and we cannot substantially control corrupt influence without some limits on speech.

The distinction between elections for public office and elections on ballot propositions holds up if the only concern is corruption defined narrowly as unacceptable influence on public officials derived from campaign contributions. The distinction breaks down when the concern is broadened to include broad structural inequality in influence over the political process, especially given that the main purpose for adopting the initiative process in many states during the Progressive Era was to provide ordinary citizens with a device for overcoming the perceived domination of legislatures by special interests.

Finally, the business corporation is the paradigm of massive financial resources accumulated for non-political and non-ideological purposes, whose infusion into election campaigns may bear little relation to the distribution or intensity of political support. Nevertheless, while it stands at one end of the spectrum in this regard, it is not sharply separated from other political contributors and spenders. Contributions by individuals give disproportionate influence to the affluent, and even non-corporate groups that are well organized, such as unions and professional and trade groups, have an advantage over relatively unorganized groups, such as ordinary taxpayers, consumers, and the poor.

Some observers have regarded the campaign finance controversy as reflecting two competing visions of the government's rights and obligations with respect to the political process. (Polsby, 1976; Fiss, 1986). In one vision, emphasis is placed on the individual's or group's right to be free from government interference with political participation. Vast inequalities in resources that may be available for such participation, by reason of unequal distribution of wealth or of relative structural advantages and disadvantages in the ability of different interests to organize, are either regarded as benign or accepted as the possibly unavoidable cost of protecting rights of speech and association.

In the opposing vision, the right to political participation may be infringed not only by government suppression but also by structural inequalities in access to the resources that are necessary for effective participation. In this vision, government intervention to offset such inequalities is permissible if not obligatory, because an individual's or group's good fortune in the economic sector does not create a right to a corresponding advantage in the political sector.

Though these visions are largely incompatible with each other, each plainly has substantial grounding in American political thought and practice. *Buckley v. Valeo* and other of the Supreme Court's earlier campaign finance decisions may be seen as an attempt to impose a moderate version of the first vision. Inequality of political resources could be assuaged only by non-restrictive measures or as a by-product of regulations aimed at unethical methods of exercising influence. Even these approaches were qualified by the right to deploy economic or organizational advantages to gain political influence.

Viewed from this perspective, *MCFL* may represent a major departure from the earlier campaign finance cases (Nicholson, 1987-88). Statements in that decision that "concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas" do more than underscore the Court's distinction between corporations and other types of contributors and spenders. In the context of a case involving independent spending, the Court's use of the term "integrity" goes beyond concern for unethical practices. Rather, the term expresses a systemic concern that elections not be dominated by those whose overwhelming resources "are not an indication of popular support" for their political ideas.

Ideological movement by the Court along the path suggested by the language of *MCFL* could upset existing campaign finance doctrine. *Bellotti's* holding that states may not regulate corporate participation in ballot measure elections seems most vulnerable. So long as the issue was corruption, narrowly conceived, the Court could distinguish corporate participation in ballot propositions from elections for public office. If the issue is domination of the process by wealth unrelated to public support, the distinction vanishes.

The Court is not likely ever to accept fully and permanently one of the competing visions described above to the exclusion of the other. *MCFL* suggests some movement away from the laissez-faire end of the spectrum towards toleration of some affirmative government action in pursuance of more equal political participation. The extent and duration of that movement cannot be predicted.

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