

Campaign Finance Reform

PPE Capstone

Background

BCRA (2002) prohibited "electioneering communications" within 30 days of a primary election and within 60 days of a general election by, or paid for by, corporate entities. *Citizens United v. FEC* (2010) overturned this provision.

Democracy, Paternalism, and Campaign Finance

1. Argument Against Restrictions

- (a) *Speaker Interests*. In a democracy, our interest in expressing our political views deserves special protections. Spending money is necessary for expressing political views. Therefore, we have an interest in spending money on political speech, which deserves special protection.

This argument applies just as well to *associations* of individuals. What about *for-profit corporations*?

JUSTICE KENNEDY: Yes because corporate speech advances the expressive interest of its shareholders.

- (b) *Listener Interests*. In a democracy, it's important for citizens to be exposed to all of the available arguments and positions and to be well-informed about the candidates they are being asked to vote on. Caps on individual expenditures would limit the total amount of political speech, which might reduce the range of arguments and views citizens are exposed to.

2. Argument For Restrictions: Anti-Distortion

A properly functioning democracy should represent the will of the people. Unlimited expenditures threaten to prevent the government from being representative.

- (a) *Electoral outcomes*. Which candidates get elected?
(b) *Legislative outcomes*. What do those candidates do once elected?

Is it *true* that money significantly influences political outcomes?

GILENS & PAGE: "In the United States, our findings indicate, the majority does *not* rule—at least not in the causal sense of actually determining policy outcomes. When a majority of citizens disagrees with economic elites or with organized interests, they generally lose." (576)

Buckley v. Valeo (1976) ruled that the limits on election spending in the FECA (1971) were unconstitutional, but held that restrictions on campaign *contributions* are justified by the government's interest in "the prevention of **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."

McCutcheon v. FEC (2014) ruled that the limit FECA placed on *aggregate* contributions made by individuals was also unconstitutional.

Note the distinction between campaign *contributions* and *expenditures*.

It is important that individuals be able to associate with others to express views as a group because (1) they may be able to reach a wider audience this way and (2) the messages that can be conveyed by associating with others may be different from what could be communicated separately.

Anti-Distortion Argument. The more money spent on political expression, the more political expression there is. Someone who is able to spend more, therefore, is able to produce more speech. A greater ability to speak gives someone a greater ability to *influence* political outcomes. If some have a greater ability to influence political outcomes than others, the government will no longer be representing the will of the people.

How does money influence politics? By which mechanisms?

3. **Objection: Restrictions are Paternalistic**

The Anti-Distortion Argument seems to assume that citizens will be moved to vote for some candidates rather than others simply because more money has been spent on those candidates. It is objectionably *paternalistic* to assume that citizens can be moved in this way. In making this assumption, we fail to *trust* citizens.

Minimally Deliberative: The role of a citizen in a democratic system is to vote *on the basis of reasons*, which involves the exercise of one's evaluative capacities.

Is regulating expenditures objectionably paternalistic?

4. **Response: Only Minimally and Not Objectionably So.**

- (a) *Evaluative Capacities.* Distinguish between (1) beliefs that are formed using one's evaluative capacities and (2) beliefs formed via other processes.

The minimally deliberative view of democracy requires that we respect (1), but what about (2)?

Objection: We should trust citizens to be able to correct for this.

- (b) *Opportunity for Full Discussion.* Distinguish between (1) false speech when there is plenty of time to hear other points of view and to consider the issue more fully and (2) false speech when there is not sufficient opportunity for it to be corrected.

It might be objectionably paternalistic to restrict (1), but what about (2)?

- (c) *Content.* Distinguish between (1) judgements about *policy* and (2) judgements about which *politicians* to support.

The minimally deliberative view of democracy requires more significant trust about (1) than about (2), which supports regulating "electioneering ads" more heavily than "issue ads."

What Could be Done?

1. Publicly Funded Elections.
2. Limits on Campaign Contributions and Expenditures.
3. Lessig's "Democracy Vouchers".

Are some of these ideas better than others? Could any of them work?

quid pro quo corruption vs *institutional* corruption.

Government censorship is unacceptable because it conflicts with the requirement that citizens are the proper judges of what are and are not good reasons.

Is it okay to ban campaign ads that use *subliminal messaging*? Would banning such ads be objectionably paternalistic?

This might support regulating campaign ads just prior to an election more heavily than those earlier in the campaign season.

Consider the justification for *term limits*, for example. "We find term limit acceptable because we think it is more important that government represent people's basic political values than that the most popular leaders get elected." (171-2)