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Campaign Finance Won't Square the Circle **by Sheldon Richman**

The new restrictions on freedom that constitute campaign-finance reform raise some important issues in political philosophy. It would have been nice if the five Supreme Court justices who upheld the law had addressed those issues. They didn't even notice them.

The majority said Congress violated no constitutional stricture, particularly the First Amendment, when it barred political parties from raising or spending unregulated "soft" money and severely restricted business and nonprofit corporations and labor unions in televising "issue" advertisements in the 60 days before a general election, even if the ads don't expressly urge viewers to vote for or against a candidate. (These entities may not spend money from their general treasuries; rather they must raise money specifically for the purpose of political activity and must disclose the names of the larger donors.)

The majority on the Court was most concerned with the appearance of corruption, specifically, the unfair access by the wealthy to the political system. As Justices John Paul Stevens and Sandra Day O'Connor wrote in the majority opinion,

Just as troubling to a functioning democracy as classic quid pro quo corruption is the danger that officeholders will decide issues not on their merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation.

That passage may seem innocuous, but it is rife with problems. Before getting to them, a couple of preliminaries. First, the justices know that the law will not remove that temptation. They said so: "Money, like water, will always find an outlet." They expect to see more laws passed and more litigation in the future.

Second, as Justice Antonin Scalia pointed out in his sharp dissent, most of the concern expressed during the congressional debate over the Bipartisan Campaign Reform Act was not about corruption. Indeed, how could it have been? That would have required the senators and representatives to confess that they have at least been tempted to decide how to vote according to who made big donations to their campaigns.

Instead of corruption, two other concerns dominated the debate. Members of Congress lamented the negative nature of “issue” ads, calling them “poison” and “pollution.” Sen. John McCain, the primary sponsor, said, “I hope that we will not allow our attention to be distracted from the real issues at hand — how to raise the tenor of the debate in our elections and give people real choices. No one benefits from negative ads. They don’t aid our Nation’s political dialog.” He assured his colleagues that banning soft money and requiring disclosure of contributors to corporate and union advertising will reduce the number of ads.

The other issue of concern was the amount of money spent on campaigns. These are the maladies that are supposed to be cured by more government control over election-season spending and advertising.

Regarding this, Scalia asks a good question. In a constitutional democracy that values free-wheeling political speech, what business is it of Congress to curb “attack” ads and “overspending” — especially when the conduct being banned or restricted is overwhelmingly directed at *incumbents*? As he put it, “The point, in any event, is that it is not the proper role of those who govern us to judge which campaign speech has ‘substance’ and ‘depth’ (do you think it might be that which is least damaging to incumbents?) and to abridge the rest.”

As for the belief that too much money is spent on politics, Scalia asks, in effect, by whose standard? He wrote that in 2000 “Americans spent about half as much electing all their Nation’s officials, state and federal, as they spent on movie tickets (\$7.8 billion); about a fifth as much as they spent on cosmetics and perfume (\$18.8 billion); and about a sixth as much as they spent on pork (the nongovernmental sort) (\$22.8 billion).”

Scalia provides ample evidence that this law is not what it seems. “This litigation [sic] is about *preventing criticism of the government*.... Those in power, even giving them the benefit of the greatest good will, are inclined to believe that what is good for them is good for the country.” (Emphasis added.)

He also cringed at this implicit promise (threat?) from the law’s co-sponsor, Sen. Russell Feingold: “This is a modest step, it is a first step, it is an essential step, but it does not even begin to address, in some ways, the fundamental problems that exist with the hard money aspect of the system.”

To which Scalia replied, “The first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech.”

All well and good, but it's not fundamental enough.

Representing constituents

Stevens and O'Connor say government interference in political campaigns is justified because democracy is endangered when officeholders decide issues according to their big supporters' preferences. As opposed to what? As opposed to the "merits or the desires of their constituencies." Note the word "or." This implies that the merits may diverge from constituents' desires. Since a legislator needs votes to be reelected, isn't he being corrupt any time he votes according to constituent desires rather than according to the merits? It's an age-old question for which there is no answer: Should a legislator vote according to his best judgment or according to the demands of his constituents?

Here's another problem: big donors are among the representative's constituents. They presumably have a "right" to representation too. If it's proper to vote the constituents' desires, why not the largest constituents' desires? This is not prima facie corrupt. Large donors (like small donors) contribute to candidates they regard as sympathetic. We should hardly be surprised if representatives vote according to their donors' wishes. To prove corruption you'd have to show that a representative would have voted another way had he not gotten a large donation. But that would be impossible.

Although taken for granted, representative democracy has some serious problems at its core. How in the world can an office-holder represent a diverse constituency? The average congressional district has 570,000 people. How would one go about representing all of them with their conflicting wishes? That it can be done is an article of democratic faith that most everyone holds but dares not examine for fear it will disintegrate at the slightest touch.

If a congressman isn't going to serve his largest constituents, which ones should he serve? At this point the supporters of campaign-finance regulation would most likely invoke "social justice" or the "common good." But these are floating abstractions that provide no guidance to action. They usually mean: distributing other people's money for a good cause.

Democracy and the welfare state

And that brings us to the crux of the matter. The law's supporters, and now a bare majority on the U.S. Supreme Court, are trying to square the circle. They want a vast distributive state — in which politicians dispense favors at the expense of others — without the appearance of corruption. An inherently corrupt system with no appearance of corruption is impossible. But that won't stop true believers from taking away our freedoms in their futile efforts. Once the government's authority to transfer wealth from one person to another is declared nonnegotiable, liberty becomes highly negotiable.

Government today is mostly a wealth-transfer machine. This takes roughly two forms: taxation and regulation. Through taxation politicians loot productive people and give the proceeds to favored constituencies, rich, middle class, and poor. For example, when government subsidizes a business or a person, it first has to take the money from someone else without consent. Through regulation government can accomplish much the same goal. A regulation imposing quotas on imported clothing will raise the price of clothing in the American market and benefit domestic producers who otherwise would have lost out to foreigner competitors. The regulation is equivalent to a cash subsidy procured by taxation.

Since government has the muscle to bestow wealth in these ways, it is no surprise that people lobby to become beneficiaries. The prospective rewards are so great that those aiming for them are willing to spend considerable sums in the effort. What better way to get a piece of the action than to contribute money to elect or reelect friendly candidates who will see things “properly” when it comes time to vote on legislation?

Money isn’t spent only to obtain the unearned. Sometimes those *threatened* with taxation or regulation make contributions to protect themselves from state encroachment. They too have an interest in finding sympathetic candidates. When government has life-and-death power over business and other areas of life, we should expect to see such defensive activities.

The second group of people is more honorable than the first, although campaign-finance reformers regard both as equally corrupt.

Notice that the surest way to end that corruption is to prohibit government from engaging in favor-peddling and transfers in the first place. If government has nothing to sell, no one will be trying to buy.

Unfortunately, it’s a rare politician who would deny himself the power to hand out booty. That’s how one wins votes and makes a career of politics.

If we really want to remove the appearance of corrupt access to government, we should eliminate the entire distributive state. There’s a simple way to keep money away from politics: keep politics away from money.

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