

PART FOUR

Points of View

This section includes short articles from a variety of people who regularly or occasionally write editorials and opinion pieces for newspapers and magazines—economists, political scientists, pundits, politicians, and political consultants. It concludes with three articles by members of the U.S. Congress who have been especially active in the campaign finance debate—Representative John Doolittle and Senators Mitch McConnell and Russell Feingold. Their varying perspectives and analyses show how deeply the campaign finance issue touches on basic political philosophy and values.

Enemies of the First Amendment

Bobby R. Burchfield

This article first appeared in the *Weekly Standard*, October 11, 1999, pp. 23–25. Burchfield, a partner in the law firm of Covington & Burling, summarizes the provisions of the campaign finance bill that passed the U.S. House of Representatives in September 1999 (252–177) and its less stringent Senate counterpart, which was filibustered.

Burchfield's main point is that the authors of these bills and their supporters are well aware that the soft money bans they entail conflict with the First Amendment's protection of free speech. The proponents persist, however, because the Supreme Court's decisions doom limits that apply only to candidates and parties, since the funds can so easily flow to constitutionally protected independent individuals and organizations.

For those who decry the amount and role of money in politics, the problem has an obvious solution: simply outlaw certain campaign donations and strictly limit spending. To accomplish this, however, reformers must get around a long line of court decisions holding that restrictions on political giving and spending suppress political dialogue and thus violate the First Amendment's guarantee of free speech.

Fortunately for the country, there is no way around the First Amendment. The essential provisions of all campaign finance proposals—and that includes the Shays-Meehan bill passed by the House on September 14 and the less sweeping McCain-Feingold bill now pending in the Senate—inevitably fetter the political debate that is basic to our system of government.

Both the case for campaign finance regulation and this core obstacle remain essentially what they were when Congress passed the Federal Election Campaign Act of 1971 and extensively revised it in 1974. Congress recognized that the goals of regulation advocates—“leveling the playing field” by equalizing resources available to candidates, reducing the total amount of money in politics, and eliminating the reality or

appearance of quid pro quo corruption—could be achieved only through a vast regulatory regime. The post-Watergate reforms attempted to regulate all activity that “influences a federal election” by imposing disclosure requirements, contribution limits on donations to parties and federal candidates, and spending limits on candidates and independent groups.

Even before they were fully implemented, large portions of the 1974 reforms were struck down by the Supreme Court as offensive to the First Amendment. In its landmark *Buckley v. Valeo* decision in 1976, the Supreme Court ruled that restrictions on political giving and spending have the direct effect of limiting core political speech. “The Act’s contribution and expenditure limits,” the Court held, “operate in an area of the most fundamental First Amendment activities.” Since virtually all means of mass communication require money, limits on campaign spending “necessarily” reduce the number of issues discussed and the quality of the debate. The Court found it “beyond dispute” that campaign regulation was motivated at least in part by the desire to limit communication.

Buckley made clear that the only governmental interest in campaign finance sufficient to override these First Amendment concerns is the need to prevent “corruption,” which the Court defined as the giving of dollars for political favors—essentially bribery. The Court unequivocally rejected efforts to reduce or equalize candidate spending as “wholly foreign” to the First Amendment. *Buckley* also emphasized the critical importance of letting both donors and spenders know what activities are subject to regulation. To provide notice to donors and spenders, the Court crafted the “express-advocacy standard”—that is, only speech that “expressly advocates the election or defeat of a clearly identified candidate” can be regulated.

Specifically, the *Buckley* Court upheld limits on the contributions individuals can make to candidates and parties for express advocacy in federal elections. (Corporations and unions had been barred from making federal political contributions for decades.) The limits—\$1,000 in

gifts to a candidate each election cycle and \$20,000 each year to a political party for federal election activity—were deemed narrowly tailored to serve the compelling government interest of eliminating actual or apparent corruption. Disclosure requirements for giving and spending for express advocacy also withstood challenge.

But perhaps more important is what the Court refused to allow. *Buckley* struck down all efforts to limit the amount candidates, parties, and interest groups can spend.

Since the moment *Buckley* was decided, campaign regulation advocates have attacked it. Common Cause, the Brennan Center for Justice (named, ironically, for the principal author of the *Buckley* opinion), and other proregulation groups unabashedly call for *Buckley* to be overruled. In a case currently pending before the Supreme Court, Senators John McCain and Russell Feingold, joined by other congressional advocates of tighter regulation, have called the constitutional protections elucidated in *Buckley* a “straitjacket” preventing their proposed reforms. They are absolutely right. But it is the reforms that are defective, not the Court’s understanding of the First Amendment.

An important by-product of the reforms of the early 1970s is the distinction between “hard” and “soft” money, hard money being money raised subject to the limitations of the Federal Election Campaign Act, soft money being everything else. Under current law, political parties are allowed to accept both soft and hard money, so long as they keep them in separate accounts and do not use soft money for express advocacy. The current wave of reform proposals aims to stamp out soft money—that is, to bring all political party spending under the regulatory net. The central feature of the Shays-Meehan bill, thus, is a ban on the solicitation or acceptance of soft money by national political parties. The bill would allow national parties to accept only fully regulated hard money.

But the Shays-Meehan bill would do much more. It would effectively prohibit preelection political advertising by corporations, unions, and other groups. Under *Buckley*, dozens of courts have rebuffed federal

and state efforts to regulate corporate and union advertisements that do not urge the election or defeat of a clearly identified candidate. No problem. The House bill simply redefines express advocacy to encompass any “communication” on radio or television that mentions a candidate within sixty days of an election. Only hard money could be used to fund such advertisements—meaning, in disregard of settled First Amendment law, that corporations, unions, and other interest groups could not fund them. Shays-Meehan, in other words, would make it illegal for Common Cause, which raises all its money outside the Federal Election Campaign Act’s restrictions, to pay for a radio advertisement on October 1 in an election year saying “Support the Shays-Meehan Bill.” Virtually no one expects this provision to withstand constitutional scrutiny.

But the House bill would impose new restrictions on hard money as well. It would overrule the Supreme Court’s 1996 decision in *Colorado Republican Federal Campaign Committee*, under which political parties have a First Amendment right to spend any amount of hard money to advocate the election or defeat of a particular candidate, so long as they do not coordinate that spending with the candidate. The House bill would prohibit such “independent expenditures” favoring a candidate if the political party also engages in any coordinated activity with the candidate—which it always does.

Finally, Shays-Meehan would punish any candidate who spent more than \$50,000 of his own money on his campaign by denying him party funds. The Supreme Court held in *Buckley* that a candidate can spend as much of his own money as he likes, since he obviously cannot corrupt himself. Apparently members of Congress, a great many of whom first won election by spending from their personal or family fortunes, are now so secure in their huge fund-raising advantage over challengers that they are willing to impose the \$50,000 limit on all who run for office.

Days after the House passed the Shays-Meehan bill, Senators McCain and Feingold introduced a pared-down version in the Senate.

In its present form, the McCain-Feingold legislation would prohibit soft money donations to national political parties and provide some fairly meaningless protection for a small class of workers against use of their union dues for political activities. Commendably, McCain-Feingold abjures many of the offensive features of the House bill. It would not regulate speech by corporations, unions, and other groups; it would not limit independent expenditures by political parties; and it would not bar individuals from financing their own campaigns.

Even without those odious provisions, however, McCain-Feingold flunks the constitutional test. Like the House bill, it would prohibit the Republican and Democratic national committees and their affiliated congressional campaign committees from accepting soft money.

Unable to justify this provision by citing instances of bribery, advocates of the soft money ban must argue that soft money donations create the appearance of corruption. Donors, they say, receive unequal “access” or “influence” in the legislative process. But this argument is specious. The largest soft money donation to the Republican National Committee during the 1998 election cycle was \$500,000, a lot of money, to be sure, but only .28 percent of the RNC’s total receipts during that cycle. The largest soft money donation to the Democratic National Committee during the same cycle was \$250,000, or .21 percent of its receipts. These donations cannot legally be earmarked to aid any specific candidate. Can anyone credibly argue that the RNC or DNC pressures its officeholders to change positions on issues—inevitably alienating other donors—to increase its receipts by a few tenths of a percent?

The tobacco companies, reformers cry, use soft money to buy influence. But during the 1998 cycle, while Congress was considering legislation that would have imposed hundreds of billions of dollars in additional taxes on the tobacco industry, the tobacco companies’ donations to Republican Party committees declined by almost 20 percent, from \$5,232,789 during the 1996 cycle to \$4,225,611. It is lobbying expenditures by tobacco companies that rose, reaching \$77,474,400 in the 1998 cycle, eighteen times their soft money donations.

The fact is that special interests rely on lobbying, not soft money donations, to obtain influence. During the 1998 cycle, the top ten corporate soft money donors gave the national parties \$12,002,390—and spent \$104,176,042 on lobbying. To believe that eliminating soft money donations to political parties would equalize access to legislators is simply naive.

Not only does the soft money ban, then, target a nonexistent problem, it also offends the Constitution in several respects. The Republican and Democratic Parties are national parties. In addition to candidates for federal office, they help candidates for governor, state legislator, and mayor. And when they aid state and local candidates, they must comply with state law. Thirty states currently allow corporate contributions to parties; thirty-seven allow union contributions. Simply put, each of these states has made a sovereign legislative judgment about how campaigns for state office will be financed. Like the House bill, McCain-Feingold would summarily overrule those state judgments. It would impose existing federal contribution limits on national party participation in state and local elections and would create a new federal contribution limit for state political parties. As policy, this is yet another instance of Congress imposing its will on the states. As law, it is an open assault on the Constitution's federal structure and on the powers reserved to the states by the Tenth Amendment.

Finally, the soft money ban would restrict the ability of political parties to engage in pure issue debates—about taxes, health care, gun control, and so on. The Supreme Court made clear in *Buckley* that speakers have an unfettered First Amendment right to discuss issues, using money from any source.

Clearly unconstitutional, a ban on soft money spending by political parties would also be ineffectual: It would simply cause corporations and unions to redirect their soft money resources from donations to parties, which are fully disclosed, to independent issue advertising, which is not. Corporations and unions would remain free to mount blistering attacks on any candidate by name based on his character or

voting record. So long as their speech did not expressly advocate the candidate's election or defeat, it would be constitutionally protected.

Senators McCain and Feingold appear to recognize that the restrictions on corporate and union issue speech in the House bill are unconstitutional. They are perfectly willing, however, to place political parties at a severe disadvantage in relation to such special interests. To join the issue debate at all, parties would have to divert their hard money from direct candidate support. The unavoidable effect of a soft money ban for parties would thus be an abridgment of the parties' political speech and a violation of their right to equal protection.

If restricting issue speech by corporations and unions, personal spending by candidates, and independent spending by parties is so clearly offensive to the First Amendment, why do campaign finance reformers keep trying to do it? The short answer is, they have to. Campaign finance regulation that addresses only party and candidate activity is doomed to fail since political donors will inevitably use their resources to engage in independent speech that does not expressly advocate any candidate's election. Such speech is fundamental to our democracy. It encompasses virtually every public policy discussion on the air and in print—and is fully protected by the First Amendment.

The reformers know this. As they recently told the Supreme Court in a brief, the giant free speech "loophole" thwarts all efforts at "meaningful" reform. Why else would reform advocates ranging from House minority leader Dick Gephardt to presidential candidate Bill Bradley advocate amending the Constitution to clear away the First Amendment as an obstacle to increased regulation?

But free speech is not a loophole, it is the oxygen of democracy. Plainly overreaching, the regulatory scheme constructed by the House would certainly fail the test of constitutionality. McCain and Feingold, though intending to be more deferential to the Constitution, would leave open the means of evading their restrictions. Either way, the effort to ban soft money is doomed to fail.