Campaign Finance Restrictions Violate the Constitution

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This selection first appeared in the *Wall Street Journal*, April 9, 1998, p. A22. In this op-ed Abrams, a partner in the law firm of Cahill Gordon & Reindel and a contributor to Democrats and the Democratic Party, argues that the free speech guaranteed by the First Amendment is more important than whatever problems (for example, the influence of wealthy contributors) might go with it. Reprinted with permission of The Wall Street Journal

Toward the end of the 1992 presidential campaign, I had "maxed out" in my contributions to the Clinton campaign. A thousand dollars for the primaries, another thousand for the general election, and I had given all that the law allows. So I was surprised to receive a call asking me if I would make an additional contribution to the Democratic National Committee.

Thus did I learn the difference between "hard" money and "soft"—that is, between money to be spent on a political campaign (which could only be given in limited amounts) and money dedicated to building one's political party (which was unlimited). And thus did I learn the lack of difference between the two.

It is understandable that proponents of campaign finance reform in Congress would seek to close the "loophole" through which my solicitor was seeking to move my money. It is more than understandable that they would seek to limit how much soft money individuals or political action committees may give. And it is perfectly understandable that they would object to corporations and unions giving soft money and thus effectively circumventing the laws that prevent them from giving hard money.

All these efforts make a kind of sense, but the legislation aimed at

campaign finance reform that was defeated last month in the Senate, and last week failed even to reach the House floor, was at war with freedom of speech.

Return with me for a moment to First Amendment principles—to one of the few principles upon which individuals ranging from Robert Bork to Laurence Tribe agree. It is that political speech is at the apex of First Amendment protection. Was I not engaged in political speech when I contributed to the DNC? And when I contributed to the Clinton campaign itself?

Proponents of campaign finance reform argue that the speech I was engaging in by contributing money was dangerous in the sense that too much of it from too few people could result in wealthier contributors skewing the political system in their favor. That is not a ridiculous argument. But it should not lead to restrictions on speech in the service of "protecting" people who have less money. That would strike at the heart of the First Amendment. The Supreme Court recognized as much in *Buckley v. Valeo* (1976). The court held unconstitutional limits on expenditures that Congress had adopted in the aftermath of Watergate. "The concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment," Justice William Brennan wrote for the court.

But while the ruling barred restrictions on campaign spending, it permitted restrictions on contributions to a campaign. The former, the Court said, jeopardized speech more directly, since expenditures were tantamount to speech itself; the latter merely associated the contributor with speech with which the contributor agreed. And contributions (unlike expenditures) were said to raise more directly the specter of corruption.

Result: Steve Forbes and Ross Perot can spend all they want of their own money on their campaigns. But if my political tastes had led me to wish to contribute to their campaigns, I would have been limited to $1,000 per campaign—or could have made unlimited contributions to

the political entities Messrs. Forbes and Perot created to tout their candidates.

It's an odd result, not least because the First Amendment distinction between expenditures and contributions is so intellectually shaky. Most of the opposition to having distinct First Amendment rules for the two categories has come from people and groups that wish to limit both political spending and political contributions. But increasing intellectual firepower has come from people who have concluded that the First Amendment does not allow restrictions on either.

Last summer, Justice Clarence Thomas issued a powerful dissenting opinion rejecting the distinction altogether. "Whether an individual donates money to a candidate or group who will use it to promote the candidate or whether the individual spends the money to promote the candidate himself," Justice Thomas wrote, "the individual seeks to engage in political expression and to associate with like-minded persons. A contribution is simply an indirect expenditure."

Kathleen Sullivan of Stanford Law School is one of an increasingly vocal group of scholars who believe that the First Amendment bars limitations on either expenditures or contributions. To share their views, as I do, is not to doom us to a system in which the views of wealthier interests will always rule. Not, at least, if the public knows who is contributing to whom. Ms. Sullivan has thus proposed that limits on spending and contributions be abandoned so long as "the identity of contributors [is] required to be vigorously and frequently reported." House Speaker Newt Gingrich has taken the same approach.

It is certainly an approach that is consistent with deeply rooted First Amendment principles. If we trust people to make sound judgments when properly informed of the facts, why not seek to assure that there is more speech *and* more information about political candidates?

None of this is fanciful. It is not at all clear that Bob Dole profited more from the contributions of tobacco companies than President Clinton did from criticizing Mr. Dole for taking the money. The same may

be true of the National Rifle Association, the American Civil Liberties Union, and other advocacy groups.

First Amendment principles should guide whatever legislative solution we choose. The first principle is that it is not for Congress to decide that political speech is some sort of disease that we must quarantine.