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The Need for Campaign Finance Deregulation

Matthew Kochen

A major storyline of this election cycle for candidates seeking to become the next President of the United States is campaign financing. No candidate can successfully reach the highest position in the land without an enormous amount of money fueling their rise. For historical reference of most recent elections: in 2004, George W. Bush spent $367,288,819 and John Kerry spent $328,479,256. In 2008, Barack Obama spent $778,642,962 and John McCain spent $368,093,763. In 2012, Barack Obama spent $540,812,931 and Mitt Romney spent $336,399,297. Note that these numbers were not adjusted for inflation and that in all cases the amount spent differed from the total amount raised. All candidates typically raised about $100 million more than they actually spent. As can be shown in this small sample size, the greatest sum of money spent was directly correlated with a winning campaign. The process for candidates to fundraise and attain these enormous capital reserves is very convoluted due to regulation imposed by the Supreme Court. The result has been an equivocal answer to the Constitutional question: does the First Amendment permit comprehensive finance regulations or is financing a political campaign a part of our protected right to freedom of speech?

The Supreme Court should strike down all of its regulations on an individual’s right to advocate for a particular candidate by whatever means within the bounds of law, be it through donation of their time, effort, voice, or money. All of these factors constitute facets on an individual’s right to free speech, which we are entitled to as

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2 Ibid
3 Ibid
Allowing each and every citizen’s unrestricted exercise of free speech will improve their lives and improve the way campaigns are handled, as well.

At publication of this analysis, the race for the 2016 presidential election consisted of five serious contenders: Hillary Clinton, Bernie Sanders, Ted Cruz, Donald Trump, and John Kasich. A big selling point for both the Sanders and Trump campaigns are that they are spurning donations from large donors and corporations in order to present themselves as more genuine and free of corruption or strings that will later be pulled during their potential presidency for favors in line with their donors’ interests. Bernie Sanders’ campaign prides itself on only accepting donations from individual donors, rebuffing larger sums that could be contributed by million/billionaires and corporations through super and regular Political Action Committees (PACs). However, no candidate can technically refuse a PAC’s support, as they act independently for their own interests. PACs make contributions to other federal political committees, or in other words, directly to a candidate’s campaign. Sanders has thus far raised $139,810,208 and PACs supporting him have raised $46,080.

Donald Trump’s calling card, on the other hand, is his aim to largely self-finance his own campaign. While he does accept donations, this accounts for very little of his overall available funds. PACs supporting him have raised $1,968,261 and his campaign has raised $34,740,678, of which, $24,384,058 was provided by his estate.

Hillary Clinton has raised the most money yet of any candidate. Her fundraising technique was been vilified by rival candidates, particularly her Democratic rival Bernie Sanders, for her openness to receive funds from big donors which, in their opinion,

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4 Ibid
5 Ibid
indebts her to them. Thus far, she has raised $159,903,128 herself and PACs supporting her have raised $62,676,002.\(^6\)

John Kasich and Ted Cruz have more traditionally financed campaigns, largely free of any positive or negative attention. Kasich has raised $12,066,999 himself and his PACs have raised $9,974,550.\(^7\) Cruz has raised $66,547,756 and his PACs have raised $52,745,673.\(^8\)

The agency charged with administering and enforcing federal campaign finance laws is the Federal Election Commission (FEC). They govern the election of the House of Representatives and Senate, along with the presidential election. Campaign finance reform can be traced back to our founding father, George Washington. In his successful effort to win an election to the Virginia House of Burgesses in 1755, he bought roughly $195 worth of hard cider and drinks for potential voters.\(^9\) Afterward, the legislature moved swiftly to pass a law banning the gifting of money and goods to voters.\(^10\) Since then, campaign regulation has increased. In 1934, the Supreme Court upheld the Hatch Act, which had been fought over since 1910. It required federal candidates to disclose quarterly reports of any contributions received over $100.\(^11\) In 1943, the Smith-Connally Act was passed, which denied unions from donating to candidates.\(^12\) This also created the first PAC, which the unions formed to work around the law.\(^13\) In 1947, the Taft-Hartley Act was passed, allowing candidates to campaign with publicly funded money.
and banning unions and corporations from making independent expenditures in federal elections.  

From 1990 to 2014, the Supreme Court ruled consistently that the First Amendment allows for campaign regulation as seen in cases such as: *Buckley v. Valeo, Randall v. Sorrell, McConnell v. FEC, Citizens United v. FEC, SpeechNow.org v. FEC, American Tradition Partnership v. Bullock*, and *McCutcheon v. FEC*. In *Buckley v. Valeo*, the Supreme Court ruled that limits placed on electoral expenditures by the FEC were constitutional, as they did not violate the First Amendment’s freedom of speech and association clauses, and the limits enhance the, “integrity of the our system of representative democracy.” Their decision was upheld later in *Randall v. Sorrell*.  

In *SpeechNow.org v. FEC*, the Supreme Court reversed precedent a bit. They maintained that government regulating of political financing, “must have a countervailing interest that outweighs the limit’s burden on the exercise of First Amendment rights,” but conceded that the government has no anti-corruption interest in limiting independent expenditures so long as they act completely independently and autonomously, which set the precedent to allow for super PACs. Then, in *American Tradition Partnership v. Bullock*, the Supreme Court ruled that political expenditures from corporations were protected as political speech, allowing firms to donate along with individuals.

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14 Ibid
15 Ibid
Finally, in *McCutcheon v. FEC*, they ruled that a limit on aggregate (the total amount of all individual contributions) campaign contributions was unconstitutional.\(^{20}\) By limiting the total campaigns could raise, regulation also limited participation in the democratic process.\(^{21}\) They also found that that limiting aggregate contributions failed to objectively prevent corruption.\(^{22}\)

After all these cases, laws, revisions, etc., what are we left with? Individuals, firms, and campaigns are very constrained in what they can and cannot do to interact and advocate their positions. Presidential campaigns and PACs must file monthly or quarterly donation reports with the FEC.\(^{23}\) It is up to their discretion which frequency to pick. They are allowed to change once a year, but must provide a written notice. An individual can donate up to $2,700 per federal election, $5,000 to a PAC per year, $10,000 per year for State/District/Local Party Committees $33,400 to National Party Committees per year, and $100,200 per account, per year for additional National Party Committee Accounts.\(^{24}\) Assuming an individual wants to support their candidate as much as possible and sees each avenue as equally contributing to his/her success, the maximum allowable direct contribution an individual can make is $152,300.

If an individual wants to advocate their voice with a larger donation, there is only one other avenue: super PACs. The official name for super PACs are Independent

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\(^{21}\) Ibid

\(^{22}\) Ibid


Expenditure-Only Committees.25 As a result of *SpeechNow.org v. FEC*, individuals, corporations, groups, and unions can contribute as much money as they wish. Super PACs are the only means by which corporations and unions can contribute. They must file for a special distinction from a normal PAC. The purpose is to advocate for or against an expressed candidate.26 The key advantage of a super PAC is that they are allowed to raise and spend unlimited funds for the pursuit of their mission. There is also a major disadvantage to them, as well. Super PACs cannot donate money directly to a candidate and their spending cannot be coordinated with candidates.27 Any interaction between the two is forbidden. As of publication, for the 2016 presidential race there are 2,255 super PACs with a total of $612,376,697 raised and $265,145,197 spent.28

Clearly contributions to super PACs are the only ones that have a substantial effect on the outcome of an election. Individual donations add up, but no single person can make that much of a difference by direct donation because of the amount constraint. In the effort to curb corruption, the Supreme Court has been equivocating their position by keeping regulation, yet slowly drawing closer and closer to the correct decision: that an American citizen has the right to contribute his or her own money, free of restrictions, to whatever campaign or campaigns they deem worthy. Granted by the First Amendment, we have this right. Advocating for or against a candidate by using your own voice is undeniably acceptable. So is advocating by volunteering with the campaign effort by going door to door, operating a phone bank, etc. Using money to advocate your

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27 Ibid
position is a facet of the same idea. By donating, a person is making the same kind of statement as they could with their mouth, hands, and feet.

Taking it a step further, the two principles this society is founded on are the right to life and the right to property. Property rights are the rights to an actions first, and then the consequences of producing or earning that object. We also have a derivative right to avoid infringing the rights of others. Campaign donation falls under the former and does not infringe the latter. Not only is the ability to spend one’s money in whatever way maximizes their happiness an individual right, it would help society and the campaign process, as well, if campaign financing was deregulated.

By deregulating campaign financing, a more open debate would be facilitated. With more regulation, less money is going to flow into the spectrum of candidates, which is crucial to airing their views and ideas across the country. We are all better off as a society when we think about new ideas and debate them until we come to the best solution. If more regulation were introduced, the pool of viable candidates would decrease sharply to only the few that have a war chest to support a full-fledged campaign with minimal cash inflow from outside. Without the regulation, just about any candidate with good ideas is going to get backing from like-mined individuals with financial means to support the proliferation of that ideology. In the 2012 election, Newt Gingrich and Rick Santorum were buoyed predominantly by super PAC support. That financing allowed them to stay in the race longer, yielding the best candidates through debate and competition.²⁹

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A criticism that proponents of regulation have is the elites will take over the election process and undermine the legitimacy of our democracy. Elections are still decided with votes, not money. However, money is absolutely crucial to getting votes. The top candidates, which most people consider the elites, already have significant monetary reserves and super PACs to finance their run. Deregulation would most help the candidates that the people like the most, but not necessarily the corporations and unions. Bernie Sanders is perfect example of this. He is not receiving financial support from corporations and unions, yet he is still fiercely competing for the Democratic nomination with Hillary Clinton through the support of an incredible number of individual donors. He has generated much more enthusiasm and talk than Clinton has, yet she still leads. Rationally, money can be seen as a driving factor behind this. As is previously mentioned, there is a $2,700 maximum contribution individual donors can give per election. If that regulation was eliminated, certainly his donations would increase. With more money, this man of the people could get his message out to more potential voters and allow him to catch up in the race.

If campaign financing was deregulated, there wouldn’t be a need for super PACs that can create attack ads and use shady political tactics to muddy the waters without the backlash falling on their candidate. Instead with all the money in hand, a candidate would be fully responsible for the way their campaign is run. They would be free to devote their time to actually talking to potential voters instead of fundraising. For example, during his 2012 run, President Obama attended 221 fundraisers as compared to 101 campaign rallies.\(^{30}\) This was the most by any incumbent in history.\(^{31}\) The reason this

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\(^{30}\) Ibid

\(^{31}\) Ibid
was necessary was because of regulations preventing the influx of cash, but also because he chose to forgo public financing for his campaign to reduce the burden on taxpayers. A commendable action on his part to be sure, though it certainly put more strain on his campaign. If funds were allowed to flow directly into a candidate’s campaign staff, there would be no reason to keep public financing of presidential elections, which falls on the taxpayer to bear.

The bottom line is deregulation needs to occur so citizens can exercise their right to free speech by advocating with their wealth. The aim of regulation is to prevent corruption in the election process, but there is no reason to think it would increase with deregulation. Identifying who each donor is and the amount they contributed to a campaign can still be reconciled with what the campaign spends to determine that funds were used appropriately and not defrauded. There will always be some level of corruption in government, and it is naïve of anyone to think there is not now. Without the convoluted regulations that force money into super PACs, campaigns could be more transparent and more easily tracked for corruption by law enforcement agencies. All these reasons help support the main argument that America’s citizens have a right to free speech in all its forms and our country is better off when the government respects these rights.