THE *CONSTITUTIONAL* QUESTION

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There are reform proposals on the table. They involve legal restrictions on how, and how much, money is spent in elections by candidates, parties, PACs, and others, very possibly accompanied by proposals for public financing of election campaigns or of some aspects of them, maybe involving the use of vouchers.

Some argue, formidably, that these reforms would work badly. Some even maintain that the best alternative is total deregulation of campaign spending. Let us agree there are real questions about the operational merits and demerits of various proposed reforms. Those questions are not the ones I address. The *constitutional* question is different. It is about how, under the American constitutional system, the matter of reform should be decided. It is about whether the Constitution, seen in its best light, authorizes tight judicial supervision of reform choices. Is the Constitution best read to invite judicial imposition of a hard-and-fast rule against expenditure caps?[1] Is it best read to invite close judicial second-guessing of whether a contribution ceiling is too strict,[2] or of whether a candidate's acceptance of a spending limit in exchange for public funding ought to be classed as voluntary, given the specific terms of choice under challenge?[3]

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1. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976).

2. *See, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897, 926 (2000) (Thomas, J., dissenting) ("[T]he State's contribution limits . . . directly suppress . . . political speech . . . and only clumsily further the governmental interests that they allegedly serve. They are . . . massively overinclusive, . . . restricting donations without regard to whether the donors pose any real corruption risk." (citation omitted)).

3. *See, e.g.*, Daggett v. Commission on Governmental Ethics & Election Practices, 205 F.3d 445, 466-70 (1st Cir. 2000).

Don't get me wrong. The Constitution's allocations of decisionmaking authority over campaign-spending reform can't be honored without some attention to the effects of proposed reforms. Any political-spending reform restricts someone's participation or influence in politics. Any that does so lacking a reasonably credible justification, rooted in widely accepted principles of American democratic government, should be disallowed by the judiciary, as unconstitutional.

Reform proposals do, however, often claim justifications of exactly the sort I mentioned. Supporters say they provide the conditions of fair access to political participation or influence for many people who presently lack it. Obviously, a spending limit can't have an effect of that kind unless it restricts some people's political activities, but supporters justify such effects by arguing that they go along with fulfillment of widely accepted norms of equality and fairness in a democracy. Fulfilling such norms looks like a pretty weighty interest. Of course, a claim that a given reform does fulfill them, measurably better than an electioneering free market would do, can be mistaken. What's more, it can be deceptive. I do take it, though, that there is *some* room for reform proposals—probably involving substantial public funding supported or protected by limits on spending out of private resources—whose overall democratic merits are intelligently and sincerely maintainable.

I have to assume that much for the sake of keeping my assigned topic open for discussion. If there really is nothing honest and intelligent to say or propose—on the merits, operationally—against any an electioneering free market, then that has to be the end of the constitutional discussion. The constitutional discussion is interesting only if you grant there is sometimes room for sincere and competent debate over the public-value serving merits of a reform proposal.

Assuming, then, that there is room for such debate, the question before us is one about the forums in which and methods by which such debates ought, in the American constitutional system, to be resolved. It is whether the Constitution is working at its best when, for example, the judiciary totally bars the door to expenditure limits as in *Buckley*, or closely second-guesses contribution limits as dissenting Justices would have done in the recent *Shrink*

Missouri PAC case.

The answer would be easy if the Constitution just hands-down decided the matter. If the First Amendment's prohibition against laws abridging the freedom of speech incontestably covers laws limiting individual, group, and aggregate spending in support of a political candidacy, then courts must enforce the prohibition as written.

I grant there are some observers who see the matter just so. However, the overwhelmingly dominant view of judges and lawyers has been to the contrary. The opinions and commentaries in this field are littered, they are beset and besotted, with arguments that are *brought to* the text, not *taken from* it. Just to mention some of them:

- We have the idea of the exceptional constitutional sensitivity of regulation in this field because the affected expression stands at the core of the concerns of the First Amendment.[4]
- We have the idea that, although the act of laying out money is not literally the act of saying something, the spending act is protected because of its crucial instrumental connection to the latter, especially in an age of mediatized politics.[5]
- We have the idea that a larger total volume of utterances and messages is presumptively constitutionally preferred, without serious regard to considerations of mix, repetition, overload, or preemption.[6]
- We have the idea that restricting the speech of anyone for the purpose of enhancing access for anyone else is "foreign" to the First Amendment.[7]

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4. *See, e.g., Buckley,* 424 U.S. at 14-15 ("The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.").

5. *See, e.g., id.* at 19 n.18 ("Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.").

6. *See, e.g.,* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 781-83 (1978).

7. *See Buckley,* 424 U.S. at 48 ("But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .").

These ideas are thick in the judicial discourse of campaign-finance law. They could not be if our lawyers and judges did not preponderantly have the clear idea that the constitutional text does not settle the campaign-regulation question, but rather leaves it in no small measure up to responsible officials—I include judges in the category of officials—to decide what restrictions to impose on campaign-spending reform in the Constitution's name. The ideas I've mentioned are all ideas about what the Constitution is best understood to mean or intend in this field—ideas for which those who rely on them for decision have to bear responsibility. Inevitably, then, we reach the question of whether it is really true that the American Constitution is best understood to protect freedom of political spending against legislative interference, in the ways our courts have been endorsing it for many years.

How would one go about giving support to that proposition? Let us count the ways . . .

- One could say: *Our Constitution is best understood to favor individual freedom of action as a default position, and therefore to condemn all purely arbitrary, purely meddlesome, interferences with liberty.* Okay, but that won't do the job here, because—this is our premise, remember—reasonable people could sincerely think there is something badly and dangerously broken in American politics and that restrictions on electoral expenditures are a necessary part of the fix.
- One could say: *Our Constitution is best understood to erect strong safeguards for basic human rights, even when that means ruling out measures that are by no means purely arbitrary, meddlesome, or lacking in reasonable public-interest justification.* Okay, but—I'm sorry—I cannot get my mind around the idea that the right to spend unlimitedly in politics is among the basic, inalienable human rights conferred on us by Nature and Nature's God.
- One could say: *Our Constitution is best understood to erect strong safeguards for the basic institutional prerequisites of a working democracy.* Okay, but it does not pass the straight face test to maintain that those basic institutional prerequisites include the absence of limits on political spending.

- One could say: *Our Constitution is best understood to erect strong safeguards against self-serving action by officeholders in those matters in which the likelihood of self-serving action by them is especially strong and threatening.* And now, at last, we are getting serious. The distrust factor is real; it is true; it is important. And I want to finish my remarks by explaining why I don't think it works as simply and obviously in favor of tight judicial scrutiny of campaign regulation as it is usually touted to do.

So please join me in imagining a moment of Nirvana. State and federal lawmakers see the light of day and deregulate election spending. We have a free market in electioneering. But some people are never satisfied, and it develops there are lots of people around who feel something is badly wrong.

- They think they see strategic necessity forcing mutually destructive and wasteful allocations of resources to campaign spending.
- They think they see officeholders excessively distracted from important work by fund raising.
- They think they see incumbents as a class systematically out-raising and outspending challengers as a class.
- They think they see the raw demands of money skewing the pool of office-seekers in ways a democracy should detest.
- They think they see democratically objectionable effects on public policy outcomes from the felt needs of officeholders to keep on the right side of potential hefty contributors.
- They think they see a large fraction of the American population, sharing these perceptions, becoming distrustful and contemptuous of their country's politics and government.
- And, finally, they think it is simply, rankly, disgustingly wrong, in a democracy, that contingencies of personal and corporate wealth, whether of candidates or supporters, should ever spell the difference in any electoral contest.

I know that some of you within earshot believe that some or all of these observations would not, in fact, be made, or be true, in a deregulated system. I put it to you, though, that it is not beyond reason to imagine that any or all of them would be, and I ask you, for now, to imagine that they would, even if you think it unlikely.

And then to continue with our story: Imagine that, perceiving these malfunctions of democracy, as they consider them to be, many people think it would be good for the country if we could introduce some spending limits, along with public financing, maybe by vouchers. Maybe lots of people are thinking this way. It could even be, who knows, a majority of the electorate. So reform bills are drafted up, and some of them make it into the legislative hopper.

And now let's imagine that the bills don't seem to go anywhere from there. They just wither and die. Do we just assume that's because civic-minded legislators are making public-spirited judgments that reform will be bad for the state or the country? Is there any chance the incumbents might be acting *at all* on the belief that free spending by and large gives clear and strong advantages to incumbents? When the Great and General Court of Massachusetts drags its heels on implementing a campaign reform enacted by ballot initiative, do we just assume that's because the members, without a thought in the world to their own political careers, are trying to save the Commonwealth from a terrible, self-inflicted wound?

I assume my point is becoming clear, so I'll put it in the form of a rhetorical question: Why distrust a legislature that *enacts* reform any more than a legislature that *refuses* reform? Reform, no doubt, can be a masquerade for incumbent protection. May refusal of reform, by any possibility, be a masquerade for incumbent protection? If so, why doesn't distrust wash out of the constitutional equation when the constitutionality of campaign reform is what is to be decided?

We can pose the question with a bit more nuance if we imagine a court reviewing a campaign reform enacted by a voter majority in a popular initiative, as has recently occurred in Maine and Massachusetts.[8] Of course, the reforms were drafted by someone and promoted by someone. The promoters

8. For exactly such a case, see *Daggett*, 205 F.3d 445.

could have had self-serving motives of the crassest kind. Or they could have been acting out of a need to feed their addictions to populist megalomania. On top of that, they could have bamboozled the voters. In sum, distrust is certainly not out of place when it comes to judicial scrutiny of what their efforts wrought.

No doubt about it, in this field distrust is the universal, default position. But the real question would seem to be: As between the do-nothing incumbent legislature, on the one hand, and the combination of self-starting reformers and supportive voter majority on the other, which is the more to be distrusted? And even if you think that is a tie—which I do not—why wouldn't a normal, ordinary, background commitment to democracy give the tie-breaker to the voters?

It doesn't follow from anything I've said that a court must give the ballot-initiative reform act a clean bill of constitutional health, and I want to close by mentioning what I think is probably the argument against relaxing the judge-made flat rule against expenditure restrictions that mainly motivates many civil libertarians to oppose relaxation.

There is, I believe, at work in this opposition a concern about the overall shape of constitutional-legal doctrine. The concern is that a court simply cannot uphold an expenditure limit, against the background of the extant web of First Amendment doctrine, without introducing pressures on that web that threaten intolerable loss or damage to true human rights.[9]

To explain: In the terms made salient by the extant web of doctrine, a campaign expenditure limit invites classification as a content-specific restriction on acts so closely tied to political expression that they are, virtually, political expression itself. If upholding the limit were not to involve a general relaxation of the extremely demanding standard for content-specific restrictions on political expression, some principle of exception would have to be articulated. Justice Breyer, for example, has suggested how an exception might be set up for cases in which a legislature is addressing a problem of conflicting constitutional rights or constitutional interests.[10] The worried

9. *Cf.* Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337, 1344-51 (1990) (tracing out a similar concern respecting flag-desecration laws).

10. *See* Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897, 912 (2000) (Breyer, J.,

civil libertarian is worried that an exception like that is too liable, once passed from Justice Breyer's hands to those of someone not as nice as he is, to grow more or less infinitely and ominously plastic.

I can appreciate the worry, but I find it overwrought. Good lawyers can find a prudent way to manage the doctrinal challenges. Maybe Justice Stevens has one, with his proposal to reconstruct *Buckley* as a case about liberty and property and not about speech.[11] But just refusing out of hand to take a step into the water is, for me, too much a counsel of despair. Maybe that's because I suspect that it is, all too often, a crocodile counsel of despair, if you see what I mean. Distrust, you know, once loosed, is not easily cabined.[12]

concurring) ("In such circumstances—where a law significantly implicates competing constitutionally protected interests in complex ways—the Court has closely scrutinized the statute's impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionality.").

11. *See id.* at 910 (Stevens, J., concurring).

12. *Cf.* Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966) ("Once loosed, the idea of equality is not easily cabined.").