

FEDERALIST FORUM

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Upcoming Events

Nov 24.....Anipall & Stephan Thernstrom
America in Black and White

Jan 26.....Prof. Mark Tushnet
Georgetown Law Center

Feb 11.....Elizabeth Fox-Genovese
Single Sex Education

Feb 19.....Judge Diarmuid O'Scannlain
US 61 App 9th Circuit

Feb 26.....Dean Tony Kronman
Yale Law School

Apr 2.....Prof. E. Allan Farnsworth
Columbia Law School

*James C. Ho and
Greg Jacob are second year
students at The Law School
and Members of the
Federalist Society.*

*The Federalist Forum
welcomes submissions from
all members of the Law
School community. Please
contact Steven J. Duffield
with suggested topics.*

Real Campaign Finance Reform

Free Speech. First and Foremost.

James C. Ho

Proponents of campaign finance reform assert a seemingly unassailable claim. Contributions corrupt the political system. To arrest this corruption, we must expand the laws that regulate campaign finance. The inevitable result of such expansion, however, is the end of free speech. **For truly radical but effective reform, we must reverse course and abolish all restrictions on campaign finance.**

The inescapable conflict between campaign finance law and the First Amendment results from two fundamental realities. First, politicians crave contributions because they are critical to running effective campaigns, and contributors comply because, given the enormous regulatory and taxing power of the state, political "access" is as valuable as any commodity. Supply will always meet demand.

Second, the history of campaign finance reform demonstrates the classic vicious cycle. Congress enacts a law restricting one area of campaign finance, and safe passage is found in another. Public agitation drives Congress towards new limits, and the cycle repeats until all expressive conduct is prohibited. Partial regulation leads inevitably to complete regulation.

The 1974 amendments to the Federal Election Campaign Act limit individual contributions to \$1,000 per candidate. Donors evade these limits, however, by funneling funds through various channels—friends, Buddhist monks, or political action committees (PACs). Reformers have responded simply by fixing tighter limits on PACs and hiring armies of enforcement officers to follow the money.

But federal law also imposes no limitations on "soft money" contributions to political parties for grass roots, party-building activities. Parties, of course, are just as susceptible to corruption as individual candidates. Moreover, party funds can easily be diverted to benefit candidates. Among the various Clinton campaign scandals is their use of soft money to fund ads which, under the guise of "party building" and "issue advocacy," praised the Administration and attacked Senator Dole by name. Soft money may be spent on advertising that does not expressly advocate a vote in favor of any particular candidate.

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Campaigning for Democracy.

Greg Jacob

Our entire governmental edifice is founded upon a simple democratic principle: we must either enact the will of the majority or resign ourselves to the tyranny of the minority. Government is only legitimate when it is by the consent of the governed. The governed, however, will never logically consent to anything other than a system of majority rule.

The legitimacy of our government, both philosophically and by the terms of its own self-conception, depends upon its ability to faithfully enact the will of the majority. If the government ceases to enact the will of the majority, if instead it consistently kowtows to minority interests at the majority's expense, then it loses its legitimacy, and with its legitimacy it loses its claim to our allegiance.

Campaign finance reform isn't about the regulation of speech; it's about the preservation of our democratic principles. The primary concern of the campaign finance reform movement is that the government seems to have been captured by a few relatively small minority interests with a lot of money. To the extent that this is true, and to the extent that the problem continues to escalate, the legitimacy of the government itself is increasingly called into question.

It is no coincidence that Americans have less confidence in the government's ability to represent their interests now than at any other point in history. And it is no coincidence that anti-government militant militia groups are becoming more and more prevalent across the United States. When the legitimacy of the government is called into serious question, its very stability begins to erode. We may not be at the verge of collapse, but why wait for the re-emergence of "the times that try men's souls" before we act?

The capture of the government by moneyed interests is clearly traceable to the campaign finance system. Senator Boxer of California recently estimated that she needs to raise \$10,000 per day throughout her six year term to be able to mount a credible reelection campaign. The astronomical sums which politicians need to raise to be competitive in today's political market come primarily from special interests that have a lot of money. Strangely enough, these special interests don't give the

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**Additional Speakers
(Dates TBA)**

Steven Brill

Founder of Court TV

Prof. Randall Kennedy

Harvard Law School

Wally Olson

Manhattan Institute

Judge David Sentelle

US Ct of App DC Circuit

Dr. Thomas Sowell

Hoover Institute

Kenneth Starr

Whitewater Indep Counsel

Prof. John Yoo

Boalt Hall Law School

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Ho—Protect the First Amendment—cont.

Again, the reformers' response is simply to crack down on soft money. The leading Congressional reform bill, sponsored by Senators McCain and Feingold, would do just that. Once again, however, the political market is a step ahead of the regulators.

Recent elections have seen increasing levels of "independent" spending - would-be donors directly purchase advertising or provide other in-kind campaign services. Because such spending is never touched by the candidate, independent expenditures fly beneath the radar of campaign finance law. Thus, greater restrictions on direct contributions result in greater independent spending. Pushing down on one side of the balloon just creates an ugly bulge on the other.

The McCain-Feingold bill combats independent expenditures by extending federal law to virtually all political expression, a cure far worse than the disease.

The Supreme Court in *Buckley v Valeo* (1976) recognized the constitutional freedom of political expression, and prohibited all regulations save those governing "express advocacy" - ads which explicitly request a vote for a particular candidate. As illustrated earlier, however, this narrow exception is easy to evade.

McCain-Feingold challenges *Buckley* by regulating any advertisement any "reasonable person" would understand as requesting a vote. Any first year law student recognizes that such legal phraseology gives wide discretion to the trier of fact, delegating a dangerous degree of control over the First Amendment. Regulators and judges would decide what is legitimate political discourse and what is impermissible advocacy, subject to state control. Where will they draw the line?

Rather than deny the obvious, some reformers admit openly their disdain of the First Amendment. Representative Gephardt, for example, proposes to amend the Constitution effectively to abolish the First Amendment with respect to political speech.

What is gained by sacrificing free expression? The law of unintended consequences cautions us never to assume success. Given intense donor demand for political access and insatiable candidate appetite for cash, who knows where the next loophole will appear? Like water flowing downstream, campaign money seems always to find a way. Increased regulation forces candidates to spend more time raising funds rather than getting to know and representing their constituencies.

We are not completely without hope, however. Representative Doolittle proposes to repeal all campaign finance law except one: mandatory disclosure. Greater access to information would empower voters and the media more easily to identify candidate supporters and monitor for undue influence. Campaign finance law actually hinders this process by encouraging obfuscation and money laundering.

But perhaps the most important lesson is that the campaign finance reform debate obscures the true cause of corruption. Politicians can coerce campaign contributions from ever-willing donors for one simple reason: the state intrudes upon so many areas of personal and commercial life that success is impossible without permission from the sovereign. Until we realize this fundamental truth, the campaign finance movement will continue to tilt at windmills at the expense of our basic freedoms.

Jacob—Campaigning for Democracy—cont.

money out of the goodness of their hearts. They expect political favors in return. And if the expected favors aren't forthcoming, the politician is appropriately punished by being deprived of further funding. The result: any candidate elected to office and seriously thinking about the prospect of seeking reelection virtually has to vote in accordance with the wishes of her special interest supporters.

There is no good reason why the campaign system has to work this way. From the perspective of the democratic system, campaigns are merely a useful means by which to distribute information to the electorate so that the electorate can make an informed choice. Democracy certainly demands that the public be fully informed about the candidates, and the process of distributing information does cost money.

But once the point of perfect information has been reached, further expenditures serve no useful democratic purpose. Indeed, such expenditures are wasteful, and, to the extent that they are allowed to escalate, they engender the vicious cycle by which moneyed special interests capture governmental influence.

As Mr. Ho points out, limits on campaign contributions are easily circumvented and are unlikely to solve the problem. A better solution might be to require candidates to finance their campaigns solely out of public funds. The funds would, of course, have to be sufficient for the candidates to fully inform the electorate of their respective platforms. As long as this requirement is met, however, several benefits would inhere in such a system at virtually no cost. Politicians would no longer be beholden to special interests for their campaign funds.

Not only would this encourage politicians to vote in accord with the interests of the majority, but it would also allow them to devote more time to the development of policy, which is, after all, what we elect them to do. And most importantly, it would restore legitimacy to a government in which those that it purports to govern have increasingly little confidence.

The primary cost which Mr. Ho suggests inevitably flows from campaign finance reform is the restriction of free speech. The presence of a publicly funded campaign system would not, however, preclude individuals or groups from addressing political issues of concern to them. It would be prudent to restrict them to "issue advocacy", so as to limit their influence over candidates, but such a system would still allow them to push political issues of importance to them.

I realize that there are still free speech issues which remain entangled in such a plan of campaign finance reform, and I am sensitive to the concerns raised by Mr. Ho. However, it must be remembered that the protection of free speech is simply a means to the end of achieving a stable and healthy system of majority rule.

The drafters of the First Amendment were primarily concerned that a tyrannical minority might obtain political supremacy by quashing all dissenting speech. The First Amendment is entirely subverted, when it is used by the minority as a shield to protect its bid for illegitimate control of the government.

We must jealously guard the protections of the First Amendment, but we need not be so inflexible as to allow democracy to be sold down the river as we look on.