

MONEY IN POLITICS

The League of Woman Voters of the United States (LWVUS) is now updating our position on campaign finance through study and consensus to consider First Amendment-political speech issues.

Accomplishing this requires member understanding and agreement about these issues. We are focusing on the extent to which political campaigns are protected speech under the First Amendment. The First Amendment has been at the center of the campaign finance debate since the Watergate years in the 1970s. A key provision says “Congress shall make no law . . . abridging the freedom of speech, or the press . . .”

Money in politics matters because the goal of campaigning is to convince voters, either for or against a candidate or issue. Thus, campaigning is ultimately about communication. In our modern age, this includes money and its effects on free speech. As we consider this issue, it is important to examine the connection between campaign, communication, free speech and money.

PURPOSE OF A CAMPAIGN FINANCE SYSTEM

A campaign finance system is intended to control and limit the money spent on an election campaign for the following reasons:

- protect the right of voters to know who is spending money to influence their vote.
- prevent corruption.
- ensure that unlimited spending does not give an unfair advantage to candidates and spenders.

Finally, there is a concern that the rise in spending corrupts representative government by downplaying the role of the voters and allowing for unfair competition, possibly leading to lower voter turnout.

Efforts to regulate money in elections go back to the Progressive Era with the passage of the Tillman Act in 1907, which banned campaign contributions from banks and corporations. The 1947 Taft Hartley Act banned contributions from unions. Revelations of financial abuses in the Watergate scandal led to amendments that significantly reworked the 1971 Federal Election Campaign Act. The 2002 Bipartisan Campaign Reform Act (BCRA), also known as The McCain-Feingold Act, dealt with the “soft money” loophole which allowed corporations, unions and individuals to make huge campaign contributions to political parties and “sham” issue ads that were in reality campaign ads masquerading as lobbying on an issue.

Since the 1970s, Justices of the Supreme Court have been unanimous in agreeing that regulating the financing of political speech raises First Amendment concerns because, in modern society, political speech is not limited to a man on a soapbox; it includes paid advertising, paid voter mobilization and other modern methods of communicating political messages. The League has a position in favor of protecting the individual rights guaranteed by the Constitution, including the free speech protections of the First Amendment.

When fundamental rights like freedom of speech and of the press are involved, the usual constitutional analysis asks three questions: 1) Is there a significant or compelling governmental interest that justifies some limitation; 2) is the limitation the appropriate or the least restrictive means of protecting that governmental interest; and 3) does the limitation apply too broadly, to situations where the governmental interest is not in play?

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In the campaign finance context, the disputes within the Supreme Court, as well as the American public, have focused on the first question: What are the significant or compelling governmental interests that justify some limitations on spending money to convey a candidate's, or anyone else's electoral message? The Supreme Court Justices have agreed that guarding against corruption is the compelling governmental interest that justifies campaign finance regulation. However, members of the Court have very different definitions of corruption.

LWVUS POSITIONS AND EFFORTS RELATED TO CAMPAIGN FINANCE REFORM

The overriding goal of the League is to ensure that government serves the interests of all the people, not just those (including, but certainly not limited to corporations) with money. The League has been a national leader on campaign finance reform since the 1970s.

The positions quoted below have been used by the League to address issues related to money in politics. The League's positions, along with extensive histories of their adoption and subsequent use, are found in its publication *Impact on Issues*, updated after each LWVUS Convention.

Position on Campaign Finance

The League of Women Voters of the United States believes that the methods of financing political campaigns should ensure the public's right to know, combat corruption and undue influence, enable candidates to compete more equitably for public office and allow maximum citizen participation in the political process (1974, 1982).

Position on Individual Liberties

The League of Women Voters of the United States believes in the individual liberties guaranteed by the Constitution of the United States. The League is convinced that individual rights now protected by the Constitution should not be weakened or abridged (1982).

Position on Citizens' Right to Know/Citizen Participation

The League of Women Voters of the United States believes that democratic government depends upon informed and active participation at all levels of government. The League further believes that governmental bodies must protect the citizen's right to know by giving adequate notice of proposed actions, holding open meetings and making public records accessible. (1984)

Position on Congress

The League of Women Voters of the United States believes that structures and practices of the U.S. Congress must be characterized by openness, accountability, representativeness, decision making capability and effective performance. (1972, 1982)

Using these positions, the League has worked toward the following goals: transparency in financing political campaigns and restraint of big money and its influence on elections and government. The League lobbied for the passage of the Federal Election Campaign Act (FECA) of 1971 and for the 1974 FECA amendments, which set contribution limits, established public financing for presidential elections and required disclosure of campaign spending.

Current work at the national level consists of:

- Working for new and effective rules by the IRS to ensure that 501(c)(4) organizations are not used for unlimited secret spending.

- Encouraging the President to appoint members of the Federal Election Commission (FEC) and seeking reform of the FEC
- Supporting all legislation addressing disclosure
- Participating in an amicus brief regarding *McCutcheon v. Federal Election Commission*

CORRUPTION AND RATIONALES FOR REGULATING CAMPAIGN FINANCE

Concern about political corruption has been a fundamental justification for campaign finance regulation for over 100 years. But it is relevant to point out that more than a century earlier, the Founders were very much concerned about limiting corruption when they debated about the best structure for a representative democracy. According to Zephyr Teachout, a scholar of Constitutional Law, the Founders used the term “corruption” to mean “excessive private interests influencing the exercise of public power,” ranging from when the political system operates to benefit private interests over the public interest to when a legislator accepts a bribe.

Various approaches to defining corruption and types or categories of corruption have been offered in court decisions and analyzed in legal scholarship. For example, Teachout identified five types of corruption: criminal bribery, inequality, drowned voices, a dispirited public and lack of integrity.¹ Thomas Burke characterized three types: *quid pro quo*, monetary influence and distortion.² Yasmin Dawood consolidated the various arguments about corruption and campaign finance into two categories, those related to abuse of power and those related to violations of political equality, but she recognized that both types of rationales can be applied to various corrupt activities.³

SUPREME COURT RULINGS ON CAMPAIGN FINANCE

Quid Pro Quo* Corruption - 1976 - *Buckley v. Valeo

In its 1976 landmark *Buckley v. Valeo* decision, a unanimous Supreme Court ruled that the First Amendment rights of candidates to get their messages to the public could not be curtailed by limits on their spending. But the Court said that limits on donations to candidates can be limited in order to prevent corruption or the appearance of corruption. The Court also said that truly independent spending in elections could not be curtailed. But if any spending was coordinated with a candidate, then it counted as a contribution to the candidate which could be limited. This structure of limits on donations but no limits on spending has governed campaign finance ever since.

Quid pro quo corruption continues to be an obvious justification for restricting campaign contributions. “*Quid pro quo*” (in Latin, “this for that”) refers to an exchange between a candidate and donor in which the candidate receives a personal gain (a contribution for election or re-election to office) from the “sale” of public power (a vote or other action that benefits the donor). This is often framed as a conflict of interest because an officeholder has a duty to act in the best interests of constituents, which overrides any agreement to follow the preferences of a donor. The Supreme Court specifically mentioned *quid pro quo* corruption as well as the appearance of *quid pro quo* in the *Buckley v. Valeo* (1976) decision, which supported restrictions on direct campaign contributions but not on campaign expenditures.

It is worth noting here that no one disagrees that bribery as direct payment or in the guise of a campaign contribution is corruption, and such direct exchanges should not be permitted. Bribery violates a number of criminal statutes and is typically prosecuted when discovered.

¹ Zephyr Teachout, 2014. *Corruption in America: From Benjamin Franklin’s Snuff Box to Citizens United*. Cambridge: Harvard University Press, p. 38.

² Thomas F. Burke, 1997. “The Concept of Corruption in Campaign Finance Law.” *Constitutional Commentary* 14, 127.

³ Yasmin Dawood, 2014. “Classifying Corruption.” *Duke Journal of Constitutional Law and Public Policy* 9, 103.

Undue Influence - 1990 - *Austin v. Michigan Chamber of Commerce*

A broader interpretation of corruption that has been accepted in support of the regulation of campaign contributions in past Supreme Court cases is distortion of the political process. Starting with the ideal that public policies should reflect the public interest and that officeholders should represent the interests of their constituents and the broad national interest, distortion is understood as favoring the interests of large campaign contributors and independent spenders when they conflict with the public interest or the best interests of constituents. The Court found that distortion can occur through processes of undue influence on candidates and officeholders by large donors in the 1986 *FEC v. Massachusetts Citizens for Life* and 1990 *Austin v. Michigan Chamber of Commerce* decisions. This was a “different type of corruption” than simple *quid pro quo* corruption which focuses on the candidates and elected officials. *Austin* recognized the distorting effect of big money on elections and the political system itself.

Undue Influence/Access - 2003 - *McConnell v. FEC*

In 2003, in *McConnell v. FEC* (2003), the Supreme Court upheld the key provisions of the BCRA. Justices Stevens and O’Connor spoke for the Court, recognizing “the Government’s interest in combating the appearance or perception of corruption engendered by large campaign contributions.” In *McConnell* the Court expanded the concept of undue influence to include undue access to officeholders by wealthy contributors as a legitimate threat to democratic political processes. The *McConnell* case was particularly notable in its documentation of evidence that wealthy donors did receive special access to influence officeholders. Over 100,000 pages of evidence included testimony from more than 200 current and former legislators, lobbyists, and business executives about the pernicious effects of large campaign donations.

Unlimited Spending Corporations & Non-Profits - 2010 - *Citizens United v. FEC*

In *Citizens United v. FEC*, decided in 2010, a 5 to 4 Supreme Court majority held that all forms of corporations – including non-profit organizations, trade associations and for-profit multi-national corporations -- as well as labor unions -- have a First Amendment free speech right to make independent campaign expenditures, just as individuals do. The majority emphasized its view that free speech rights do not depend on the identity of the speaker – whether corporate or individual.

The majority opinion in *Citizens United* stressed the view that independent expenditures do not corrupt political candidates or elected officials. Because independent expenditures are defined as ones not coordinated with any candidate or political party committee, the Court said that they cannot corrupt.

The *Citizens United* decision effectively overturned the Tillman Act, which had prevented direct corporate and union spending in elections for many decades. It also overturned the *Austin* decision and narrowly defined the corruption -- *quid pro quo* corruption -- that could justify limits on the First Amendment.

Justice Stevens wrote a dissent in *Citizens United*, opposing the idea that corporate money is not a corrupting influence. He attacked the majority’s absolutist views both on the First Amendment and on the meaning of corruption. He said, “In a variety of contexts, we have held that speech can be regulated differentially on account of the speaker’s identity, when identity is understood in categorical or institutional terms. The U.S. Government routinely places special restrictions on the speech rights of students, prisoners, and its own employees” among others.

The Court says that independent expenditures cannot corrupt because they are not coordinated with a candidate or campaign. With no restrictions on independent expenditures, Super PACS have stepped in to spend unlimited amounts in elections and to serve as vehicles for donors and candidates to bypass the contribution limits that apply to a candidate’s campaign. And weak rules have allowed many kinds of coordination – a candidate can even raise money for a Super PAC supporting his or her candidacy so long

as the candidate uses the right words to get around the law. So now, virtually every Presidential candidate has a Super PAC and candidates at every level want one in order to compete.

Unlimited Spending Individuals - 2014 - *McCutcheon v. FEC*

In *McCutcheon v. FEC* (2014), the same 5-4 majority of the Court struck down the aggregate contribution limitations of BRCA so long as a donor kept contributions to individual candidates within the act's limits. Reaffirming its view that the only permissible ground for limiting speech in the form of campaign contributions is quid pro quo corruption, the majority expressed confidence that limits on individual contributions were sufficient to protect against the danger of bribing an individual candidate or appearing to do so.

ARGUMENTS PRO AND CON FOR LIMITS ON CAMPAIGN FINANCE

Historically money has always been a part of the system.

Supporters of unlimited money in politics say that:

- Political communication informs the voters.
- Government should not regulate political speech.
- Just because a candidate takes contributions does not mean that as an elected official they will take orders from the contributor--especially if it is "independent" spending.

Opponents of big money in elections say that:

- There is a growing cynicism among the U.S. population based on the idea that democracy is now for sale.
- The large amounts of money spent on campaigns make candidates dependent on these dollars and responsive to their contributors and less likely to listen to "the people" – whose interest the Founders expected elected officials to represent.

MONEY IN POLITICS: ACTION IN THE STATES

State Level Regulations

While considerable media and public attention has been focused on campaign finance at the federal level, many campaign finance reformers have shifted their attention to the states as they recognize that the state and local levels are the arena where voters retain the most influence and where political action is possible.

States have enacted legislation addressing several areas including: disclosure; coordination; small donor funded elections; Pay-to-Play; and, oversight and enforcement – with oversight and enforcement as the necessary ingredients of all effective reforms. Laws governing campaign finance in the states are as varied as the states themselves. Post-election data since 2010 clearly reveal that Supreme Court decisions related to campaign finance have led to a torrent of cash flooding state and local elections and made campaign finance laws in many states vulnerable to legal challenge. It's important to note that the changes reach beyond legislative and congressional races to local elections. Some states have repealed or rewritten laws to comply with new federal rules, while others have chosen not to enforce laws.

Disclosure

Majority opinions of the Roberts Court in the relevant cases overturning campaign finance law rested on two, key assumptions: 1) that prompt disclosure of expenditures would allow voters to make informed decisions about issues, candidates and elected officials, and 2) that outside groups would operate

independently from campaigns and candidates as a hedge against the “corruptive threat” of money in elections. The reality has proven quite different.

The Supreme Court in *Citizens United* affirmed disclosure as a primary antidote to money in politics. Yet, disclosure is poorly regulated and is increasingly vulnerable to legal challenge as having a chilling effect on free speech. The Federal Election Commission (FEC) has the authority to compel disclosure, but has not acted. Likewise, Congress could pass disclosure legislation, but has failed to do so. This leaves action to the states.

Since 2010, a growing percentage of the money in elections comes from Super PACs and outside spending groups claiming ‘social welfare’ status. Over half of this outside money is not subject to donor disclosure requirements. There are no limits on the amount of money these groups can spend on elections as long as the outside money is not directly contributed to candidates or political parties and money spent is not done in direct coordination with candidates or parties.

Expanding and strengthening donor disclosure requirements continues to be one of the most viable and important areas for reform at the state level. With 35 states operating with disclosure laws that are less stringent than federal regulations, there is much room for improvement.

What Makes Disclosure Regulation Effective?

Effective disclosure regulations would include most to all of the provisions listed below. Please note that operationally, the use of “timely” in the first two bullets is intended to mean prior to elections and “in real-time.”⁴

- Timely reporting of contributions
- Timely reporting of expenditures
- Identification by the entity of responsible person & address
- Easy accessibility by the public through a searchable, campaign finance database and electronic filing system
- Whistle-blower protections
- Anonymous reporting of violations
- Reporting of gifts
- Contributor's employer & occupation
- Disclosure of top contributors of independent expenditures, electioneering communications and ballot question spending through TV, internet and print ads and identification of the individuals or entities who are the top contributors.

CONSENSUS QUESTIONS

PART I: Democratic Values and Interests with Respect to Financing Political Campaigns

1. What should be the goals and purposes of campaign finance regulation?

(Please respond to each item in Question 1.)

⁴ <http://sunlightfoundation.com/blog/2013/12/11/real-time-disclosure-one-simple-fix-for-a-more-informed-public/>

a. Seek political equality for all citizens.

Agree Disagree No consensus

b. Protect representative democracy from being distorted by big spending in election campaigns.

Agree Disagree No consensus

c. Enable candidates to compete equitably for public office.

Agree Disagree No consensus

d. Ensure that candidates have sufficient funds to communicate their messages to the public.

Agree Disagree No consensus

e. Ensure that economic and corporate interests are part of election dialogue.

Agree Disagree No consensus

f. Provide voters sufficient information about candidates and campaign issues to make informed choices.

Agree Disagree No consensus

g. Ensure the public's right to know who is using money to influence elections.

Agree Disagree No consensus

h. Combat corruption and undue influence in government.

Agree Disagree No consensus

2. Evaluate whether the following activities are types of political corruption:

(Please respond to each item in Question 2.)

a. A candidate or officeholder agrees to vote or work in favor of a donor's interests in exchange for a campaign contribution.

Agree Disagree No consensus

b. An officeholder or her/his staff gives greater access to donors.

Agree Disagree No consensus

c. An officeholder votes or works to support policies that reflect the preferences of individuals or organizations in order to attract contributions from them.

Agree Disagree No consensus

d. An office holder seeks political contributions implying that there will be retribution unless a donation is given.

Agree Disagree No consensus

e. The results of the political process consistently favor the interests of significant campaign contributors.

- Agree
- Disagree
- No consensus

OPTIONAL COMMENTS (250 word limit):

PART II: First Amendment Protections for Speakers and Activities in Political Campaigns

1. Many different individuals and organizations use a variety of methods to communicate their views to voters in candidate elections. Should spending to influence an election by any of the following be limited?

(Please respond to each item in Question 1.)

a. Individual citizens, including wealthy individuals like George Soros and the Koch Brothers.

- Spending banned
- Some spending limits
- Unlimited spending
- No consensus

b. Political Action Committees, sponsored by an organization, such as the League of Conservation Voters, Chevron, the American Bankers Association, and the International Brotherhood of Electrical Workers (IBEW), whose campaign spending comes from contributions by individuals associated with the sponsoring organization, such as employees, stockholders, members and volunteers.

- Spending banned
- Some spending limits
- Unlimited spending
- No consensus

c. For-profit organizations, like Exxon, Ben and Jerry’s, General Motors, and Starbucks, from their corporate treasury funds.

- Spending banned
- Some spending limits
- Unlimited spending
- No consensus

d. Trade associations, like the U.S. Chamber of Commerce, the American Wind Energy Association, and the American Petroleum Institute, from the association’s general treasury funds.

- Spending banned
- Some spending limits
- Unlimited spending
- No consensus

e. Labor unions, like the United Autoworkers and Service Employees International, from the union’s general treasury funds.

- Spending banned
- Some spending limits
- Unlimited spending
- No consensus

f. Non-profit organizations, like the Sierra Club, Wisconsin Right to Life, Coalition to Stop Gun Violence, American Crossroads, and Priorities USA, from the organization’s general treasury funds.

- Spending banned
- Some spending limits
- Unlimited spending
- No consensus

g. Non-partisan voter registration and GOTV (get out the vote) organizations and activities, like the LWV and Nonprofit Vote.

- Spending banned
- Some spending limits
- Unlimited spending
- No consensus

h. Political parties, like the Republicans, Libertarians, and Democrats.

- Spending banned
- Some spending limits
- Unlimited spending
- No consensus

i. Candidates for public office spending money the candidate has raised from contributors.

- Spending banned
- Some spending limits
- Unlimited spending
- No consensus

j. Candidates for public office spending their own money.

- Spending banned
- Some spending limits
- Unlimited spending
- No consensus

2. The press plays a major role in candidate elections through editorial endorsements, news coverage, and other communications directly to the public that are often important to the outcome. Should such spending to influence an election by any of the following be limited?

(Please respond to each item in Question 2.)

a. Newspapers, like the New York Times and the Wall Street Journal.

- Spending banned
- Some spending limits
- Unlimited spending
- No consensus

b. Television and other electronic media, like Fox News, CNN, MSNBC and CBS.

- Spending banned
- Some spending limits
- Unlimited spending
- No consensus

c. Internet communications, like Huffington Post, Breitbart, Daily Kos, and individual bloggers.

- Spending banned
- Some spending limits
- Unlimited spending
- No consensus

OPTIONAL COMMENTS (250 word limit):

PART III: Methods for Regulating Campaign Finance to Protect the Democratic Process

1. In order to achieve the goals for campaign finance regulation, should the League support?

(Please respond to each item in Question 1 a and b.)

a. Abolishing SuperPACs and spending coordinated or directed by candidates, other than a candidate’s own single campaign committee.

Agree Disagree No consensus

b. Restrictions on direct donations and bundling by lobbyists? (Restrictions may include monetary limits as well as other regulations.)

Agree Disagree No consensus

c. Public funding for candidates? Should the League support:

(You may respond to more than one item in Question 1 c.)

i. Voluntary public financing of elections where candidates who choose to participate must also abide by reasonable spending limits?

Agree Disagree No consensus

ii. Mandatory public financing of elections where candidates must participate and abide by reasonable spending limits?

Agree Disagree No consensus

iii. Public financing without spending limits on candidates?

Agree Disagree No consensus

2. How should campaign finance regulations be administered and enforced?

(You may choose more than one response for Question 2.)

a. By an even-numbered commission with equal representation by the two major political parties to ensure partisan fairness (current Federal Election Commission [FEC] structure)?

b. By an odd-numbered commission with at least one independent or nonpartisan commissioner to ensure decisions can be made in case of partisan deadlock?

c. By structural and budget changes to the FEC (e.g., commission appointments, staffing, security, budget, decision making process) that would allow the agency to function effectively and meet its legislative and regulatory mandates.

d. No consensus.

OPTIONAL COMMENTS (250 word limit):