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The Myth of Campaign Finance Reform

Bradley A. Smith

March 24, 2009, may go down as a turning point in the history of the campaign-finance reform debate in America. On that day, in the course of oral argument before the Supreme Court in the case of *Citizens United v. Federal Election Commission*, United States deputy solicitor general Malcolm Stewart inadvertently revealed just how extreme our campaign-finance system has become.

The case addressed the question of whether federal campaign-finance law limits the right of the activist group Citizens United to distribute a hackneyed political documentary entitled *Hillary: The Movie*. The details involved an arcane provision of the law, and most observers expected a limited decision that would make little news and not much practical difference in how campaigns are run. But in the course of the argument, Justice Samuel Alito interrupted Stewart and inquired: "What's your answer to [the] point that there isn't any constitutional difference between the distribution of this movie on video [on] demand and providing access on the internet, providing DVDs, either through a commercial service or maybe in a public library, [or] providing the same thing in a book? Would the Constitution permit the restriction of all of those as well?" Stewart, an experienced litigator who had represented the government in campaign-finance cases at the Supreme Court before, responded that the provisions of McCain-Feingold could in fact be constitutionally applied to limit all those forms of speech. The law, he contended, would even require banning a book that made the same points as the Citizens United video.

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There was an audible gasp in the courtroom. Then Justice Alito spoke, it seemed, for the entire audience: "That's pretty incredible." By the time Stewart's turn at the podium was over, he had told Justice Anthony Kennedy that the government could restrict the distribution of books through Amazon's digital book reader, Kindle; responded to Justice David Souter that the government could prevent a union from hiring a writer to author a political book; and conceded to Chief Justice John Roberts that a corporate publisher could be prohibited from publishing a 500-page book if it contained even one line of candidate advocacy.

In June, the Court issued a surprising order. Rather than deciding *Citizens United*, the justices asked the parties to reargue the case, specifically to consider whether or not the Court should overrule two prior decisions on which Stewart had relied: *Austin v. Michigan Chamber of Commerce*, a 1990 case upholding a Michigan statute that prohibited any corporate spending for or against a political candidate, and *McConnell v. Federal Election Commission*, the 2003 decision that upheld the constitutionality of the 2002 McCain-Feingold law. The Citizens United case was reargued on September 9, and a decision is pending. But however the Court rules, the debate over campaign-finance laws appears to have suffered a shock.

To anyone following the evolution of the campaign-finance reform movement, it should have been obvious that book-banning was a straightforward implication of the McCain-Feingold law (and the long line of statutes and cases that preceded it). The century-old effort to constrict the ways our elections are funded has, from the outset, put itself at odds with our constitutional tradition. It seeks to undermine not only the protections of political expression in the First Amendment, but also the limits on government in the Constitution itself—as well as the understanding of human nature, factions and interests, and political liberty that moved the document's framers.

By putting the point so bluntly before the Supreme Court, Malcolm Stewart may have inadvertently set off a series of events that could, in time, erode the claim to moral high ground upon which the campaign-finance reform movement has always relied. At the very least, his frankness invites us to consider the origins and consequences of that movement—and the implications of its efforts for some cherished American freedoms.

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THE MISCHIEFS OF FACTION

Concerns about the political influence of the wealthy have never been far from the surface of American political life. The effort to restrict political spending—with the twin goals of preventing corruption and promoting political equality—began in earnest in the late 19th century. But in order to understand that movement and the intense debate it spawned, it is necessary to look back even further—to the founding of the American republic.

Figuring out how to keep special interests under control was a dilemma at the core of the Constitutional Convention. James Madison's most original contribution to political thought may well be his effort, in the Federalist Papers, to demonstrate how the new Constitution would ensure that private interests could not seize control of the government and use its power for their private benefit. Federalist No. 10 in particular addressed the tendency toward, and the dangers of, a government controlled by what Madison termed "factions."

In that essay, Madison recognized that there will always be individuals and interests seeking to use the government to their own ends. His entire approach to government, after all, was based on the notion, expressed in Federalist No. 51, that government is "but the greatest of all reflections on human nature"—and that by nature, men are not angels. Because partiality, the ultimate cause of faction, was "sown into the nature of man," Madison argued in No. 10, the causes of faction could not be controlled in a free republic—at least not without "destroying the liberty that is essential to its existence." This, he quickly added, would be a cure "worse than the disease." Madison's approach to the problem was therefore not to limit the emergence of factions, but to control their ill effects and, where possible, even to harness them for good.

To achieve this end, the Constitution relied on three primary devices. One was the separation of powers within the federal government. In three of the Federalist Papers—Nos. 47, 48, and 49—Madison elaborated at length on how the separation of powers would protect liberty and, by implication, prevent "factions" (what we would call special interests) from gaining control of the government. The other two devices, federalism and the idea of enumerated powers, were to work in tandem. The creation of separate spheres of action for the various state and federal governments—and the sheer size of the republic—would make

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it difficult for factions to gain control of the levers of power. "[T]he society itself will be broken into so many parts, interests, and classes of citizens," wrote Madison in Federalist No. 51, "that the rights of individuals, or of the minority, will be in little danger." Because the federal government would concern itself only with matters of "great and aggregate interests"—such as national defense, foreign policy, and regulation of commerce between the states—factions would be limited to minor squabbles of local concern, where they could do relatively little harm. The idea, then, was not to limit the freedom of factions, but to divide and limit the power of government itself so that factional interests could not dominate American politics. And the very fact of the multiplicity and diversity of factions would be a limit on the power of governing majorities.

Of course, a fourth bulwark was soon added: the Bill of Rights, and in particular the First Amendment. The First Amendment was in part a reflection of Lockean principles of natural rights. In Cato's Letters—which constitutional historian Clinton Rossiter has called "the most popular, quotable, esteemed source of political ideas in the colonial period"—John Trenchard and Thomas Gordon wrote that freedom of speech was "the right of every man." But the First Amendment guarantees of free speech, assembly, and press were not seen purely as protections against government encroachment on natural rights. Rather, as political scientist John Samples notes, the founders believed that "the liberty to speak would force government officials to be open and accountable." During the crisis over the Alien and Sedition Acts in the early years of the new republic, Madison himself noted that the "right of freely examining public characters and measures, and of communication...is the only effectual guardian of every other right." As Samples argues, these founders realized that for "knowledge to inform politics and decision making, it must be publicly available. If the government suppresses freedom of speech, it prevents such knowledge from becoming public." Thus, freedom of speech was seen as both an individual liberty and a means of advancing the public interest.

Despite these protections, spending on political campaigns was often a source of concern in antebellum America, especially after the rapid expansion of the franchise and the rise of mass campaigns for the presidency and other offices. In 1832, the Bank of the United States spent approximately $42,000—the equivalent of about a million dollars

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today, in inflation-adjusted terms — to try to defeat Andrew Jackson, who was seeking to revoke the bank's charter. With the growth of industry in the aftermath of the Civil War, political spending began to rise rapidly — and corporations became an important source of campaign funding. It has been estimated that by the campaign of 1888, the national Republican Party and its state affiliates were receiving 40 to 50% of their campaign funds from corporations (which benefited from high tariffs supported by the GOP). Democrats, though usually poorer, had their own financial titans — such as banker August Belmont and later his son, August Belmont, Jr., who could be counted on for at least $100,000 (nearly $2 million in inflation-adjusted terms) in just about every campaign in the last half of the 19th century.

But even as money was becoming more important to campaigns, the Constitution's limits on government power (which, in the view of the framers, would also limit the power of factions to manipulate public policy) began to fall out of favor in some important quarters. Beginning in the late 19th century, the influential Progressive movement launched a sharp critique of the founders' notions of enumerated powers and limited government, and even federalism and the separation of powers. Progressive theorists such as Herbert Croly and Columbia University law professor Walter Hamilton railed against the constraints that the Constitution placed on government power. Hamilton argued that the Constitution was "outworn" and "hopelessly out of place." Croly argued for the need to "overthrow" the "monarchy of the Constitution." Eltweed Pomeroy — a New Jersey glue manufacturer who became prominent as an author and the leader of the National Direct Legislation League — argued that "representative government is a failure," and sought ways to bypass the checks and balances of the constitutional system. In short, the Progressives' goal was a more energetic, less restrained government, which they believed was necessary to meet the demands of a modern industrial society.

It was in this context of hostility to federalism, checks and balances, and limited government that the modern drive to restrict political speech emerged. It started not as an effort to protect our constitutional arrangements from factions that would overpower them, but rather an effort to overcome our constitutional limits on the power of government. It was also intended to overcome the loud, messy, unpredictable democratic process, so as to empower a more "elevated" vision of government.

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At the 1894 New York state constitutional convention, the progressive Republican icon Elihu Root called for a prohibition on corporate political giving. "The idea," said Root, "is to prevent...the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests against those of the public." Root explained that he was concerned about "the giving of $50,000 or $100,000," amounts equal to roughly $1.2 or $2.4 million today. His effort ultimately failed to change the laws in New York—but it did effectively launch the modern movement to limit campaign contributions and speech.

THE PARTY OF SELF-INTEREST

At the same time that Root's speech gave rise to a movement, it also pointed to one of that movement's fundamental weaknesses. Legal historian Allison Hayward of George Mason University Law School argues that Root's real objective was less to secure passage of his proposal than to score partisan points against the Democrats (whose leaders were then being grilled for accepting bribes from the Sugar Trust). Thus, the movement was born less from noble ideals of good government than from ignoble motives of partisan gain.

This has remained a fundamental dilemma for the "reform" movement, as the century-old effort to restrict and regulate campaign spending has come to be known. If the problem is that venal legislators are betraying the public trust in exchange for campaign contributions, why would we expect them not to be equally motivated by base impulses when passing campaign-finance legislation? Wouldn't the ability to control political speech empower the faction that wields it, rather than constraining the power of all factions? A review of the evidence suggests this concern is well founded.

After Republican William McKinley won the presidential election of 1896 with corporate support organized by the legendary political strategist Mark Hanna, the Democratic-controlled legislatures of Missouri, Tennessee, and Florida (three states that had voted for McKinley's opponent, William Jennings Bryan), as well as the legislature in Bryan's home state of Nebraska, passed bills prohibiting corporate spending and contributions in state races. Even if one accepts that the authors of

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these state bans were sincere in their belief that limiting the speech of McKinley and his allies was in the public interest, it is still easy to recognize the danger of regulators' mistaking their partisan advantage for the public good.

The first federal law in this arena, passed in 1907, was also a ban on corporate contributions to campaigns. The law was dubbed the Tillman Act, after its sponsor, South Carolina senator "Pitchfork Ben" Tillman. Tillman wrote and said little of his motives for sponsoring the ban on corporate contributions, but he hated President Theodore Roosevelt and appears to have wanted to embarrass the president (who had relied heavily on corporate funding in his 1904 election campaign). Tillman's racial politics also clearly contributed to his interest in controlling corporate spending: Many corporations opposed the racial segregation that was at the core of Tillman's political agenda. Corporations did not want to pay for two sets of rail cars, double up on restrooms and fountains, or build separate entrances for customers of different races. They also wanted to take advantage of inexpensive black labor, while Tillman sought to keep blacks out of the work force (except as indebted farm laborers).

Corporations supported Republicans, and Tillman — a Democrat, like most post-war Southern whites — often bragged of his role in perpetrating voter fraud and intimidation in the presidential election of 1876 in order to overthrow South Carolina's Republican reconstruction government. It is clear, then, that Tillman was no "good government" reformer; and far from being born of lofty ideals, federal campaign-finance regulations were, from their inception, tied to questionable efforts to gain partisan advantage.

Within a few years of the Tillman Act, in 1911, came "publication" laws requiring disclosure of campaign contributors and limits on campaign expenditures. These were followed by the Federal Corrupt Practices Act of 1925, aimed at tightening the Tillman Act's limits on corporate donations. In 1943, the Smith-Connally Act prohibited contributions to candidates by labor unions. In 1947, Congress extended the ban on corporate and union contributions to cover "expenditures" made directly to vendors in behalf of campaigns, rather than contributed to candidates or parties.

While these laws influenced the way in which groups and individuals participated in politics, they did little to stem the overall flow of money into campaigns, due to weak enforcement mechanisms and various

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loopholes that could readily be exploited. The Federal Election Campaign Act, passed in 1972 and substantially amended in 1974, sought to address these problems by creating the most comprehensive set of regulations in history and an independent agency, the Federal Election Commission, to enforce the law.

The FECA maintained the ban on corporate and union contributions and expenditures, instituted a detailed system of reporting on contributions and expenditures, and placed limits on contributions and expenditures by individuals, including any expenditure "relative to" a federal candidate. Individual contributions to candidates were limited to $1,000 (a limit that has since been raised to $2,400), and contributions to Political Action Committees were capped at $5,000. PACs, in turn, were limited to contributing $5,000 to candidates. The law also limited total giving in an election cycle (no person may give more than $115,500 over two years to candidates and PACs combined), and placed a host of limits on the sizes of various other contributions.

The Supreme Court pulled back some of these limits in the 1976 case *Buckley v. Valeo*, holding that FECA's limits on expenditures made independently of a candidate violated the First Amendment. The decision further confined regulation so that it covered only expenditures that "expressly advocated" the election or defeat of a candidate, using specific words such as "vote for" or "vote against." This allowed for heavy spending on "issue ads" that might criticize or praise a candidate but stop short of expressly urging a vote one way or the other.

The 2002 McCain-Feingold law attempted to cut off this spending, which became known as "soft money." Among its many provisions, McCain-Feingold prohibited political parties from accepting any unregulated contributions, and prohibited corporate or union spending on any cable, broadcast, or satellite communication that mentioned a candidate within 30 days of a primary or 60 days of a general election. The law applied to non-profit membership corporations, such as the Sierra Club or the National Rifle Association, as well as to for-profit corporations. This is the law that Citizens United is alleged to have violated.

Even this account understates the complexity of the law. In an amicus brief filed in the Citizens United case, eight former FEC commissioners note that the FEC has now promulgated regulations for 33 specific types of political speech, and for 71 different types of "speakers." The statute and accompanying FEC regulations total more than 800 pages; the

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FEC has published more than 1,200 pages in the *Federal Register* explaining its decisions; and it has issued more than 1,700 advisory opinions since its creation in 1976.

Considered in detail, each step in the effort to limit campaign spending turns out to advantage the party that sought it. If its own numbers are insufficient to pass the legislation (as was the case with McCain-Feingold in 2002), then it seeks to broaden its base by adding incumbent-protection sweeteners to attract enough members of the opposing party to create a bipartisan majority. John Samples notes that McCain-Feingold drew most of its support from Democrats — who, he argues, saw long-term electoral disaster in the growing Republican fundraising edge, which was increasing after Republicans won the presidency in 2000. But to gain a legislative majority, the minority Democrats had to gain Republican votes; Samples finds that the Republicans who supported McCain-Feingold were, by and large, those most in danger of losing their seats. For them, the incumbent-benefit protections of the law made it irresistible.

Samples makes the Madisonian observation that "politicians use political power to further their own goals rather than the public interest.... Campaign finance laws might be, in other words, a form of corruption." Noting that "scholars date the largest decline in congressional electoral competition from 1970" and that the Federal Election Campaign Act — the foundation of modern campaign-finance law — was passed in 1972, Samples points out that "the decline in electoral competition and the new era of campaign finance regulation are virtually conterminous."

This is no accident. Since the passage of the FECA, the average incumbent spending advantage over challengers in U.S. House races has soared from approximately 1.5-to-1 to nearly 4-to-1. Incumbents begin each cycle with higher name recognition and a database of past contributors, making it easier to raise more money through small contributions from more people. They also typically make the decision to run earlier than challengers do — since a challenger often waits to see if the incumbent will run before making his choice — so they have more time to raise small contributions. And because campaign-finance regulations essentially require that candidates fill their coffers in small increments, the law clearly advantages the incumbents who passed it.

The effect of campaign-finance regulations has therefore been to help the people who passed them and to strengthen special interests, rather

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than to cleanse American politics of the influence of self-interested factions. Even the well-meaning reformers, it appears, have failed at their stated goals.

A FAILURE IN PRACTICE

Campaign-finance reform has not managed either to promote political equality or prevent corruption. And data show that one reason campaign-finance regulations are of little value in attacking corruption is that contributions simply don't corrupt politicians. In a 2003 article in the *Journal of Economic Perspectives*, three MIT scholars — Stephen Ansolabehere, James Snyder, Jr., and John de Figueiredo — surveyed nearly 40 peer-reviewed studies published between 1976 and 2002. "[I]n three out of four instances," they found, "campaign contributions had no statistically significant effects on legislation or had the 'wrong' sign — suggesting that more contributions lead to less support." Given the difficulty of publishing "non-results" in academic journals, the authors suggested in another paper, "the true incidence of papers written showing campaign contributions influence votes is even smaller." Ansolabehere and his colleagues then performed their own detailed study, which also found that "legislators' votes depend almost entirely on their own beliefs and the preferences of their voters and their party," and that "contributions have no detectable effects on legislative behavior."

Truly corrupt legislators will, after all, be lured by the prospect of personal financial benefits, not merely holding office (since most legislators, at least at the congressional level, could make more money doing other things). Those on the recent who's-who list of corrupt politicians were all brought down by their love of money: Louisiana Democratic congressman William Jefferson was caught with $90,000 in bribe money stashed in his freezer; Ohio's Bob Ney enjoyed an all-expenses-paid golf outing in Scotland on the dime of disgraced lobbyist Jack Abramoff, and accepted thousands of dollars in gambling chips from a foreign businessman; California's Duke Cunningham solicited bribes and bought, among other things, a yacht; and Illinois governor Rod Blagojevich sought lucrative positions on corporate boards for himself and his wife. These politicians were corrupted by money and gifts given directly to them, not by funds provided to pay for pamphlets and ads.

Most legislators run for office because they have strong political beliefs, and they are surrounded most of their days by aides and

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constituents with similarly strong beliefs. On reflection, far from being counterintuitive, it seems only logical that legislators would not want to betray their political principles — or those of the electorate — for a campaign contribution. After all, votes — not dollars — are what ultimately get put into ballot boxes. And it would make little sense to anger one's constituents for a contribution that can only be used to try to win those constituents back.

By insisting that campaign contributions corrupt members of Congress and the legislative process despite the repeated failure of dozens of systematic studies to find any evidence of such corruption, reform advocates ask us to set aside important speech rights without proving the need for doing so. Their assumption that the sheer scope of campaign spending somehow proves that our system is corrupted simply has no basis in evidence — and fails entirely to keep political spending in perspective. Total political spending in the U.S. in 2008 — for state, local, and federal races — amounted to approximately $4.5 billion. By comparison, the nation's largest single commercial advertiser, Proctor & Gamble, spent about $5 billion on advertising in the same year.

The second widely stated goal of "reform" is to promote political equality. Reformers argue that some people and organizations have more money to spend on political activity than others do, and that it is unfair to allow this discrepancy to give the wealthy a major advantage. But inequality is not unique to money: Some people have more time to devote to political activity, while others gain political influence because they have a special flair for organizing, speaking, or writing. It is not clear how political equality is enhanced when a Harvard law student can spend his summer volunteering on a campaign while a small-business owner must spend his working.

In the political arena, money is a means by which those who lack talents or other resources with direct political value are able to participate in politics beyond voting. It thus increases the number of people who are able to exert some form of political influence. Limitations on monetary contributions therefore elevate those with more free time — such as retirees and students — over those (like most working people) who have less time, but more money. Such regulation also favors people skilled in political advertising over those skilled in growing corn or building homes; it favors skilled writers over skilled plumbers; it favors those, such as athletes and entertainers, whose celebrity gives them a public

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megaphone over people like stockbrokers and investors, who lack a public platform for their views. And this is before we arrive at the influence of media and other elites. Under the rules established by the "reform" regime, editorial-page editors, columnists, and talk-show hosts may endorse candidates — but others may not pay to take out an ad of equal size or length to explicitly endorse their candidates.

Easing the restrictions on campaign contributions would not constrain any of these other forms of political support. Rather, allowing more contributions simply permits more people to participate in the system — thus diffusing influence, rather than concentrating it. Campaign-finance reform, then, actually *undermines* the effort to promote equal access to the political arena.

Campaign-finance reform hasn't succeeded in achieving various secondary goals often attributed to it, either. For example, the McCain-Feingold law included the "Stand by Your Ad" provision, which now requires candidates for federal office to state in each ad: "I'm So-and-So, and I approved this message." The idea was that forcing candidates to take direct responsibility for what they say would reduce negative advertising. Of course, it's worth questioning whether negative advertising *should* be reduced: As Bruce Felknor, the former head of the Fair Political Practices Committee, observed as far back as the 1970s, "without attention-grabbing, cogent, memorable negative campaigning almost no challenger can hope to win unless the incumbent has been found guilty of a heinous crime." But even leaving this question aside, the provision has failed miserably to curb negative campaigning. In 2008, for example, researchers at the University of Wisconsin found that more than 60% of Barack Obama's ads, and more than 70% of ads for John McCain — that great crusader for restoring integrity to our politics — were negative. Meanwhile, the required statement takes up almost 10% of every costly 30-second ad — reducing a candidate's ability to say anything of substance to voters.

Some also argue that reform will reduce the amount of time elected officials must spend fundraising, thus allowing them to devote more time to their official responsibilities. It turns out, though, that the campaign-finance regulations themselves are the primary reason for the extensive time spent fundraising. Raising large amounts of money in small contributions is much more time-consuming than raising fewer large contributions.

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Given these circumstances, it is almost impossible to argue that campaign-finance reform has improved government. *Governing* magazine — in connection with the (pro-campaign finance reform) Pew Charitable Trusts — regularly ranks state governments on the quality of their management. In both of *Governing*'s last two studies, in 2005 and 2008, Utah and Virginia were ranked the best-governed states in the nation. Utah and Virginia also tied for first place in the first *Governing* survey, from 1999, and Utah ranked first in the second study in 2001. What do these two states have in common? Among other things, they appear on the short list of states that have no limits on campaign spending and contributions. Meanwhile, states such as Arizona and Maine — which have enacted full taxpayer financing of their state races — score unimpressive marks. In terms of management, *Governing* ranked Arizona in the middle of the pack, tied for 14th with 17 other states. Maine was ranked next to last — ahead of only New Hampshire. This alone does not prove an inverse relationship between campaign-finance laws and good governance, of course, but it does help to show the absence of a direct relationship. At the very least, campaign-finance restrictions do not seem to improve government.

As campaign-finance reform has failed to achieve its goals, it has also exacted serious costs. Studies have shown that political spending helps voters to learn about candidates, to locate them on the ideological spectrum, and to be better informed about issues and contests. Reducing the amount that may be spent, and constraining the ways it may be used, can thus hurt the quality of political discourse. More important, the laws involve serious restrictions on the exercise of fundamental rights.

RESTRICTING RIGHTS

For years, advocates of campaign-finance regulation have worked to establish a reputation as plucky underdogs: the nation's moral conscience, fighting the good fight against powerful special interests. They did this even as the leading reform groups spent some $200 million in the 1990s and early in this decade to pass the McCain-Feingold bill. In addition to liberal donors like the Pew Charitable Trusts, the Carnegie Foundation, and the Joyce Foundation, the groups' financial backers included several large corporations and firms, among them Bear Stearns, Philip Morris, and Enron. Yet somehow the reformers successfully branded their opponents as the purveyors and defenders of

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a corrupt system, bent on protecting it for personal gain. This gambit won the reformers some moral authority, which they wielded to great effect — making deep inroads with Congress, the press, and the public.

This is why the unexpected turn in the oral argument of the Citizens United case caused such a stir (and such concern among campaign-finance-reform advocates). Americans, like most free people, react with visceral disgust to the notion of banning books. It is seen as a fundamental violation of the freedom of speech and the open exchange of ideas. To equate campaign-finance reform with book-banning is to threaten the moral high ground of the case for campaign-finance limits. Ceding that high ground would be very costly for reformers, since their efforts have produced so little in the way of demonstrable results.

But there is simply no question that restricting the freedoms guaranteed in the Bill of Rights — no less than side-stepping the limits on government power established by the Constitution itself — is inseparable from the movement's goals. Restrictions on campaign contributions and spending affect core First Amendment freedoms of speech, press, and assembly. While the Supreme Court has quite correctly never held that "money is speech," it has recognized, equally correctly, that limiting political spending serves to limit speech (by restricting citizens' ability to deliver their political messages). In fact, only one of the 19 Supreme Court justices to serve in the past 30 years — John Paul Stevens — has ever argued that political campaign and expenditure limits should not be treated as First Amendment concerns. Those who doubt that basic constitutional rights are at stake should imagine how they would react if the Supreme Court were to interpret the free exercise clause as allowing the faithful to hold their religious beliefs, but not to spend money to rent a church hall, purchase hymnals, or engage in church missions. Presumably, the move would be seen as much more than a mere regulation of property.

These limits on expression do not affect only wealthy donors or prominent candidates. On the contrary: Groups without a broad base of support are the ones that rely most heavily on large donors to make their voices heard. Almost by definition, political minorities, newcomers, and outcasts will find it harder to reach enough people to raise the money they need through many small contributions. Their base of support is simply too narrow. One can analogize the process to that of raising capital in financial markets: If no investor could put more than $5,000

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into a company, large-scale IPOs would become a thing of the past. Established companies might be able to raise large amounts of capital from tens of thousands of small investors, but capital-intensive start-ups would be doomed.

So it is with political entrepreneurs, who would get nowhere without large donors. In the 1990s, for example, large-scale spending by Ross Perot gave voice to millions of Americans who were concerned that the major parties were failing to address the national deficit. Perot's spending did not "drown out" ordinary citizens, but rather helped them to be heard. In 2004, early contributions from a few big donors to the Swift Boat Veterans for Truth allowed the group to get its message on the air at a time when the national media were ignoring it. Once the group's first ads were seen by the public, the organization was bombarded with hundreds of thousands of small donations — and of course millions more supported or were influenced by the group's message. Similarly, large contributions by George Soros to MoveOn.org gave the organization the ability to contact millions of Americans and develop one of the most phenomenal grassroots political machines in American history.

Not surprisingly, it is often upon the most authentically grassroots candidacies and campaigns that the burden of regulation weighs heaviest. For example, in 2006, a group of neighbors in the unincorporated community of Parker North, Colorado, joined together to fight annexation into the neighboring city of Parker. Because they printed yard signs, made copies of a flyer, and formed an e-mail discussion group, they were charged with operating as an unregistered political committee. Three years later, their case remains entangled in the courts. And when Mac Warren ran for Congress in Texas in 2000, he spent just $40,000 on his campaign — roughly half of it his own money. All of his campaign materials contained the name and address of his campaign committee. But two pieces of literature failed to contain the required notice that the literature was paid for by the committee — and for that omission, Warren's long-shot campaign was fined $1,000 by the Federal Election Commission.

WORSE THAN THE DISEASE

As Madison understood, some people will always try to use government for their private aims. But with the Madisonian restraints on government rent-seeking largely discarded, campaign-finance regulation

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becomes a futile and misguided effort—one that, as Madison argued, is not only bound to fail, but also bound to make matters worse.

A classic example is the Tillman Act and its ban on corporate contributions. The law was easily evaded, it turns out, by having corporations make "expenditures" independently of campaigns, or by having executives make personal contributions reimbursed by their companies. And when the Tillman Act was extended to include unions in 1947, unions and corporations formed the first political action committees to collect contributions from members, shareholders, and managers to use for political purposes.

Later, when the Federal Election Campaign Act imposed dramatic contribution limits, parties and donors discovered "soft money"—unregulated contributions that could not be used directly for candidate advocacy, but could be used for "party-building" activities. Such party-building activities soon came to include "issue ads"—thinly veiled attacks on the opposition, or praise for one's own candidates—that stopped just short of urging people to vote for or against a candidate (instead typically ending with "Call Congressman John Doe, and tell him to support a better minimum wage for America's workers"). When the McCain-Feingold bill banned soft money, the parties—especially the Democrats—effectively farmed out many of their traditional functions to activist groups such as ACORN and MoveOn. When McCain-Feingold sought to restrain interest-group "issue ads" by prohibiting ads that mention a candidate from appearing within 60 days of an election, groups responded by running ads just outside the 60-day window. The National Rifle Association responded by launching its own satellite radio station to take advantage of the law's exception for broadcasters. Citizens United began to make movies.

Preventing this type of "circumvention" of the law has been a fixation of the "reform community" from the outset. Yet each effort has led to laws more restrictive of basic rights, more convoluted, and more detached from Madison's insights. Each effort also appears to be self-defeating, since the circumvention argument knows no bounds. As Madison would have appreciated, every time we close off one avenue of political participation, politically active Americans will turn to the next most effective legal means of carrying on their activity. That next most effective means will then become the loophole that must be closed.

This is how the Citizens United case found its way to the Supreme Court. When the case was reargued in September, solicitor general Elena

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Kagan — taking poor Malcolm Stewart's place at the podium — assured the Court that the government had never taken action against a book, and presumably never would. But in fact, after the election of 2004, the Federal Election Commission had conducted a two-year investigation of George Soros for failing to report as campaign expenditures the costs of distributing an anti-Bush book. The agency ultimately voted not to prosecute, but its authority to do so was never in question. And Kagan did not back away from the government's position that it had the authority to ban books should they, at some point, become a problem.

As the Supreme Court ponders whether campaign-finance restrictions assault Americans' First Amendment rights, academic champions of such "reform" efforts are laying the groundwork for yet more regulation. Legal scholars such as Harvard's Mark Tushnet, Ohio State's Ned Foley, and Loyola Law School's Richard Hasen — publisher of the "Election Law Blog" — have all argued that true reform will require open censorship of the press in order to assure political equality. Yale law professor Owen Fiss has argued that "we may sometimes find it necessary to 'restrict the speech of some elements of our society in order to enhance the relative voice of others,' and that unless the [Supreme] Court allows, and sometimes even requires the state to do so, we as a people will never truly be free."

Until *Citizens United*, such Orwellian newspeak was largely buried in obscure academic journals. Malcolm Stewart's sin was to state openly the implications of campaign-finance reform — and, in doing so, to strip away the veneer of "good government" and moral authority so carefully cultivated by reform advocates (and so important to their power). As a result, Stewart might have launched the beginning of the end for America's failed experiment to limit factions by destroying the liberty that allows for them in the first place. When the Supreme Court decides the case, it will have the opportunity to reassert the wisdom of Madison's deep insight into human nature — and to protect those liberties that, while they may make factions possible, also define the republic designed to contain them.

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