



# Public financing for campaigns is perfectly constitutional

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Are taxpayer subsidies for elections consistent with the First Amendment? Last week two of my favorite tech policy thinkers — my former Cato Institute colleague Jim Harper and copyright scholar turned campaign finance crusader Larry Lessig — had an exchange about Lessig's proposal for a "democracy voucher" to finance American campaigns. Lessig argues that the proposal was tailor-made to address libertarian objections to conventional campaign finance regulations. But Harper doesn't buy it. He thinks subsidizing political speech — even indirectly — runs afoul of the First Amendment.

Interestingly, Lessig's argument for the constitutionality of democracy vouchers runs directly parallel to the traditional libertarian argument for school vouchers. Liberals have long objected to school vouchers because they force secular taxpayers to subsidize religious instruction with which they might disagree. Libertarians counter that because it's parents, not the government, who are deciding how the money will be spent, voucher programs don't run afoul of the First Amendment's ban on the establishment of religion.

The same argument seems to apply to democracy vouchers. True, if you're a Republican, you might be miffed to see your tax dollars flowing to Democratic campaigns. But ultimately, the amount of money that goes to Democrats, Republicans, Libertarians, and other political parties is controlled by individual voters, not the government.

Harper counters that "school vouchers promote education, sometimes religious. Campaign vouchers never don't promote political speech." But this seems like an awfully narrow distinction to draw. Democracy vouchers only go to candidates if voters choose to use them, just as school vouchers only go to religious schools if parents choose to use them that way. In both cases, the practical result is that taxpayer funds subsidize expressive activities some taxpayers find objectionable.

I think the more fundamental issue is that liberals like Lessig think the corrupting influence of campaign donations is a big problem and libertarians like Harper don't. The First Amendment has a lot of ambiguity, so people inevitably read their own policy preferences into it. Libertarians

think school choice is a good idea, so they're inclined to read the First Amendment in a way that permits it. Liberals think school choice is a bad idea, so they read the First Amendment in a way that prohibits it. On the issue of democracy vouchers, liberals and libertarians have opposite policy views and so they wind up reading the Constitution in opposite ways.

It's worth mentioning that the Supreme Court has taken the permissive view in both cases. The court upheld the constitutionality of school vouchers in 2002. And it has held since 1976 that public financing of campaigns "furthers, not abridges, pertinent First Amendment values."

The Supreme Court's ruling in *Citizens United v. FEC* essentially held that spending money on election ads is a form of free speech, and thus there's little Congress can do to limit it. In contrast, direct donations to political candidates could remain regulated and restricted. This created an incentive for moneyed groups and individuals to affect elections by spending on their own election ads rather than donating to candidates or parties.

At issue in *Citizens United v. FEC* was an existing law that restricted corporate and union spending on election season ads. They could not pay for ads with their general funds, but instead had to set up PACs that would be regulated by the FEC, and spend through those. In *Citizens United v. FEC*, the court ruled that this restriction was unconstitutional. The court held that corporations and unions have a First Amendment right to freedom of speech, and the prohibition on spending their own money on elections was effectively muzzling them.

The court did clarify that corporations are still banned from donating directly to candidates — because when money is handed over to politicians, that theoretically presents a greater danger of corruption. The court also stated that Congress could still require disclosure of outside groups' election spending. But no limits on the *amount* of outside spending are permissible.