



Freer Political Speech Strengthens Our Democracy

Ilya Shapiro

October 8, 2013

As the Supreme Court held in the key free-speech case of *Roth v. United States* (1957), the First Amendment broadly protects political expression in order to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Election-campaign contributions and expenditures facilitate such discourse and are thus vital to our democracy. Yet our current laws – including the aggregate-contribution limits at issue in *McCutcheon v. FEC* – stifle political speech and inhibit the unfettered exchange of ideas. While someone can spend any amount on his own political advocacy, the amount he can donate to political parties and candidates is strictly limited by laws that the Supreme Court upheld in the seminal campaign-finance case of *Buckley v. Valeo* (1976).

Buckley correctly held that spending money is a form of speech protected by the First Amendment. But the court only found caps on expenditures – and not on the contributions that enable them – to be unconstitutional, reasoning that "while contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." While the court has since abandoned the concept of "speech by proxy," the contribution-expenditure distinction remains. That distinction has been the target of persistent criticism and its underlying logic was repudiated in subsequent decisions.

Even in *Buckley* itself, Chief Justice Burger argued that contributions and expenditures are "two sides of the same First Amendment coin." Justice Thomas now maintains that *Buckley*'s framework should be replaced with "strict scrutiny" of all campaign-finance restrictions, such that the government must demonstrate a compelling interest for limits on individual rights and closely tie its actions to that interest.

Buckley's contribution/expenditure distinction also causes various practical issues. Politicians spend inordinate time fundraising rather than legislating. Money has been pushed away from political parties and towards advocacy groups, leaving the former with relatively fewer resources and muddled messaging. Most importantly, the scope of the constitutional right to engage in political speech changes at the government's whim. Just like banning printing presses or computers would violate the First Amendment, so does allowing the government to approve the size and scope of political contributions.

Nor does "stare decisis" – the idea that precedents should sometimes be respected even if wrong because society has relied on them – require preserving contribution limits. Buckley's distinction is of relatively recent constitutional vintage and has produced an arbitrary, irrational, and increasingly unworkable system. Nobody "relies" on having less freedom of speech.

Free speech fosters political change, holds officials accountable and sustains a healthy democracy. Not only would liberating political speech energize our democracy and reduce corruption, it would be consistent with the Constitution.