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Divorcing Voters, Again

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Supporters predicted that the McCain-Feingold Act would make elections more competitive and voter-friendly, as well as reduce corruption. However, past federal and state regulations have merely succeeded in protecting incumbents from competition and have divorced voters further from the political process.

To supporters, McCain-Feingold merely fills in the loopholes in previous campaign-finance laws. Yet, like other government attempts at central planning, the law is incredibly complicated and results in unintended consequences. When the act was challenged on constitutional grounds in a lawsuit filed earlier this year, a special three-judge district court felt it necessary to issue an unheard of 1,600-page opinion. To try to sort things out, the Supreme Court held a special hearing on the case, *McConnell v. Federal Election Commission*, on September 8, 2003, three weeks before its new term was scheduled to begin. The four hours of oral argument made it the Court's longest hearing since the last major campaign-finance law was argued in *Buckley v. Valeo* in 1975.

The new law seems to cover just about everything. It restricts how much parties can give to candidates and what can be given to political parties. It bans contributions by minors. Limits on individual contributions are going up, but they are now adjusted by a formula that penalizes wealthy candidates from spending their own money. The law limits or bans advertising by outside groups, when the group mentions the name of candidates for federal office within sixty days of a general election or within thirty days of a primary. Even politicians' appearances at fundraisers are regulated.

Supporters predict that these rules will reduce money's role in politics and make elections more competitive, reduce corruption, and encourage more people to vote. Of course, this is what was predicted for past campaign-finance regulations. But instead of getting better, things have gotten worse.

Entrenching Incumbents

Consider the most obvious unintended consequence of existing rules: entrenching incumbent presidents.

Under the current rules, presidential candidates who accept federal funds will be limited to some spending $40 million in the 2004 primaries and $70 million in the general-election campaign.

Democratic candidates, who must fight each other for their party's nomination, will likely reach the primary spending limit by March, when their battle will be over, even though the convention that sets the general-election fight in motion begins in August.

President George W. Bush, who faces no opposition, can then use his "primary campaign" funds against whichever Democrat wins the

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nomination—that is, to attack from March to August an opponent who has no money left to pay for a response. (Former president Bill Clinton had the same advantage over presidential nominee Robert Dole in 1996.) The problem is so obvious and so bad that Democratic presidential hopeful Howard Dean is now considering forgoing federal funds precisely to avoid this spending limit.

The regulations entrench incumbents in other ways. For example, incumbents typically have a list of regular donors from many previous elections and thus can more easily raise small amounts of money from many different donors.

Spending limits for a given election also help incumbents because their political positions are already well known (thanks in part to past campaign spending). A less-known challenger needs to spend a certain amount simply to make up for that edge in familiarity—so a "fair" limit on total spending actually helps the incumbent.

Think about it: suppose it takes the unknown $1 million simply to tell the voters where he stands; if total spending is limited to $2 million, he will effectively be outspent two-to-one—whereas if the two candidates could each spend $5 million, the gap would be much narrower.

The impact of campaign-finance rules can clearly be seen in the post–World War II election data: before 1976, when donation limits began, House members lost 12 percent of their races; after 1976, it was just 6 percent. Senators moved from a 24 percent loss rate to 19 percent.

The same pattern shows up in states that already have McCain-Feingold type donation limits. I conducted a study on all 1,969 state senate seats in America from 1984 through to the primaries in 2002. The findings: donation limits raised incumbents' winning vote margin by at least 4 percentage points. The increase was up by as much as 23 percent when political parties' donations were also restricted. There were fewer competing candidates, too—a reduction of 20 percent.

The Supreme Court may be open to these arguments. For example, Justices Stephen Breyer and Ruth Bader Ginsberg's concurring opinion in one case *(Nixon v. Shrink Missouri)* worried about legislators using campaign-finance laws to "insulate themselves from effective electoral challenge." But the record in that case held no empirical evidence that the law actually entrenched incumbents, so the justices assumed that the legislators genuinely only wanted to prevent even the appearance of corruption.

And last year, in a case on Minnesota judicial elections *(Republican Party of Minnesota v. White)*, the justices' questions in oral arguments indicated concern that campaign regulations protected incumbents from competition. Minnesota's state Supreme Court had forbidden state judicial candidates from discussing previous court decisions; Justice Sandra Day O'Connor objected that "the rule curbed challengers, while leaving incumbent judges free to express their views in the form of judicial opinions."

She explicitly noted the protection of incumbents when she said, "It's kind of an odd system, designed to—what—maintain incumbent judges?"

The plaintiffs challenging McCain-Feingold have a particularly strong case, as the evidence presented clearly demonstrates how such rules entrench incumbents. Indeed, given the importance the justices have placed on ensuring electoral competition, it is surprising that the Justice Department's defense of the law cited no evidence whatsoever to counter the plaintiffs' expert report.

Loopholes

The 1974 reforms did nothing to stop the growth in campaign spending. McCain-Feingold will be no more successful. Regulations may change how the money is spent, such as moving it from the candidates to independent groups, but the total amount spent depends upon what is at stake. My past research in the *Journal of Law and Economics* (2000) has shown that as government grows, the importance of winning office increases and so does spending. Indeed about two-thirds of the growth in campaign spending can be explained just by the growth in government spending.

When given a chance, donors would much prefer to give their donations to the candidate directly rather than to an independent organization, simply because doing so allows the candidate to provide a more consistent message to voters. Uncoordinated independent expenditures educate voters less per dollar spent.

With regulations, the possible loopholes are endless. Suppose independent groups were completely banned. Would that stop money from being spent on elections? Obviously not. Instead of political contributions, wealthy individuals or organizations can buy radio and television stations or newspapers. Unless the First Amendment is

completely gutted, there is no way to regulate the number of favorable news stories given to different candidates.

Hillary Clinton has also shown the way this year on another loophole. Should Simon and Schuster's promotional budget for her book, likely over $1 million, be counted as a campaign donation? Undoubtedly, the money made Clinton appear to be a more attractive presidential candidate. Former Republican presidential hopeful John McCain likewise benefited from a book tour for *Faith of My Fathers,* his book that came out the fall before the 2000 primaries, yet no one thus far has proposed that politicians cannot write and promote books.

Corruption

Under *Buckley v. Valeo,* the Supreme Court held that the only permissible constitutional basis for government regulation was concern over the appearance or incidence of corruption. Yet the government's defense of McCain-Feingold basically relies on hard-to-interpret anecdotal evidence.

In passing the McCain-Feingold campaign-finance regulations, public interest groups and the press insist that donors give money to politicians to merely bribe them. There is little doubt that campaign contributions and voting records often go together. But few supporters mention that donors may be giving to candidates for another reason: they share that candidate's views.

Fortunately, we can separate out these two motives. Consider a retiring politician. He has little reason to honor any "bribes," for reelection is no longer an issue. Even if earlier there were corrupting influences from donations, the politician would now have freedom to vote according to his own preferences. Therefore, if contributions indeed bribe politicians to vote against their beliefs, there ought to be a change in the voting record when the politicians decide to retire.

Yet, this proves not to be the case. Together with Steve Bronars of the University of Texas, I have examined the voting records of the 731 congressmen who held office for at least two terms during the 1975 to 1990 period. We found that retiring congressmen continued voting the same way as they did previously, even after accounting for what they do after their retirement or focusing on their voting after they announce their retirement.

Despite retiring politicians' only receiving 15 percent of their preceding term's political action committee (PAC) contributions, their voting pattern remains virtually the same: on average, they alter their votes during their last term on only one out of every 450 votes. And even then it is the opposite of what the "bribing" theory would predict.

The voting records also reveal that over their entire careers politicians are extremely consistent in how they vote. Those who are the most conservative or liberal during their first terms tend to be still ranked that way when they retire. Thus the young politician who does not yet receive money from a PAC does not suddenly change when that organization starts supporting him.

In short, the data thus indicate that politicians vote according to their beliefs, and supporters are giving money to candidates who share their beliefs on important issues.

A reputation for sticking to certain values is important to politicians. This is why political ads often attack policy "flip-flops" by the opponent—if a politician merely tells people what they want to hear, voters lack assurance that he will vote for and push that policy if he gets reelected. Voters rather trust politicians who show a genuine passion for the issues.

If donations were really necessary to keep politicians in line, why would individual donors ever give money to a politician who was running for office for the last time?

Some point to PACs or corporations giving money to competing candidates in the same races as evidence of influence buying, but this claim is based upon a mistaken understanding of the data The vast majority of PACs are banned by their charters from giving money to both sides in a race. The few exceptions occur in cases where the PACs feel obligated to encourage their members to run for office and when their own members are in a race . The confusion over the numbers often comes about because donations during primaries are often lumped together with donations made during a general election. Yet while a PAC wants to try to get the best Republican and Democrat selected in their respective primaries, it will only support one of them in the general election.

Similar confusion exists over corporate donations. Corporations do not give money to candidates. What happens is that the people who work for corporations give the money, and it is not surprising that some people who work for a company like Republicans and others like Democrats. It makes no sense to say that the "company" is supporting both sides.

Déjà Vu All Over Again

Despite all the rhetoric, past federal and state regulations have succeeded only in protecting incumbents from competition and divorced voters further from the political process. The sad and ironic truth is that all the concerns raised by "reform" advocates about the current system have been made worse by past reforms. Nothing in our extensive experience with these regulations at both the state and federal levels suggests that we can expect a different outcome this time.