

Campaign Finance Regulation in the United States: A Complex Corruption

Willem Bracher

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Abstract

This paper explores how the current system of campaign finance in the United States leads to dependence corruption, how it is the seemingly inevitable product of legal canon, and how this legal canon itself began. This leads to a call for reform to tackle the corruption that campaign finance poses. Suggested reforms range from the passage of new legislation all the way to a restructuring of the Supreme Court, but these are areas where further research and exploration should take place.

Lessons for Practice

- Oftentimes, problems faced in American society go deeper than simply an issue of legislation (or lack thereof); instead, we have to examine underlying institutions and structures that are influencing outcomes.
- Fundamental human rights are complicated, and in our efforts to protect them in daily life, we cannot forgo one in favor of another, but instead must find a way to balance the variable interests represented by each.
- Corruption doesn't have to be blackmail or quid pro quo agreements, it can also be simply a blurring of incentives that shifts the motivations of political actors away from the public good and their electorate.
- There is an increasing interconnectedness between different spheres of our society, so in seeking solutions to complex societal problems, multi-dimensional approaches will be necessary.

Keywords: corruption, campaign finance, political lobbying

Introduction

This paper will discuss democracy and an essential tenet of democracies – campaigns. Like most things in this world, campaigns cost money, and the way in which they are financed have serious implications for the way a country is run. But before we jump into that, let's begin with a little thought experiment...

Political Perspective

Imagine a country called Lesterland, exactly like the United States in every way except one, they have a two-tiered election system:

“Rather than a single election for selecting its leaders, Lesterland has two elections. In the first election, only [people named Lester] get to vote. In the second, all citizens (who are over 18, and who register, and in some states, who remember to bring their ID) get to vote. But here’s the rub: For a candidate to run in the second election – the “general election” – she must do extremely well in the first election – the “Lester election.” “Do extremely well” does not necessarily mean win. You don’t have to end up first in your district in the Lester election to have the right to compete in the general election. But you must have done very well. The vast majority of the winners of the general election also won the Lester election. That fact is not a secret to anyone” (Lessig 2012, p. 5).

This appears to be a rather absurd setup for a democracy, rather than relying on a simple plurality of support for election, politicians must first cater to the interests of people who are named Lester. Obviously, not everyone named Lester will have the exact same interests or values; nevertheless, they will only represent a small subset of the views and beliefs held across the entire nation. Essentially, this setup forces politicians to be dependent on the Lesters before they can consider what the general population wants. Of course, the politicians still need to win the general election, and thus must adopt generally popular policies; however, if there are certain popular policies that would come at a cost to people named Lester (e.g., changing the two-tiered election system), it is extremely unlikely that it will become a widely held policy position. This reliance on people named Lester is what Lessig terms *dependency corruption*. Ideally, the actions and decisions made by politicians are not independent choices, but instead are dependent on whether or not they serve the public good. Unfortunately, the setup of Lesterland corrupts this ideal, making these actions initially dependent on the whims of the Lesters. Even more unfortunate, this institutional setup is more similar to the United States than we might think at first glance.

In American elections, politicians who wish to have a successful campaign need to first have a well-funded campaign, and those with the ability to provide those funds are representative of an exceedingly small subset of the American electorate. Subsequently, rather than being dependent on the people alone, politicians must first appeal to those with the capability to fund their campaigns – just like politicians have to cater their campaigns first to Lesters in our thought experiment. This blurring of incentives corrupts politicians' abilities to be solely dependent on the people, and thus, corrupts American democracy.

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Historical Perspective

If we explore the topic of campaign finance from a historical perspective, it becomes clear how the establishment of early precedent shaped all subsequent decisions. In *Buckley v. Valeo 1976*, the Supreme Court treated campaign expenditure as equivalent to speech. This meant that any restrictions on expenditure would correlate to an infringement on the fundamental right to free speech. This interpretation has shaped every subsequent case concerning campaign finance regulation. Litigants continued to argue that campaign finance restrictions were inhibiting their right to free speech, in *First National Bank of Boston v. Bellotti*, *FEC v. Conservative PAC*, and *Citizens United v. FEC* (the list goes on and on) and based on the decision in *Buckley*, they kept winning. This led to the gradual withering of campaign finance regulation that we have seen over the past several decades and is what led to the dependency corruption described by Lessig.

Legal Philosophical Perspective

However, it is important to note that these court decisions did not happen randomly. There was a deliberate guiding philosophy that drove the court to make their decisions in the particular way that they did. They treated fundamental rights according to one of many competing legal theories that lie on a spectrum. One extreme understands that “rights are absolute but for the exceptional circumstances in which they may be limited” (Greene 2018, p. 30). This view would align more with what is called the subsumptive approach. It tends to distill a court case down to the fundamental right in question, and make the decision based on this interpretation of the scenario. The complementary approach would be one where “rights are limited but for the exceptional circumstances in which they are absolute” (Greene 2018, p. 30). This is termed the particularist account. It tends to take several different rights and interests into account and makes the decision by weighing the value of each of these factors against each other. We can visualize them as along the spectrum seen in Figure 1, below, with one leaning towards universality, and the other contextualization.

Figure 1. Spectrum of Legal Approaches to Fundamental Rights’ Adjudication



The Supreme Court currently adopts a view aligned more with the subsumptive approach, and the implications are drastic. This leads to a situation wherein the courts attempt to adjudicate via universal principles, splitting a right into different categories with different outcomes, which overlooks potential variation in a right’s premises (Greene 2018, p. 62). Typically, we understand that not all speech is equal, or that not all discrimination is the same; however, the current legal approach makes these factors difficult to parse in the court of law, erring on the side of strong fundamental rights. So as soon as the Supreme Court equated political expenditure to speech, that freedom could only be curtailed in exceptional circumstances, limiting the scope of regulation. This created an opportunity for money to flood political campaigns, blur the incentives of politicians, and corrupt the ideal representation traditionally sought in American democracy.

Conclusion

With the implications of campaign finance, it can be easy to fall victim to fatalism. When examining the vast amounts of money that flood campaigns every year, it can seem as if democracy itself is drowning under the weight of this excessive spending. However, viewing our democracy as ‘drowning’ can serve as a useful metaphor for beginning to understand how it can be rescued.

‘Lesterland’ revealed that the integrity of our democracy was compromised by corruption, in other words, that we were drowning. Through examining the way court cases influenced these decisions, our understanding was broadened. This revealed that we were trying to swim in a river, but the currents of history were pulling us under. Looking at the guiding legal philosophy extended this understanding again, showing us that the force driving the current in this particular direction was a choice, and the ability to reverse its flow exists. Finally, by transforming competing understandings of this issue into a spectrum that ranges from individual to structural, we gain the insight that in order to prevent this drowning, it will take more than just a life raft. To truly resolve the issues of campaign finance we need a life raft, a dam, even a reversal of the flow of the river, not individually, but in concert with each other. What then is a life raft in the world of campaign finance regulation? What does a dam look like in this context? These responses range from passing new legislation to fundamentally altering the judicial philosophy of the Supreme Court -

by no means easy tasks. However, if we want to continue to work towards the ideals that American democracy strives for, the path is unlikely to ever be easy.

A note from the author

Willem Bracher is currently studying Philosophy, Politics and Economics at Utrecht University in the Netherlands, with a focus on markets and regulators. He grew up in the Chicago suburbs but has appreciated the chance to live and study in Europe for the duration of his undergraduate program. Willem has always been fascinated by American politics and enjoyed having this opportunity to explore the topic more deeply and share the results with others. Outside of academics Willem is passionate about music, spending his free time playing piano and guitar (and curating his many Spotify playlists). He would like to thank his academic supervisors who provided invaluable feedback on his research paper, as well as Public Note for sponsoring the Undergraduate Research Symposium.



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