

Rethinking Campaign Finance Prohibitions

By

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Modern politicians and activists face a sea of complex and contradictory campaign finance regulations. Every step is governed by limits, prohibitions, reporting requirements -- all run through with a maze of exceptions. The Federal Election Campaign Act (FECA) as it has evolved is simultaneously complex, restrictive and porous. The confusion and doubt created by such complicated laws seem to serve the interests of no one, certainly not the voters and citizens who they are intended to benefit.

In general, the evolution of campaign finance law demonstrates a lack of means-to-ends fit between political conduct and particular reforms. One might expect that public controversies would yield regulations that address the core conduct in the controversy. Instead, the political will for reform created after a scandal has generally been applied to pass reforms that were already "on the shelf," whether or not the reforms would address the scandal's specifics.

This is as true for those aspects of the laws that prohibit contributions or expenditures as for other aspects of the law. These prohibitions are the most extreme aspects of our law, and they forbid equal political participation based upon the status of an entity. Yet, absent a means-ends fit between scandal and reform, it is open to question whether campaign finance rules as they exist today are a result of experience and considered policymaking by Congress. If they are not, it may be past the time to step back and reconsider the law's scope, in particular its prohibitions upon certain entities from participating.

How Did We Get Here?

The first example of this lack of fit is the corporate contribution ban. In the wake of civil service reforms, which curtailed political party funding from patronage assessments, politicians looked elsewhere for political funding and found it, in part, from corporations. After President Theodore Roosevelt's election in 1904, and in pursuit of an entirely different examination into business abuses, New York investigators found that major corporations financially supported Roosevelt during his campaign, and ultimately it was learned that 73.5 percent of Roosevelt's 1904 campaign fund came from corporations.¹ Roosevelt, in a defensive response, embraced a corporate contribution ban -- but was opposed to mandatory disclosure requirements. Democrats, who did not benefit from corporate largess to the same degree, favored a corporate contribution ban *and* disclosure, believing that publicity would drive corporations out of politics.² The

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¹ ROBERT E. MUTCH, CAMPAIGNS, CONGRESS AND THE COURTS 3-7 (1988).

² *Id.* at 8.

corporate ban alone carried the day, and in 1907 Congress passed and Roosevelt signed the Tillman Act, prohibiting any contributions by corporations in federal elections.

The controversy surrounding Roosevelt's activities was about secrecy, yet the law in the end prohibited a class of contributors from participating in federal politics, but did not address the publicity issue. Another possible approach -- corporate contribution limits -- would have reduced the role of large corporations, while allowing small businesses the ability to support candidates. Yet what passed was a ban without effective disclosure, and thus without a means for voters to become more informed about candidates' supporters, or for monitoring or enforcement short of a specific investigation.³ The inability to secure meaningful disclosure would remain a problem for some decades.

The next wave of reform came out of the Teapot Dome bribery scandal. Albert Fall, Secretary of the Interior to President Warren Harding, personally received payments from oil interests in return for leases, and was prosecuted and imprisoned for his crimes. In related investigations, it was learned that the lessors also contributed to the Republican Party, but these funds were never disclosed since the law did not require off-election year reporting.⁴ The problems with the disclosure law's reach were evident years earlier, and the Teapot Dome scandal revolved around bribery -- already against the law. Nevertheless, the scandal resulted in the 1925 Federal Corrupt Practices Act, which strengthened disclosure laws by requiring political committees active in two or more states to report quarterly.

But the 1925 reform did not provide for dissemination of those reports, or for their review. The disclosure laws did not provide good information about key political actors, and did not sweep in non-party and non-candidate groups.⁵ Enforcement had its own problems - the one prosecution attempted against outside groups ended in acquittal.⁶ In short, despite a generation having passed in which scandals revolved around the lack of disclosure, unless the financing of an election became the subject of a congressional investigation or a topic for scholarly attention, comprehensive information about campaign finance was not available to the voters.

Yet the policy disconnect persisted. In 1940, Congress passed an extension of the Hatch Act of 1939, which among other things banned federal government contractors from making federal contributions.⁷ The law did not come about from any scandal but represented the antipathy Republicans and southern Democrats felt for the second Roosevelt administration's use of federal funding for political advantage.⁸ In 1943, Congress extended the corporate contribution ban to labor unions as part of the War Labor Disputes Act, which extended only for

³ A series of legislative battles led to the passage of disclosure and spending limits in 1910 and 1911, but the Supreme Court in *US v. Newberry* found in 1921 that these regulations could not constitutionally be applied to primaries, deciding that as part of the "nomination" process primaries were not "elections" regulated by Congress. (That interpretation remains the law until it was reconsidered by the Court in the 1941 decision *U.S. v. Classic*, yet Congress did not enact laws covering primaries until the 1971 Federal Election Campaign Act.)

⁴ See Leslie E. Bennett, *One Lesson From History: Appointment of Special Counsel and the Investigation of the Teapot Dome Scandal* (Brookings 1999), available at www.brook.edu/gs/ic/teapotp dome/teapotp dome.htm.

⁵ LOUISE OVERACKER, MONEY IN ELECTIONS 259-70 (1930); Mutch at 25-27.

⁶ See Mutch at 28 (discussing *Burroughs v. United States*).

⁷ See 2 U.S.C. 441c (formerly 18 U.S.C. 611)

⁸ Mutch at 34.

the duration of the Second World War.⁹ The most proximate cause of the legislation's passage was congressional pique at a massive coal miner's strike that year, coupled with Republican alarm over growing labor contributions to Democrats.¹⁰ Labor union prohibitions were renewed in 1947 in the Taft-Hartley Act, and clarified to ban labor "expenditures" as well.¹¹ The labor union ban was justified at the time as a measure necessary to protect dissenting members, and to protect elections from the wealth of unions, but was not precipitated by any particular scandal.¹² In short, while *post hoc* policy justifications for the ban on government contractors and labor organizations can be created, the true motives supporting their passage were political.

In 1966, Congress amended the Foreign Agents Registration Act to prohibit contributions by foreign agents on behalf of their principles in federal and nonfederal campaigns.¹³ These amendments passed after hearings led by Senator William Fulbright revealed that foreign interests with interests in sugar import guidelines and Central American policy had directed contributions through intermediaries.¹⁴ The law was strengthened to apply to contributions from foreign nationals in the 1974 amendments to the Federal Election Campaign Act, in response to revelations out of the Senate Watergate Committee that the Nixon Administration had sought campaign funding directly from foreign sources.¹⁵

The Watergate scandal involved among other things, burglary, wiretapping, perjury, false campaign disclosure, and raising funds from illegal corporate and foreign sources. Watergate conduct for the most part violated existing law – hence the scandal. Yet Congress took the opportunity to drastically revise campaign finance laws in 1974 amendments to the Federal Election Campaign Act of 1971 (FECA). It hardly seems likely that had the limits, prohibitions, and reporting requirements – or the public funding provisions – of the 1974 Amendments been in effect in 1972, that the Watergate players would have renounced their methods, since they demonstrated willingness to break so many other, more serious, laws. Nor did the reform provide significant additional sanctions for their conduct. The 1974 Amendments set contribution and expenditure limits, limited independent expenditures and party expenditures on behalf of candidates, provided optional public funding for presidential campaigns, and created an independent agency (the Federal Election Commission) to administer the law.

Observe again the poor fit between Watergate and many of the 1974 reforms. As before, a scandal made possible the enactment of an assortment of existing reform proposals into law, even though those specific reforms had little to do with the conduct behind the scandal. Nevertheless, effective disclosure of party and candidate finances, a goal that had eluded reformers from the first, was made closer to reality with the 1974 amendments to FECA.

⁹ 57 Stat. 1167 (1943). The ban on labor union contributions or expenditures is incorporated into the prohibitions at 2 U.S.C. 441b.

¹⁰ Mutch at 153.

¹¹ See *United States v. Congress of Industrial Organizations*, 335 U.S. 106 (1948) (discussing scope of legislation).

¹² Mutch at 156-57.

¹³ Pub. L. No. 89-486 Sec. 8(a), 80 Stat. 244 (1966) (codified at 18 USC 613) The provision is now codified at 2 USC 441e.

¹⁴ For a longer discussion, see Bruce D. Brown, *Alien Donors, the Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 YALE L. AND PUB. POL'Y REV. 503 (1997).

¹⁵ *Id.* at 510 & n. 37.

Similarly the passage of the Bipartisan Campaign Reform Act (BCRA) depended on a mostly unrelated scandal. Reformers had for some years sought to curb nonfederal or “soft money” activities by parties and outside groups. But it was the corporate management scandals and the implosion of Enron that provided the political will for Congress to ban national party nonfederal fundraising and prohibit corporate and union money for electioneering advertisements within 30 days of a primary or 60 days of a general election.

As before, the scandal that precipitated reform had little to do with the particulars of the reform measure. Enron used unconventional accounting techniques and off-books partnerships to hide mounting debts. In December 2001, after disclosing enormous losses and watching its share prices tumble, Enron filed for bankruptcy protection. Disclosure databases showed that Enron gave soft money even as it approached bankruptcy. Enron executives and employees were active political donors to Republicans and Democrats, though it was never established that its political activities related to its failure as a business venture, or that it received special treatment from politicians.¹⁶

Yet, reformers rushed to associate the ensuing furor over Enron with their lagging campaign finance reform efforts.¹⁷ One group argued that to “de-Enron America Now” required passage of their existing package of reforms in Shays-Meehan, their measure blocked up in the House of Representatives.¹⁸ During the debate preceding passage in the House of Representatives, reform sponsor Marty Meehan (D-MA) described a “cloud over the Capitol and the White House because of the Enron scandal” and that voting for reform would remove the cloud.¹⁹ The House passed reform in February of 2002, and President Bush signed it into law in March.

This history necessarily presents an abbreviated summary of these scandals, but even so it is illuminating. In political scandals, the campaign finance aspect of the scandal often involves secrecy. The real story in our campaign finance history thus may not be about the “buying of America” by particular entities or the role of “money in politics” but the legal system’s inability to secure prompt, accurate, accessible and comprehensible disclosure.

What Are We Doing?

Policy makers have not been content to work toward better disclosure. Laws also prohibit a number of society’s players from participating financially in federal elections. We now turn to the rationale made for its prohibitions, whether the goals sought are appropriate, and whether there may be less extreme (or just better) policies for achieving them.

In its modern form the statute prohibiting corporate contributions or expenditures in federal election is a model for confusion. It begins with one 185-word sentence that reads:

¹⁶ See e.g. Robert J. Samuelson, *It's not Reform, It's Deception* (Editorial), WASH. POST, Feb. 13, 2002 at A27. Samuelson described the claim that Enron justified the need for campaign finance reform as “complete make-believe.”

¹⁷ John Lancaster, et al., *Grass-Roots Effort Given Key Boost by Enron Scandal*, WASH. POST Feb. 14, 2002 at A06.

¹⁸ Public Citizen Press Release, *De-Enron America Now, Pass Campaign Finance Reform*, Feb. 6, 2002, available at <http://www.citizen.org/pressroom/release.cfm?ID=1018>.

¹⁹ Susan Milligan, *Campaign Finance Bill Gets Key Boost*, BOSTON GLOBE, Feb. 14, 2002 at A1.

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.²⁰

The upshot of this impenetrable statute is that national banks and corporations organized by Congress may not give “in connection with” federal, state or local elections, and that other corporations and labor organizations – regardless of type or size, cannot contribute or spend in federal elections. The federal law continues with a section that defines the term “labor organization” and a section that excludes from these prohibited contributions and expenditures communications by a corporation to its shareholders or executive and administrative personnel and their families, and by labor organizations to their members and families (called the “restricted class”); nonpartisan registration and get-out-the-vote efforts aimed at the restricted classes, and PAC solicitations to the restricted class. The statute prohibits PACs from using money that was secured through use of threats or other coercion.

Additionally, federal law bars government contractors (regardless of organizational form) from making federal contributions, but specifically allows such entities to establish PACs under the guidelines set up for corporations, thus treating incorporated contractors somewhat more leniently than other kinds.²¹ The Act also prohibits foreign nationals from making donations or contributions in federal, state or local elections.²² Federal law is by no means unique in singling out particular economic entities for disfavored treatment in the campaign finance arena. Twenty-one states also prohibit corporate contributions²³, and several states impose special restrictions on particular kinds of entities, notably gaming companies,²⁴ regulated industries,²⁵ lobbyists²⁶ and liquor distributors.²⁷

²⁰ 2 U.S.C. 441b(a).

²¹ *Id.* 441c, previously 18 USC 611 (Acts June 25, 1948). See *FEC v. Weinstein*, 462 F.Supp. 243 (S.D.N.Y. 1978) (considering constitutionality of government contractor ban).

²² *Id.* 441e, previously 18 USC 613 (Pub. L. 89-486 S. 8(a) July 4, 1966).

²³ See Contribution and Solicitation Limitations, available at www.fec.gov/pubrec/cfl/cfl02/cfl02chart2a.htm.

²⁴ *Casino Ass’n of Louisiana v. State*, 820 S.2d 494 (La. 2002) (upholding Louisiana Rev. Stat. 18:1505.2 (L) prohibition corporate contributions from gaming corporations).

²⁵ See Georgia Code Ann 21-5-30.1 (prohibiting certain regulated industries from contributing to state executive officers).

The purpose of such laws is, in general, to reduce the political power and influence of the prohibited source. But why these particular entities? The rationale for the federal corporate and labor organizations ban was set forth by the Supreme Court in *United States v. Auto Workers*.²⁸ In that decision, upholding the application of a labor expenditure ban against a union using treasury funds for television advertisements to influence the election of members to Congress, Justice Frankfurter observed that corporate restrictions grew out of “popular feeling that aggregated capital unduly influenced politics, an influence not stopping short of corruption.”²⁹ He noted that Elihu Root, speaking on behalf of a corporate contribution ban in New York law, had explained that:

The idea 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 as against those of the public.³⁰

According to Justice Frankfurter, the corporate contribution ban was “merely the first concrete manifestation of a continuing congressional concern for elections ‘free from the power of money.’”³¹

The rationale for extending the corporate restrictions to labor organizations, as expressed by a sponsoring Congressman, was that unions “should be granted the same rights and no greater rights than any other public group” and to put them “on exactly the same basis, insofar as their financial activities are concerned, as corporations have been on for many years . . .”³² Supporters also stressed the interests is dissenting members, and the impropriety of using money raised for one purpose for a different purpose. But the animating factor in Taft-Hartley appeared to be the leveling of the campaign finance playing field. The explanation for the government contractor prohibition, which is coterminous with the corporate contribution ban in the case of incorporated contractors, seemed similarly to be based on considerations of political advantage. In contrast, the foreign national contribution ban rested upon congressional investigations and hearings, leading to the particular judgment based on that record that foreign individuals and interests should not be allowed to contribute to elections.

The rationale for the contribution and expenditure bans may make sense when discussing large institutions, but in reality the bans extend to Subchapter S corporations, other small

²⁶ Alaska Stat. 15.13.074(g), *see also* State v. Alaska Civ. Lib. Union, 978 P.2d 597, 617-20 (Alaska 1999) (prohibiting lobbyists from contributing to legislator unless resident of district).

²⁷ Schiller Park Colonial Inn v. Berz, 349 NE2d 61 (Ill. 1976) (upholding Liquor Control Act contribution ban).

²⁸ 352 U.S. 567 (1957)

²⁹ *Id.* at 570.

³⁰ *Id.* at 571 (quoting Elihu Root, Addresses on Government and Citizenship 143 (1916)). Lest any reader think that the reliance upon Elihu Root is an artifact, the Supreme Court in *McConnell v. FEC* apparently found it effective enough to begin its opinion with the same quotation. *See McConnell v. FEC*, 124 S. Ct. 619, 643-44 (2003).

³¹ *Id.* at 575.

³² *Id.* at 579 (quoting Congressman Landis before the House Committee on Labor, Hearings on H.R. 804 and H.R. 1483, 78th Cong. 1st Sess. 1,2,4 (1943))

businesses, and nonprofit entities – in fact any corporation, labor organizations, or government contractor. The reasons given by Elihu Root for keeping “the great railroad companies” from electing candidates “to vote for their protection” do not justify a contribution and expenditure ban for small or nonprofit incorporated entities. In fact, Root’s concerns would seem to be more directly met by some form of “pay to play” regulation, which could prohibit entities that lobby Congress from making contribution or expenditures, rather than an outright ban that extends to the funds of, for example, a sole proprietorship controlled by an individual.

The purpose served by the corporate, labor, and government contractor bans could also be served by a limit on contributions from these entities. It should be acceptable for such groups to contribute to candidate and political committees at a level which Congress has found appropriate in light of concerns about corruption. An instructive example would be the \$2,000 per election limit individual donors may give to candidates. Extend to those limits an aggregate limit – perhaps less generous than the aggregate limit applicable to individuals, and the law would allow these groups, as such, to participate while addressing the concerns about “aggregations of wealth.” Limits, rather than prohibitions, could serve to make the law less complex in practice. Corporate and labor facilitation regulations, designed to ensure that not one cent of their resources improperly subsidize political activity, could be reconfigured so entities could account for in-kind support attributable to political activity. To be sure, corporations or unions could still exceed the limit, and would be held liable for making excessive contributions unless reimbursed.

A more controversial element would be whether to allow corporations and labor organizations to make independent expenditures advocating the election or defeat of candidates. Here, court cases have concluded that, when done by individuals, independent expenditures may not be limited. If Elihu Root’s “aggregation of wealth” justification has some merit, then it may nevertheless be reasonable to place a cap on independent expenditures by corporations and labor organizations, or place corporate or labor governance restrictions on such expenditures to protect the interests of shareholders and union members. But the effect of the ban on independent expenditures, when advocacy to a corporation or labor organization’s restricted class is allowed, and corporations and labor organizations engage in issue advertising (restricted by the electioneering communications provisions of BCRA within thirty days of a primary and 60 days of a general election) is to channel and distort corporate and labor speech, complicate the law, generate enforcement matters, and confuse the public. The political system can apparently tolerate restricted-class communications and issue advertising – is it beyond the pale to suggest that it might also be able to tolerate corporate and labor independent expenditures? Even were the law to continue to apply a 30 and 60 day preelection restriction, such a change would simplify the rules. The present regulation of corporate and labor political speech may be the best example of the law as complex, restrictive and porous.

Even so, if government is to persist in excluding these entities from making contributions and expenditures in federal elections, it should be expected to offer a contemporary rationale for such drastic regulation. The pervasive use of the corporate form in modern life bears little resemblance to the industrial powers Root invoked. The role of unions in American life has also changed in the years since the contribution and expenditure ban was extended to them. At that

time, unions represented over one-third of the workforce. In 2003 that figure was 13%, and union membership continues to fall in absolute numbers.³³

On the other hand, if corporate and labor activity in connection with federal elections cannot be tolerated, then the laws are overly permissive. Congress has seen fit to prohibit national banks and corporations chartered by Congress (and foreign nationals, for that matter) from activities in connection with federal, state, or local elections. Were the scope of this ban extended to corporations and unions generally, many of the “problems” the federal system has had with nonfederal funds (i.e. “soft money”) subsidizing federal activity would go away, since those funds would no longer be a part of state and local election accounts. If corporate and labor funds should not subsidize federal election activity, then perhaps they should not be available to pay the administrative costs of corporate and labor PACs, which at present enjoy an advantage against non-connected political committees in that their sponsoring organizations can pay all administrative and fundraising costs out of general treasury funds. Perhaps corporate and labor treasury funds also should not be available for restricted class and member communications. Rather, any political committee could be able to speak directly to the public and raise funds from any permissible source using money acquired under the federal limits.

The point of this series of speculations is not to suggest that corporations and labor organizations should be freed from all regulation, or regulated out of politics altogether. It is instead an attempt to show that the regulation of these groups is schizophrenic. At once, our laws express a prohibition on corporate and labor contributions and expenditures, seemingly because in Congress’s policy judgment such involvement is unacceptable. But the law allows special treatment for corporate and labor committees, communications with restricted classes, which in the case of unions include *all members*, and a host of other activities that would seem *ultra vires* to the purpose of a corporation or union. What function, then, is served by the contribution and expenditure ban?

Our system also leaves unregulated a multitude of other activities that would seem to pose at least the same potential for corruption as campaign contributions. Lobbying disclosure, as compared with campaign disclosure, is rudimentary and inexact, and the law sets no source or amount limits on lobbying funding beyond the general prohibition against using federal appropriations. While it is true that the U.S. Constitution guarantees the right to petition, one could see where courts would balance that right against competing governmental interests, much as courts do with campaign finance regulation. The Supreme Court in *McConnell* has already identified a legitimate Congressional interest in legislation to curb undue influence on officeholders and “peddling access,” which would seem to implicate at least some lobbying.³⁴ News, commentary, and editorials are exempt from the limits, prohibitions and reporting requirements in campaign finance law, even if the purpose of the news or commentary is plainly to influence an election. The content of political advertising is essentially immune from any action for libel or defamation.

If lawmakers wish to institute a campaign finance system that is more straightforward, effective, and creates fewer distortions, thus enhancing political debate, compliance, and respect

³³ See *Union Members in 2003*, available at <http://www.bls.gov/news.release/union2.nr0.htm>.

³⁴ *McConnell v. FEC*, 124 S. Ct. at 664.

for the rules, they should revisit the contribution and expenditure bans on corporate, labor and perhaps even government contractors. As they now stand, these rules prohibit political activity by certain entities for reasons that are hard to fathom or defend. They are rife with exceptions that would seem to undermine their purported rationale. They are traps for the unsophisticated, and seem to serve the interests only of those who seek grounds for investigating their political opponents, or for those left relatively more influential by the silencing of competing views. Perhaps it is time to reform the “reform” under which our system labors.