



# CENTER *for* COMPETITIVE POLITICS

*Congress shall make no law...*

WWW.CAMPAIGNFREEDOM.ORG

## **Government Shouldn't Play Election Favorites sense**

**By Bradley A. Smith**

*Wall Street Journal*

Published March 28, 2011

Should the government choose sides in elections? That is the core question at stake today when the Supreme Court hears oral argument in *McComish v. Bennett*, challenging Arizona's tax financing system for political candidates.

Historically, the government's role in elections was limited to managing the process of voting in a neutral, nonpartisan way. From an early date virtually every state and the federal government enacted laws prohibiting the use of state resources for campaigning.

In the 1976 case of *Buckley v. Valeo*, however, the Supreme Court upheld the constitutionality of government directly funding candidate campaigns, so long as candidates remained free not to participate. Under these programs, candidates received a lump sum from the government in exchange for limiting their own fundraising and spending.

In recent years, Arizona and a handful of other jurisdictions have gone far beyond what was approved in *Buckley* by offering candidates "rescue" funds. In this scheme, if a tax-subsidized candidate is outspent by an unsubsidized candidate, the government gives additional money to the participating candidate—usually enough to match the amounts raised by the non-participating candidate. And if a group of citizens, such as MoveOn.org or the Club for Growth, spends money to criticize a participating candidate, the government gives still more "rescue" money to that candidate.

Supporters of Arizona's law claim that it fights corruption by encouraging candidates to take public subsidies rather than private financing. They also argue that the system is constitutional because it increases the amount of speech through its selective increases in government subsidies. In fact, there is little evidence that government subsidies to campaigns have reduced corruption or special interest influence.

Nor are these systems unbiased. The rescue only works one way. If a nonparticipating candidate spends less than a participating candidate, or if a group makes \$50,000 in independent expenditures in favor of a participating candidate, the participating candidate's subsidy isn't reduced.

Suppose that in a three-way primary, a single nonparticipating candidate, a centrist, is fighting criticism from participating candidates to his left and right. If he spends \$10,000 over the trigger, each of his opponents gets a \$10,000 match. Thus, the nonparticipating candidate's \$10,000 in added spending leads to the deployment of \$20,000 in tax subsidies against him.

This will discourage political speech. Why would a group spend money in a race if doing so unleashed double that amount against its preferred candidate? Why make a contribution to support your favored candidate if doing so triggers a government subsidy to his opponent?

The government is trying to rig the system to favor tax-subsidized candidates. Indeed, candidates who choose to take the government subsidies are deemed "clean candidates," a term intended to bias the electorate in their favor, and the government in effect instructs voters that "clean candidates" are less likely to engage in corruption once in office—a most dubious proposition.

Dissenting in *Buckley*, Chief Justice Warren Burger warned that "the use of funds from the public treasury to subsidize political activity of private individuals [will] produce substantial and profound questions about the nature of our democratic society . . . the inappropriateness of subsidizing, from general revenues, the actual political dialogue of the people—the process which begets the Government itself—is as basic to our national tradition as the separation of church and state . . . or the separation of civilian and military authority."

Having the government pay for political campaigns runs counter to the very idea of a government responsible to the people. We should head this off now with a new constitutional doctrine that flows naturally from the document: separation of campaign and state.

*Mr. Smith, a professor of law at Capital University Law School, is a former chairman of the Federal Election Commission.*