Why Regulating Political Advertising Firms May Make For Better Speech

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Money spent in U.S. elections, particularly on television advertising, is largely understood as operating as a "marketplace of ideas." This reasoning is underpinned by the Supreme Court's 1976 ruling in Buckley v. Valeo, which concluded that most limits on campaign spending are unconstitutional. Ever since, money has been treated as the functional equivalent of speech. Treating money as speech in the marketplace of ideas allows candidates and interest groups to flood the airwaves with political advertisements, on the theory that free competition between varying positions and proposals will naturally result in the most popular ideas rising to the top(and along with them, the most popular politicians, laws, and policies.)

However, the market metaphor is flawed. The simple existence of candidates and interest groups that produce competing ads is treated as sufficient for competing ideas to be given equal weight by the public. Furthermore, what it means for money to be speech is not a static concept:Justifying how and why money is speech can change the justification for regulating political advertisements. My research examines the history of campaign finance reform as it relates to the creation of political speech, and suggests a new framework for regulating political advertising to achieve greater fairness.

Market Principles for Political Speech

When analyzing the Congressional Record, legislation, and both Supreme Court hearings and decisions, I uncovered a common thread of concerns relating to what makes for "good speech" as it relates to campaign funds. Five interconnected and interlocking concepts that I call the money-speech paradigm have shaped how money can be spent on political advertising:

• Access centers on reducing barriers to getting airtime. Limitations have been placed on how much broadcasters can charge candidates for political advertising, assuaging politicians' concerns about their ability to be heard and to compete with better-financed peers.

• Accountability focuses on transparency: Who is producing a given advertisement? This principle took shape in the 1970s, with new requirements for public disclosure of campaign fundraising and spending, and continued with the passing of the Bipartisan Campaign Reform Act in 2002. This Act further increased standards of accountability and birthed "Stand by Your Ad" statements ("I am _______ and I approve this message") in advertisements. Additionally, the creation of electioneering expenditures sought to analyze spending based on the "spirit" of interest group ads curtailing the issue advocacy loophole where interest groups would produce ads calling for the election and defeat of candidates in all but name.

• Acceptability of political speech hinges on the public's general dislike of negative advertising and mudslinging, and has engendered some proposed restrictions on ad content—which have often been pushed aside due to First Amendment concerns. Congress has therefore eschewed firm restrictions and instead attempted to (unsuccessfully) disincentivize negative advertisements through practices like Stand by Your Ad requirements.

• Authorization questions who, other than candidates themselves, has the right to produce political advertisements, focusing on where and how interest groups can become involved in campaigns. Introduced in the Boston v. Bellotti Supreme Court case, authorization drove home the importance of competition in the marketplace of ideas—though Bellotti is often viewed as having little impact on legislative decisions until Citizens United v. FEC and SpeechNow.org v. FEC. These rulings helped create Super PACs, the committees that can raise and spend unlimited amounts of money on campaigns, expanding the range of public actors that could produce advertisements.

• Autonomy aims to protect fairness in the marketplace of ideas by ensuring public voicesare unconnected to and not directly collaborating with other sources that could coerce or corrupt their speech. Concerns over autonomy have created a hesitance to place formal government regulations on advertisers—but this issue encompasses the potentially coercive ties between candidates and interest groups as well.

The Autonomy Problem

Each aspect of the money-speech paradigm is an important part of a whole, but autonomy calls for particular attention when considering competition among speakers. Current efforts to ensure autonomous speech (outside of limiting government intervention) are lacking. In fact, while accusations of coordination between outside groups regularly result in complaints to the Federal Election Commission (the agency that enforces campaign finance law), they do not end with sufficient consequences, if any. Recently, there have even been pushes to deny the importance of the autonomy principle all together. In Citizens United, Justice Scalia argued that speech, not speakers, mattered; in this framing, the independence of speakers is less important than simply the act of getting as much information to the public as possible to ensure fair competition in the marketplace of ideas, even if it means that a small handful of actors can hold financial dominance. What makes this so important is that within Justice Stevens's dissent in Citizens, he claimed that the importance of limits on corporations was previously seen as so obvious they did not need to be outlined, and he accused those in favor of deregulation of attempting to regulate markets without knowing how they work. This highlights how drastically Citizens United change in how the government thinks about corruption and coordination.

The chipping away at autonomy has had noticeable consequences. Since the creation of Super PACs in 2010, we have seen an increasing number of interest groups that create political advertisements coordinate through advertising and consulting firms. This gives advertising firms tremendous power over political messaging. Candidates now often have Super PACs that serve as unofficial wings of their campaigns, which coordinate through consulting firms and, in some cases, directly with other interest groups, further consolidating and amplifying the voices of the powerful.

Rethinking Regulation

Advocates for campaign finance reform have regularly targeted incoming dollars to politicians and interest groups—if we limit how much individuals, corporations, and committees can contribute to campaigns, then no single campaign or campaigner can amass an insurmountable war chest. Outgoing dollars, after all, are much harder to regulate due to rulings in Buckley and Citizens. However, another actor in the electoral process may be regulatable: advertising firms. Finding a way to limit how many interest groups and candidates advertising firms can work for in a single election allows for the ability to target coordination at the point of action rather than donation. This is something that the Federal Election Commission has already acknowledged as a problem since the 1980s. By limiting whom advertising firms work with, we circumvent debates over the right to spend or raise money. Additionally, we further reinforce the importance of autonomous speech and allow for a broader set of uncoordinated voices to become involved in politics.

Read more in Nathan Katz, "Turning Money into Speech: Campaign Finance, Political Advertising, and the Civic Sphere," University of Missouri-Columbia, 2022.