

Senate Committee on Rules
Meeting on 2019-06-03
Testimony of Kyle Markley
Member, 2015-2017 Task Force on Campaign Finance Reform

Introduction

I was a member of the 2015-2017 Task Force on Campaign Finance Reform. I have been a Libertarian candidate for State Representative four times, and am currently the Chair of the Libertarian Party of Oregon.

I strongly oppose any constitutional amendment that would weaken Oregon’s freedom of speech guarantees.

Perceived Problems

The proponents of contribution and expenditure limits have not clearly articulated a problem statement, so I will meander from topic to topic as they do. Let me begin with a few acknowledgments. Political campaigns in Oregon are relatively expensive compared against other states. Yes, the candidate who spends the most money usually wins. Oregon gets “bad grades” on campaign finance. Special interests seem to have a lot of influence with state government.

That these things are true does not mean that they are problems, and even if they are problems, it does not follow that they are problems government ought to address, and even if government ought to address them, it does not follow that weakening freedom of speech is the best solution. The Task Force on Campaign Finance Reform skipped through this part of the process and jumped on the bandwagon of political censorship. Let us take a better look at each problem area in turn.

1. Expense of Campaigns

Political campaigns are expensive. But not compared to the Oregon government all-funds budget of over \$74 billion¹. Political campaign spending on state races amounts to only about a *thousandth* of that amount. Viewed from the perspective of how much money that spending could conceivably “control”, it’s amazing that political campaigns are so cheap!

The overwhelming majority of spending in political campaigns is for the purpose of communicating a political message – that is, for speech which informs the voters. More spending means more speech which means a better-informed electorate. This is a good thing, not a bad thing. We should celebrate each additional dollar spent on political communication.

It is not true that additional money merely bids up the price of a fixed communication channel. Although that may sound plausible regarding broadcast television and radio advertising, it is manifestly untrue for direct mail, online search, social media platforms like Facebook and YouTube, and other kinds of growing digital advertising.

I do not believe that smaller voices are being drowned out. They do bid for resources in the advertising market, but this is like buying any scarce resource, and advertising is not a very scarce resource. More spending on political speech gets us more political speech, much more than it shifts who is speaking.

I grant that the quality of most political messages is poor, and that I get as tired as anyone of watching politicians smile and point and avoid the hard topics, but it still informs the voters, and I’d rather have it than not. Reducing the amount of money in campaigns would reduce the quantity of political speech, which would contradict the goal of having an informed electorate.

1 https://www.oregonlegislature.gov/lfo/Documents/2017-1_LAB_Summary_17-19.pdf

2. Money and Winning

The candidates who spend the most money win their races about 90% of the time. The implication is that they won because they had more money, but it's always important to distinguish correlation from causation. It is actually more plausible, to me, that the candidate with broader support is going to be more successful at fundraising. Do they win because they raise more money, or do they raise more money because they're going to win? If political alignments and willingness to donate were randomly distributed, we would expect the results we see, without a whiff of impropriety to be found.

In fact, there are so many great examples of well-funded candidates losing badly to underdogs that I don't see unequal funds as a problem at all. Donald Trump was outspent by four of his 2016 primary opponents², and outspent almost 2:1 in the general election³. Alexandria Ocasio-Cortez won her general election despite being outspent⁴ more than 4:1, and Andrew Gillum won his primary election despite being outspent⁵ 15:1, spending the least of all five candidates in that race.

3. Bad Grades

You've heard that the Center for Public Integrity gave Oregon an "F" grade for its campaign finance system. Well, the Institute for Free Speech gives Oregon an "A+" grade⁶! There are no universally accepted criteria for evaluating these systems. Each grader is just reflecting their political preferences, and they are in fact pushing an agenda while trying to appear neutral.

According to the Institute for Free Speech, writing in 2018, 17 states have raised or repealed their contribution limits since the 2010 *Citizens United* decision⁷. Still, the majority of states have contribution limits, and that should provide fertile ground for the proponents of such limits to show data to demonstrate that limits lead to desirable outcomes. Where is the hard data that shows limits make governments better? The data actually show that contribution limits have a weakly *negative*⁸ impact on the quality of government, as measured by the criteria of the Pew Center on the States.

4. Special Interest Influence

I agree that special interest influence is a problem. The theory is that large campaign contributions can give special interests "undue influence" over an elected official, and that by preventing large contributions we prevent this influence. This is a plausible rationale, but still flimsy: after all, how often do contributions actually influence the behavior of politicians?

If my campaign slogan is "a chicken in every pot", and then the National Chicken Council gives my campaign a million dollars, they aren't *influencing* me – I was *already* pro-chicken. I can't be corrupted by their contribution if I was already ideologically in line with their interests. They're just supporting me, they aren't changing me. And isn't a contribution that doesn't lead to influence the least objectionable kind of contribution?

If my mother wants to make a large donation to my campaign, it's because she loves me and wants me to succeed, it's not an effort to influence my official actions. How is that corrupting? On the other hand, as someone who knows me personally, she is in a position to influence me whether she makes a contribution or not.

2 https://en.wikipedia.org/wiki/2016_Republican_Party_presidential_primaries Trump (\$76.4M) was outspent by Carson (\$77.7M), Rubio (\$111.8M), Cruz (\$127.1M), and Bush (\$138.1M), cumulatively \$454.7M or almost 6 times the spending of Trump.

3 <https://www.opensecrets.org/pres16> Clinton \$794.9M to Trump \$408.4M.

4 https://ballotpedia.org/Alexandria_Ocasio-Cortez

5 [https://ballotpedia.org/Florida_gubernatorial_and_lieutenant_gubernatorial_election,_2018_\(August_28_Democratic_primary\)](https://ballotpedia.org/Florida_gubernatorial_and_lieutenant_gubernatorial_election,_2018_(August_28_Democratic_primary))

6 <https://www.ifs.org/wp-content/uploads/2018/03/IFS-Free-Speech-Index-Grading-the-50-States-on-Political-Giving-Freedom.pdf>

7 Ibid.

8 https://www.ifs.org/wp-content/uploads/2013/10/2013-10-08_Issue-Analysis-6_Do-Lower-Contribution-Limits-Produce-Good-Government1.pdf

Although it's clear by these examples that blanket prohibitions on large contributions fail to be narrowly tailored to prevent corruption, let's examine a scenario where they would at least be aimed at something objectionable. I think it's critical to understand this process in detail, so let's look at a hypothetical sequence of events:

1. Legislative candidate announces platform
2. Special interest identifies candidate as likely ally
3. Special interest makes large contribution to candidate
4. Candidate spends contribution on political speech
5. Political speech persuades electorate to vote for the candidate
6. Candidate wins election
7. Legislation creating targeted tax credit for special interest is introduced
8. Elected candidate votes in favor of tax credit
9. Tax credit is passed into law
10. Special interest receives large tax credit

Let's assume that #10 is bad. Campaign contribution limits are an attempt to disrupt this sequence way back at #3. That's very far removed from the bad consequence. After the contribution, we still need to go through seven more steps before the bad thing happens! The political speech censors want to take away the freedom to donate to political candidates because the speech it funds *might* persuade other voters enough for the candidate to win, and then that official *might* help pass a bad law. They want to limit free speech because of a hypothetical *tertiary* consequence of *other peoples'* actions! That's absurd. It's wrong to take away one person's rights because of somebody else's actions. Limiting political speech holds the wrong person responsible, treating an innocent person as the bad guy. Maybe you legislators can't control yourselves, but that's no justification for trampling my freedom of speech.

I don't believe there is a problem in #3. I don't believe there is any problem anywhere in this sequence until #7. The bad targeted tax credit scenario is a problem entirely within government, and the solution ought to be through attacking steps 7 and/or 8.

We could go after #7 by describing the kinds of laws we don't want, and making them unconstitutional. This would reduce the power of the legislature, and I think would beneficially obligate us to get rid of subsidies for causes we favor as part of getting rid of subsidies for causes we disfavor.

We could go after #8 by trying my fellow task force member Seth Woolley's idea of excluding a legislator's vote when they have a conflict of interest. (I think this would be very difficult to write, but it's worth exploration.)

Either of these approaches places limits on the legislature rather than on the people. Neither approach would reduce the freedom of the public. I think you should focus on those avenues instead of on censorship.

A Defense of Free Speech

There are three additional things I would like to speak about: Privacy in political activity, the voice of concentrated interests, and the freedom to criticize government.

1. Privacy in Political Activity

I support the right of privacy in political activity. Some of the cornerstones of this country's government are the Federalist Papers and the Antifederalist Papers, which were published anonymously. Anonymous political speech has a proud place in the American tradition. It enables people to be bold and to say what they really think, free from personal repercussions of unpopular ideas.

For example, how intimidating was it, just a few years ago, to be an open advocate for same-sex marriage or marijuana legalization in very conservative locations? A shield of anonymity lets more people participate in the public discourse and helps broad political change happen more quickly.

It also has the merit of causing people to focus on the content of the message, rather than on the identity of the speaker, or even less usefully on the financial backers of the speaker. The message is what's important. Let's focus on that. If we instead focus on identities, it's too easy to get stuck in your own ideological bubble by automatically ignoring anything said by one of the "bad guys". I think we should pay more attention to what people say, and less at whether they were funded by George Soros or by the Koch family or Michael Bloomberg or Phil Knight or whoever your favorite boogeyman is.

Justice Thomas's opinion in *Citizens United*⁹ (concurring in part and dissenting in part) states that "[d]isclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies specifically calculated to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights." The opinion observes that opponents of a 2008 ballot measure in California used personal information gathered from required campaign finance disclosures to publicize the names and locations of people in favor of that measure, many of whom "suffered property damage, or threats of physical violence or death, as a result." Two organizations received mail containing a white powdery substance.

The opinion also provides an example of public disclosure operating to protect an incumbent:

[...] a candidate challenging an incumbent state attorney general reported that some members of the State's business community feared donating to his campaign because they did not want to cross the incumbent; in his words, "I go to so many people and hear the same thing: "I sure hope you beat [the incumbent], but I can't afford to have my name on your records. He might come after me next.""

Furthermore, research by the Institute for Justice has revealed that ordinary voters have little interest in disclosure data¹⁰.

2. The Voice of Concentrated Interests

Campaign contribution and expenditure limits do not create a level playing field. In fact, they tilt it against the voices representing concentrated interests, voices that deserve to be heard.

For example, a business with few employees whose continued existence is threatened by government regulation has a very small pool of people interested in defending it. With low contribution and expenditure limits, that business would be unable to get its message out to the electorate. With a small number of people with any personal interest, the business has no direct electoral power, and without a voice to reach the electorate at large to persuade them to protect its interests, there is nothing it can do.

You've probably heard the old saw that "democracy is four wolves and a sheep voting on what to have for lunch." Contribution and expenditure limits deny the sheep the right to argue it shouldn't be eaten. The sheep can't win the vote, and your muzzle prevents it from persuading others, so it's doomed. Is that right? Is that fair? It has been said that campaign finance reform is about restoring trust in the elections process. How could we trust a process that would, by design, stifle or silence some points of view?

Supporters of contribution and expenditure limits say that they don't want the smaller voices to be drowned out by the bigger ones. What they mean is that they prefer the smaller voices, and want to impose their preference on everyone through censorship of the political speech of the large voices.

9 *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), available at <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf>

10 <http://ij.org/wp-content/uploads/2015/03/fulldisclosure.pdf>

There is already perfect equality at the ballot box: only individuals get to vote, and each vote counts equally. Concentrated interests are, by dint of being concentrated among few hands, already hugely disadvantaged in elections. Let them speak. Speech is harmless, it picks no one's pocket and breaks no one's leg. It can only persuade. We should not enact a policy designed to keep the electorate ignorant of a point of view. Everyone's ideas deserve a fair hearing.

3. Freedom to Criticize Government

A few days ago, the BBC reported that Russia's parliament passed a bill outlawing "disrespect" of the State, public officials, or Russian society – making it a criminal offense. Russia will be joining Turkey, Thailand, China, Saudi Arabia, North Korea, and other states where it's illegal to criticize the government.

Even the United States has been on the wrong side of this. The Sedition Act was law less than ten years after the ratification of the Bill of Rights, leading to criminal convictions for people critical of government officials.

The *Citizens United* case was actually about protecting the right to criticize government officials. A nonprofit corporation "Citizens United" created a documentary film critical of then-Senator Clinton, and wanted to make it available via video-on-demand shortly before the 2008 primary election in which she was running for President. They wanted to advertise their documentary on broadcast and cable television, which would be considered a corporate independent expenditure – which was forbidden in the time shortly before an election.

In other words, there was an association of people pooling their resources for the purpose of publicly criticizing a sitting government official who was running for higher office. But the government had passed a law prohibiting their speech at precisely the time it would have had its greatest impact.

Does suppressing political speech near elections inform the electorate, or keep them ignorant? Does limiting the freedom of people to criticize elected officials make those officials more accountable, or less?

We must never, never, never, never, never suppress speech that is critical of government or government officials. Even if that speech occurs near an election. Perhaps especially if that speech occurs near an election.

Thank you for the opportunity to testify in the defense of our most cherished liberal value.

Kyle Markley
kyle@arbyte.us