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STATE OPTIONS FOR REFORM

By Brent Ferguson

Many who want to reduce the influence of big campaign money on politicians are frustrated by damaging Supreme Court decisions and astonishing inaction by Congress and the Federal Election Commission. It's natural to be discouraged by rulings like *Citizens United*, which held that corporations and unions may spend as much as they want on advertisements supporting politicians. But giving up is the wrong choice. States and cities have shown in the last few years that there are plenty of options that can give ordinary voters a greater say in elections, ensure that elections are transparent, and limit the influence of big money. States and cities with these reforms have seen promising results, despite the limits imposed by the Supreme Court.

Below is an overview of the most promising reforms, most of which are already used in various states and cities. And all of them are clearly permissible under current Supreme Court jurisprudence.

Public Financing

The best way to fight back against the big spending that dominates elections is public financing, which lets candidates without wealthy supporters run competitively. Public financing can come in various forms: public matching of small contributions, vouchers allowing donors to give small contributions, block grants for competitive candidates, or rebates for those who make small contributions, to name a few.

Small-donor matching

Small-donor matching systems in several major cities, such as New York and Los Angeles, have demonstrated the power of public financing. Under such programs, small donations from individuals (usually under $200 or so) are matched by public money. The most successful systems have a multiple match, such as New York City, which provides six dollars for every dollar of a donation of $175 or less. Thus, a $175 donation is matched by $1,050 in public money. Typically, matching systems require participating candidates to agree to certain conditions, such as spending ceilings or lower contribution limits.

Small-donor matching systems have shown that public financing can transform elections. In New York City, about 90 percent of candidates in the most recent election participated in the program, thereby "reach[ing] out to their own constituents rather than focusing all their attention on wealthy out-of-district donors." A 2012 study concluded that the system "has increased the extent to which participating candidates rely on small donors financially." The program has also encouraged greater donor diversity: contributors to city candidates are much more racially and economically diverse than donors to candidates for New York's state legislature, who are not publicly-financed. New York City's law and rules are good models for small donor matching systems.

Vouchers

Another version of public financing is providing citizens with vouchers they can give to candidates, who can use the vouchers to fund their campaigns. Voucher programs were originally proposed in 2002 by Yale Law School Profs. Bruce Ackerman and Ian Ayres, but have yet to be implemented. However, an exciting proposal on the November ballot in Seattle would create a system in which each voter receives four $25 vouchers that they could give to city candidates. Rep. John Sarbanes (D-Md.) has introduced a federal bill called the Government by the People Act that would create a voucher pilot program for federal elections.

Voucher proposals are designed to reap the same benefits as small-dollar matching programs, increasing the participation of everyday citizens, and reducing the influence of big spending. While we don't yet know how widely voters would use such a system, vouchers could have a large impact since citizens would not have to spend any money to participate. Simply by filling out a voucher form online (or by mail or in-person), voters could support their candidate financially with less effort than it takes to vote. Candidates seeking to campaign most efficiently would likely make it a priority to persuade voters to use their vouchers, rather than focusing on higher-dollar events that draw a small portion of voters.

Block grants

Several of the most prominent public financing systems, including those in Maine and Arizona, have given qualifying candidates block grants of public money. This method is intended to both remove candidates' dependence on large donors and lift the burdens of fundraising, so candidates can focus on developing policy plans and meeting with constituents.

Yet public financing programs cannot limit the spending of outside groups like super PACs. Arizona's system attempted to help candidates respond to such spending by providing extra public money when a candidate faced an opponent who benefitted from especially high spending. The Supreme Court in 2011 invalidated that part of Arizona's law, saying that it unconstitutionally discouraged speech. While block grant systems still may be viable, states and cities that use them have looked for ways to ensure that participating candidates can raise extra money in the event that they face an opponent with deep-pocketed supporters.

For example, Maine is attempting to revive its public financing system in response to the Supreme Court decision. A measure on the November ballot would allow candidates to receive additional funds provided they grow their ranks of five-dollar contributors.

Rebates and tax credits

The three public financing systems discussed above attempt to transform elections by allowing candidates to rely principally on public money. Yet there are several states and cities that offer public money in a more limited manner that can still encourage small contributions. States such as Minnesota, Virginia, Oregon, and others offer small contributors a rebate or tax credit, usually with a cap of no more than $50.

Essentially, rebates and tax credits serve the same goals of voucher programs by making it more attractive for individuals to give small amounts of money to their preferred candidate or party (rebates are more useful, because receipt of a refund does not depend on the amount of a citizen's tax bill). Because donors must still pay out-of-pocket, participation in such programs has never been sufficiently high to fundamentally change privately-funded elections. Yet there are success stories. Minnesota's rebate law (see Subd. 23) has likely encouraged many more small donors, helping the state's candidates to rely less on larger contributions. Refund applications are done on a simple one-page form.

Coordination Rules

Coordination rules distinguish what qualifies as a campaign contribution and what counts as independent spending. The distinction is especially significant because contributions to candidates can be limited, but independent spending cannot. Because of the rise of independent spending over the last five years, coordination rules have become much more important, and many states and cities have worked to ensure that super PAC and other outside spending is truly independent.

As a baseline, federal, state, and local rules generally provide that spending counts as a contribution if a candidate has coordinated, consulted, or cooperated with an outside spender on a campaign advertisement, or has requested or suggested an advertisement. Yet reformers have begun to realize that candidates and outside groups can sometimes circumvent traditional rules through a variety of methods, such as sending trusted advisers to operate a super PAC, or by having the candidate raise money for a super PAC, thereby indicating his or her support for its message (and encouraging donors to evade contribution limits by giving to the supported group).

Last fall, the Brennan Center issued a report identifying several rules that are necessary for effective coordination regulations. Those include:

- Ensuring that coordination rules apply to all election-related spending, not just spending on ads that directly solicit a vote for or against a candidate.
- Treating an outside group's spending as coordinated if the candidate has recently raised money for the group.
- Create a "cooling off" period before a candidate's adviser may work for an outside group that makes independent expenditures in support of the candidate.
- Treat spending as coordinated if it reproduces or redistributes any material produced by the candidate's campaign.
- Ensure that candidates and outside groups may not use the same consultants or other vendors that could share information about the candidate's campaign plans, unless there is a proper firewall.

States and cities have already set rules like these, and they have shown such restrictions make a big difference: if candidates and outside groups know that coordination laws are strong and will be enforced, they comply with the rules, ensuring that unlimited spending is truly independent. For example, California's regulation presumes spending is coordinated if it is done with the involvement of anyone who has provided professional services to the candidate within the same election cycle. The state also prevents a group from making independent expenditures supporting a candidate who has helped the committee raise money. The state regulator, the Fair Political Practices Commission, has shown a willingness to investigate and enforce the law. For instance, in 2013, the Commission fined a candidate's campaign manager when he also served as an officer for an outside group that spent money on mailings to promote the candidate.

Other states have strong coordination rules that could serve as models, such as Connecticut (Sec. 9-601c) and Maine (94-270 Ch. 1, § 6(9)).

Disclosure and Disclaimers

Transparency in election funding is vital to a democracy's health. When the public knows who is spending to get candidates elected, they can determine whether elected officials are furnishing those funders with special treatment. Further, information about financial supporters of candidates and ballot initiatives often helps voters make their choice. Disclosure rules are widespread, and they have consistently received strong endorsement from the Supreme Court. But with new avenues of secret outside spending, it is important for states and cities to update their laws to ensure that citizens are getting thorough, accurate, and timely information.

Disclosure of spending

Requiring disclosure of campaign contributions is simple: candidates are responsible for reporting information about their donors, usually above a certain threshold, such as $200. Disclosure rules covering outside spenders are more tricky. First, the law must decide what type of spending will trigger disclosure. For instance, if the law only covers ads that directly urge a vote for or against a candidate or ballot measure, the law can be easily circumvented by ads that have a point of view but do not include express advocacy.

Second, the law must ensure that disclosure is meaningful, such that voters understand the true identity of the people, corporations, or other groups that are responsible for spending. Recently, spenders have avoided disclosure by creating shell groups that provide voters with little information about who is behind a certain advertisement. This occurs frequently in federal elections: while super PACs must disclose their donors, large super PACs often simply report contributions from obscure groups or other organizations that do not disclose their donors.

For example, in the 2012 election, the super PAC supporting President Obama disclosed that an affiliated group called Priorities USA gave it $190,000. But Priorities USA was a § 501(c)(4) nonprofit that was not required to disclose its donors.

Again, cities and states have begun to innovate. Most simply, many jurisdictions (including the federal government) require groups to disclose their contributors if they run advertisements that mention candidates within a certain window preceding the election. These laws prevent groups from avoiding meaningful transparency by styling their campaign work as "issue advocacy" ostensibly unrelated to the election.

Jurisdictions have also begun to pass laws to ensure that spenders cannot avoid disclosure by simply creating shell groups that hide the group's real contributors. Last summer, New York City passed a disclosure law that goes one level deeper: instead of only disclosing contributors to an outside spending group, spenders must reveal groups that gave money to those contributors, above a certain threshold. While the law leaves open the possibility that people and groups could pass their money through an extra level of shell entity, it will make evasion of disclosure laws more difficult.

Connecticut and Rhode Island have approached the problem differently, attempting to ensure that spenders cannot circumvent the rules regardless of how many shell groups they employ. Those states require disclosure of any "covered transfer", which is defined broadly to include payments that are intended to eventually fund political advertisements. A federal bill called the DISCLOSE Act, a previous version of which came extremely close to passage in 2010, takes a similar approach. Another helpful provision in some state laws requires that for any contribution from a non-individual, the spender must list a "responsible party" who must be a human being. For example, Delaware's "responsible party" law (§ 8031(a)(4)(b)), requires disclosure of the name and address of a person who controls the entity making the donation.

Disclaimers on Political Advertising

While public information about funders is important, it is most helpful to voters if disclosure about funding appears on the advertising itself. When informative disclaimers are included, voters immediately know the identity of an outside spender, rather than having to search for information online about a group with an opaque name such as "Americans for a Strong Economy" or hoping that the press will research and publish relevant information. Simple disclaimer requirements are common and often require that advertisements state whether they are paid for and/or authorized by a candidate or another group.

While such disclaimer requirements are useful, some states and cities have begun to require greater disclosure on political advertising. Several states, including Washington and Alaska (§15.13.090(a)(2)(C)), have passed laws requiring advertisements from outside groups to list the groups' top few contributors at the end of each ad. Such a requirement informs citizens and prevents circumvention when ads are run by groups that do not have names that can be readily assessed by voters.

Conclusion

While the federal government's failure to address fundamental problems of our democracy is frustrating, states and cities are leading the way by enacting common-sense reforms that can give ordinary citizens a voice. Public financing laws can increase citizen participation while reducing the power of moneyed interests, and disclosure and coordination rules prevent the worst abuses by candidates and big-spending groups. More states and cities should move quickly to follow the examples of leaders in the field.

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