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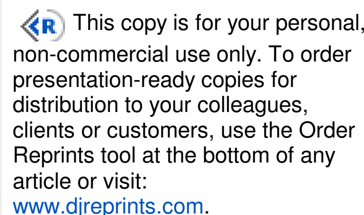

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COMMENTARY

The Speech Police

By BRADLEY SMITH
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In February 2006, Norm Feck learned that the city of Parker, Colo., was considering annexing his unincorporated neighborhood, Parker North. Realizing that it would mean more bureaucracy, Mr. Feck and five other locals wrote letters to the editor, handed out information sheets, formed an Internet discussion group, and printed up anti-annexation yard signs that sprouted throughout the neighborhood.

Annexation supporters responded with a legal complaint against Mr. Feck and his friends for violating Colorado's campaign-finance laws. The suit also threatened anyone who had contacted Mr. Feck's group about the annexation, or put up one of their yard signs, with "investigation, scrutinization, and sanctions for Campaign Finance violations." Apparently the anti-annexation activists hadn't registered with the state, or filled out the required paperwork disclosing their expenditures on time. In February of this year voters defeated the annexation proposal -- but Mr. Feck and others still face steep fines. The case remains in litigation.

Martin Kozlowski

Should Americans care? There has been little press about the dispute. The lack of interest is understandable: Campaign-finance reform, whether on the state or federal level, is at once forbiddingly complex and seemingly irrelevant to most citizens' lives. People tend to see reform as affecting only the powerful -- lobbyists, big corporations, "fat cats" -- not ordinary Joes.

But as Norm Feck's story shows, that's a riskily blasé attitude. Campaign-finance reform is creating an intrusive regulatory regime on all levels of government. Its proponents, mostly on the left, have chiefly used it to bolster their own political fortunes and to undermine limited, constitutional government.

Moreover, the extent of the regulatory web now in place is evident even when advocates of free speech win an occasional victory. On Monday the Supreme Court affirmed, by a narrow 5-4 margin, that the Federal Election Commission cannot prevent citizens' groups from running broadcast ads discussing pending legislative issues close to an election. *FEC v. Wisconsin Right to Life* usefully prunes back one tentacle of the McCain-Feingold law of 2002. But the bulk of over 400 pages of FEC regulations remain intact. The opinion has no impact on the law under which Norm Feck is being prosecuted, or any of the many other Norm Fecks in the United States.

This year marks the 100th anniversary of the first federal campaign-finance law, the Tillman Act. Named

for its sponsor, South Carolina Democratic Sen. Ben Tillman, the act banned corporate contributions to federal campaigns, and as such remains the backbone of federal campaign-finance regulations. "Pitchfork Ben" Tillman advocated lynching black voters and had a big hand in establishing Jim Crow. His law fit neatly with his segregationist agenda, since corporate "money power" primarily backed anti-segregationist Republican politicians.

The modern era of campaign-finance reform has an equally partisan origin. From the mid-1960s on, opinion polls showed steady erosion in public support for big government and liberalism. Republicans made substantial congressional gains in 1966, and two years later Richard Nixon won the presidency. By 1970, Democrats feared -- with good reason -- that their longstanding electoral majority was in jeopardy.

To help prevent that outcome, the Democrats passed the Federal Election Campaign Act (FECA) in 1971 (and amended it three years later) which would, they hoped, strike at the heart of Republican political power -- while leaving untouched their own sources of influence, such as union-organized volunteers. The law tightly limited both political contributions and any expenditure that might "influence" an election. It also mandated disclosure of political contributions as small as $10, established a system in which taxes financed part of presidential races, and set up a bureaucracy, the Federal Election Commission (FEC), to enforce the new rules. In *Buckley v. Valeo* (1976), the Supreme Court struck down the expenditure limits on First Amendment grounds, and held that the disclosure requirements, as well as limits on contributions to non-candidate political organizations (the National Rifle Association, say), would apply only when the group receiving the donations "explicitly advocated" the election or defeat of a candidate, through such phrases as "vote for Smith." Still, even as truncated by the Court, the new law left American politics more heavily regulated than at any time in history.

Democrats don't back campaign-finance reform strictly for partisan reasons. For many, private campaign funding is also a major obstacle to an ideological agenda of regulating the private sector and expanding government. The writings of J. Skelly Wright, one of the most prominent reform advocates in the '70s, are among the clearest expressions of these ideological values. As a federal appellate judge, Wright upheld all of FECA's provisions, including spending limits, only to have *Buckley* reverse him. After that defeat Wright continued to back campaign-finance reform, arguing (incoherently) that it was politically "neutral" but also necessary if Congress was to enact a host of liberal policy goals: increased regulation of auto dealerships, a "windfall profits" tax on oil companies, hospital price controls, creation of a superfund for victims of toxic chemicals, and "any other legislation that affects powerful, organized interests."

To prove his point, Wright cited ballot initiatives in California and Colorado that proposed regulating certain private industries. In both cases, the initiatives began with leads in opinion polls, but suffered defeat after the targeted industries launched ads opposing the proposed regulation. Such private spending, Wright believed, "distort[ed] the expressed will of the people" -- meaning not the will that they in fact expressed at the ballot box, but rather the pro-regulation stance that he himself embraced.

Wright's belief that potential targets of regulation shouldn't be able to communicate directly with voters -- since that could "distort" their true opinions -- remains a staple. Here's the former president of the liberal advocacy group Common Cause: "At the same time there are efforts to regulate them, [you] have oil and gas companies, [you] have trial lawyers, [you] have all the major interests that have an outcome in this election and an outcome in policy being able to pour this money in . . . they want access to influence the political process. It's corrupting!"

Campaign-finance reform neatly accomplishes Democrats' goal of muffling political speech on the right. Reformers seldom state that goal explicitly, of course; instead, they claim that reform gets rid of the political corruption that supposedly follows from large campaign contributions.

Yet study after study shows that contributions play little or no role in how politicians vote. One of the most comprehensive, conducted by a group of MIT scholars in 2004, concluded that "indicators of party, ideology and district preferences account for most of the systematic variation in legislators' roll call voting behavior." The studies comport with common sense. Most politicians enter the public arena because they hold strong beliefs on public policy. Truly corrupt pols -- the Duke Cunninghams of the world -- want illegal bribes, not campaign donations.

Campaign-finance reformers also often claim to seek something more radical than eradicating corruption: equalizing political influence. During the debate over McCain-Feingold, numerous members of Congress repeatedly picked up on this theme. "It is time to let all our citizens have an equal voice," argued Rep. John Lewis (D., Ga.). Sen. Jean Carnahan (D., Mo.) complained that "special interests have an advantage over average, hard-working citizens." Sen. Susan Collins (R., Maine) wanted "all Americans [to] have an equal voice."

Yet reformers leave important sources of influence -- including academia and Hollywood, both tilting to the left -- alone. Consider how the law applied to Michael Moore's anti-Bush film, "Fahrenheit 9/11," and to competing conservative films released in the run-up to the 2004 election. A number of complaints filed with the FEC charged Mr. Moore and others with campaign-finance violations; both the movie and the advertising surrounding it, the complaints asserted, amounted to illegal contributions to the Kerry campaign. Despite Mr. Moore's public statements that he'd made his movie to help defeat President Bush, the FEC dismissed all the complaints, noting, among other things, that the film was a commercial rather than a political effort.

But when the conservative organization Citizens United tried to release a film responding to many of Fahrenheit 9/11's anti-Bush assertions, the FEC advised it that any public broadcast or advertising close to the election would be subject to McCain-Feingold regulations. Why? The conservative producer, unlike Moore, wasn't normally in the movie business.

Then there's the press -- and who would deny that it has great political influence? Nevertheless, campaign-finance reform leaves it unregulated thus far.

Early this year campaign-finance reform advocates sought to include in Congress's lobbying reform bill a provision that would heavily regulate "grassroots lobbying" -- that is, corporate appeals to citizens to voice their opinions on particular issues to members of Congress.

The Senate stripped the anti-grassroots-lobbying provision from the bill, to the dismay of Meredith McGehee, policy director of the Campaign Legal Center, who decried the practice of "Astroturf lobbying." Apparently when productive businesses, worried about excessive government regulation, try to get voters on their side, that's Astroturf lobbying -- fake and unworthy of protection. But when a foundation-funded organization with no public accountability, such as the Campaign Legal Center, speaks out in Washington, well . . .

The plain fact is that campaign-finance regulation discourages true grassroots political activity. Consider two examples. During the 2000 presidential race, four men placed a homemade sign, reading VOTE REPUBLICAN: NOT AL GORE SOCIALISM, on a cotton trailer along a Texas highway. The FEC spent *nearly 18 months* investigating, because the sign lacked the legally required information about who had paid for it. In 2004, Nascar driver Kirk Shelmerdine spent $50 to affix a BUSH-CHENEY '04 decal to an unsold spot on his car's advertising space. The FEC admonished him for making an unreported campaign expenditure.

Such cases are not merely examples of bureaucratic excess, points out campaign-finance lawyer Bob

Bauer, a lonely pro-freedom voice in Democratic circles: Under today's intrusive laws, Mr. Shelmerdine's activities demanded an FEC inquiry. Nor are such cases rare.

While serving on the FEC from 2000 to 2005, I kept a file of letters from political amateurs caught in the maw of campaign-finance laws. Many of these people had no lawyers; none had the least intent to corrupt any officeholder; and all thought that they were fulfilling their civic duty by their involvement in campaigns.

A Texas dentist wrote: "It is 5:30 p.m. on Good Friday. Today, like many days previous, I have taken time away from my business and my family to respond to the Commission. . . . I am being pursued by the Commission to pay over $30,000 from my personal funds." A CPA who had served as a volunteer campaign treasurer, and who was facing over $7,000 in fines for improper reporting, wrote: "No job I have ever undertaken caused me more stress than this one. I was frightened and concerned every day that I would do something wrong."

Another volunteer treasurer asked the FEC to waive its fines: "We were just honest, hard working, tax paying Americans who wanted to make a difference . . . at this point, we are so disillusioned with the [legal] difficulty of running for office that we wonder why anyone other than a professional would attempt to do so." A retired high school teacher wrote: "I taught, and believe, that we have the best government in the world. I was happy to be part of the process. . . . I made every attempt to comply and am now being fined $600 for a misunderstanding."

The letters flowed in -- from lawyers, teachers, doctors, retirees, all facing investigations and fines for their volunteer political activity. One summed up: "I will NEVER be involved with a political campaign again."

Though they claim to speak for average citizens, reformers don't care much about the way their reforms hurt those citizens. Trevor Potter, president of the Campaign Legal Center and a McCain adviser, has dismissed complaints by arguing that campaign-finance laws are no more complex than antitrust or patent laws. "They are worth the inconvenience and lawyers' fees they generate," says Mr. Potter -- who also heads the campaign-finance practice at the law firm of Caplin & Drysdale, where partner billing rates can range upward of $750 per hour.

Another disturbing trend in campaign-finance regulation is the attempt to directly regulate speech. For example, in the Shelmerdine case, the FEC valued the driver's "contribution" not at the $50 it cost him to place a decal on his car, but at several thousand dollars -- what the FEC determined to be the advertising spot's monetary value. Similarly, if an executive instructs his secretary to type a fund-raising letter, the FEC values the contribution not at the cost of typing the letter, but at the amount of money that the letter raises. This move dramatically expands the reach of campaign-finance laws: not only can the FEC limit funds that can be used for speech, but it can limit speech itself by assigning it a monetary value.

Richard Hasen, an oft-quoted expert on campaign finance whom the media regularly portray as a moderate voice for reform, has proposed limiting citizens' financial participation in politics to a government-provided voucher, and prohibiting any other private funding of political speech. Edward Foley, a former Ohio state solicitor and director of the Ohio State University's influential election-law program, has made a similar proposal. Both experts would extend their regulations even to newspaper editorial pages. Mr. Hasen explains that he's trying to solve the "Rupert Murdoch problem" -- just in case you had any doubt about whom he's got in his sights.

"I have come to doubt that the masses of the people have sense enough to govern themselves," wrote Ben Tillman, the founder of federal campaign-finance reform, in 1916. Many years later, in 1997, House

Minority Leader Richard Gephardt famously described the battle over campaign-finance reform as "two important values in direct conflict: freedom of speech and our desire for healthy campaigns in a healthy democracy. You can't have both."

Many a tax- and regulation-prone politician, stymied by real political debate, would agree with both men. But Norm Feck and his Parker North neighbors, the Texas dentist facing $30,000 in fines, and tens of thousands of NASCAR fans realize that free speech is not a bar to healthy democracy, but is its cornerstone. It's imperative that we speak up to defend freedom of speech -- before that very speaking up becomes impossible.

Mr. Smith, a professor of law at Capital University, was chairman of the Federal Election Commission in 2004. This essay is adapted from a forthcoming City Journal article.

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