

THE DEBATE: CAN GOVERNMENT REGULATE MONEY IN POLITICS?

This paper looks at three of the ideological underpinnings of the debate about whether government can restrict money in politics.

Libertarian vs. Egalitarian: Dawood 2014

Yasmin Dawood¹, addresses the duality in the debate on campaign finance in terms of libertarian and egalitarian perspectives. According to the libertarian approach, the government should not restrict electoral speech because individuals should be free from state control, democracy depends on a free market of ideas, and speech should be rebutted rather than censored. Many argue that this is the underlying rationale for First Amendment guarantees of personal rights. Under the libertarian approach, the constitutional protection of free speech means that there is a presumption against the state's regulation of campaign contributions and expenditures. The egalitarian approach, by contrast, holds that the state regulation of speech is required in some instances to prevent the wealthy from monopolizing political discourse. Those with the greatest wealth could monopolize the means of communication. Concentrations of private power may mean that the speech of those less powerful is never heard, and consequently, that the marketplace of ideas does not represent the full range of views and speakers.

Fundamentalist vs. Idealist: Sunstein 2005

Further light is shed by considering the methodology applied at the level of Supreme Court jurisprudence as examined by Cass Sunstein² who identifies four categories of justices: (1) Fundamentalists, who seek to understand the Constitution as it was understood at the time of adoption [around 1789]; (2) Perfectionists (i.e., idealists), who read the Constitution in broad terms to put its ideals in the best possible light; (3) Minimalists, who avoid either of the foregoing extremes and who favor narrow decisions that only address the specific questions in contest without taking stands on the broader issues; and (4) Majoritarians, who believe that judges should respect the outcomes of democratic processes and uphold legislative policies unless they are clearly beyond constitutional boundaries.

Sunstein's approach would yield the following classifications for Supreme Court justices: The Requist/Roberts majority would be Fundamentalists; the majority on the preceding Warren Court would be Perfectionists; any moderates (not consistently following either extreme) would be Minimalists; and those who upheld the innovations of the New Deal in response to the Great Depression would be Majoritarians. Examples of Majoritarian movements that led to the amending of the Constitution are the adoption of women's right to vote (19th Amendment, 1920) and the adoption (18th Amendment, 1919) and then repeal (21st Amendment, 1933) of prohibition of liquor. Looking at the current makeup of the Supreme Court, this classification system for judicial ideology seems useful in understanding the Fundamentalist (conservative) and Perfectionist (progressive) dichotomy.

Conservative vs. Progressive: West 1990

Robin West³ brought sociological considerations into analysis of the conservative-progressive polarization. Very broadly, conservative constitutionalists view private or social normative

authority as the legitimate and best source of guidance for state action; accordingly, they view both the Constitution and constitutional adjudication as means of preserving and protecting that authority and the power that undergirds it against either legislative or judicial encroachment. In contrast, progressive constitutionalists view the power and normative authority of some social groups over others as the fruits of illegitimate private hierarchy, and regard the Constitution as one important mechanism for challenging those entrenched private orders.

Where the conservative is likely to see in a particular social or private institution a source of community wisdom and legitimate normative authority, the progressive is likely to see patterns of domination, subordination, and oppression that inevitably attend such inequalities of power. For this reason, the debate ongoing between progressives and conservatives is only superficially over interpretive issues; on a more substantive level it is over the value of the visions of the good defined by the various hierarchies that make up their private and social life. Thus, the deepest divisions in modern constitutional thought are not a function of jurisprudential differences, but of socio-political orientation.

¹ Yasmin Dawood, "Campaign Finance and American Democracy," (to be published in the Annual Review of Political Science, June 2015), <http://ssrn.com/abstract=2528587>. Dawood draws the libertarian/egalitarian distinction from Cass Sunstein, 1995. *Democracy and the Problem of Free Speech*, New York: The Free Press.

² Cass R. Sunstein, 2005. *Radicals in Robes*, New York: Basic Books.

³ Robin West, 1990. "Progressive and Conservative Constitutionalism," Michigan Law Review, Vol. 88, No. 4, p. 641, <http://scholarship.law.georgetown.edu/facpub>.