

From Super PACs to Dark Money:
Politics after *Citizens United* (Part 2)
A talk with **Richard Briffault**

I. Inequality, Accountability, and Other Issues in Campaign Financing

A. Inequality

1. Representational inequality

- a. Wealthy individuals and groups are more likely to donate to candidates and in greater amounts, which exacerbate to representational inequality.
- b. Candidates and political parties are more likely to cater their platforms to the positions of the wealthier donors. Wealthy donors have greater access to candidates than smaller and poorer donors.
- c. A healthy mix of contributions would include both big and small donors.

2. Majority self-funded candidates

- a. Candidates spend a significant amount of time and energy on fundraising efforts. An advantage for self-funded candidates is they do not need to spend as much time fundraising.
- b. Self-funded candidates also give the appearance of being an outsider or shielded from influence of special interest groups, though most majority self-funded candidates still do receive contributions from interested individuals.

B. Accountability and credibility

1. *Caperton v. A.T. Massey Coal Co.*¹

- a. Hugh Caperton, Harman Mining Company president, filed suit against A.T. Massey Coal Co., Inc. for tortious interference, fraudulent misrepresentation, and fraudulent concealment. West Virginia trial court rendered judgment against Massey for \$50 million.
- b. While an appeal was pending in the West Virginia Supreme Court of Appeals In the election for the West Virginia Supreme Court seat, Massey's CEO donated over \$3 million to Brent Benjamin, a WV lawyer, and created a nonprofit called And for the Sake of the Kids which ran attack ads accusing the incumbent of voting to set a child molester free. Benjamin won the race. When the case came before the Court, Caperton petitioned for Benjamin to recuse himself but Benjamin declined and was part of the majority that overturned the \$50 million judgment.
- c. Caperton petitioned the Supreme Court.
- d. The Supreme Court ruled that Benjamin improperly failed to recuse himself because his interest posed a risk of actual bias and that such risk exists where a judge has a direct, personal, substantial, pecuniary interest.

¹ 556 U.S. 868 (2009): <https://www.law.cornell.edu/supct/html/08-22.ZO.html>

2. Generally, a candidate has to raise a base level of money to get their message out and lend credibility to their candidacy. Beyond that base level, the sources of donations and how much from each of those sources can pivot to whom they are accountable and what issues are important on their platform.

C. Foreign money

1. The Federal Election Campaign Act (FECA) prohibits foreign nationals from making contributions or expenditures directly or indirectly in connection with a U.S. election. Lawful permanent residents are not considered foreign nationals for purposes of election laws and may donate.
2. A U.S. subsidiary of a foreign corporation or a U.S. corporation owned by foreign nationals may also be subject to the prohibition in certain circumstances.
 - a. A U.S. subsidiary of a foreign corporation may not establish a PAC to make federal contributions if:
 - i. The foreign corporation finances the PAC's establishment, administration, or solicitation costs; or
 - ii. Foreign nationals participate in the operation of the PAC, serve as officers, participate in the selection of persons who operate the PAC, or make decisions regarding PAC contributions or expenditures.
 - b. A U.S. subsidiary of a foreign corporation (or a domestic corporation owned by foreign nationals) may not contribute in connection with state or local elections if:
 - i. These activities are financed by the foreign parent or owner; or
 - ii. Individual foreign nationals are involved in any way in the making of donations to nonfederal candidates and committees.
3. These prohibitions do not necessarily prevent foreign money from seeping into elections indirectly through lobbyists.
 - a. It is unlawful to knowingly provide substantial assistance to foreign nationals making contributions or donations in connection with any U.S. election. 11 CFR 110.20(h).
 - b. "Substantial assistance" includes solicitation, making, receipt, or acceptance of a foreign national contribution or donation with the intent of facilitating the successful completion of the transaction.

II. Alternative Systems and Proposals

A. Campaign finance regulations in other countries

1. Loose limits on campaign financing – e.g. Australia
 - a. Australia has no limits on donations or candidate spending.
 - b. Candidates must file annual or election period financial disclosure returns detailing the total value of donations received, the total number

of donors, individual donations above a certain threshold (of about 8-9K USD), the details of such donations, and electoral expenditures.

- c. Individuals and corporations may donate significant amounts of money before being required to disclose.
 - d. Australia employs both public and private funding.
 2. Strict limit nations – e.g. France, Iceland, Belgium
 - a. These nations employ strict and relatively low limits on both contributions and candidate spending.
 3. Limits on spending – e.g. U.K., Italy, New Zealand
 4. Limits on contribution – e.g. Finland, U.S.
- B. Vouchers
1. Seattle voters approved a voucher system to be implemented in 2017. Initiative 122 or the “Honest Elections” measure was approved by over 60% of Seattle voters. The government will send out four \$25 vouchers to contribute to local candidates who chose not to opt out. Those candidates cannot take funds from PACs, must adhere to spending caps, and enact measures for greater transparency. Candidates may redeem the vouchers with the city for campaign cash.
 2. Critics contend that the system will benefit incumbents or those who do not need to heavily rely on outside sources to convince voters to give them their vouchers.
- C. Public funding
1. Current public funding regime
 - a. Presidential Election Campaign Fund Act
 - i. Under Internal Revenue Code, qualified Presidential candidates get money from the Fund, which is an account on the US Treasury books. The fund is financed exclusively by voluntary tax check-off. Individuals can direct \$3 of their tax to the Fund.
 - b. Primary Matching Payments
 - i. Candidates in primaries get public funds to match the private contributions they raise. Only individual contributions are matchable and only the first \$250 of the contribution.
 - ii. Candidates must demonstrate broad based support by raising more than \$5K in matchable contributions in 20 different states.
 - c. General Election Grants
 - i. Party nominated candidates may receive a grant to cover all their expenses of general election campaigns: a basic \$20 million grant, adjusted for inflation. In 2012, grant was \$91.2 million.
 - ii. Nominees who accept the grant must agree not to raise private contributions and to limit their campaign expenditures to the

amount of public funds they get. The grant money can only use for campaign expenses.

- d. Party convention grants - major political party may receive grants to pay for its national nominating convention. The grant is \$4million, adjusted for inflation each Presidential election year. In 2012, the grant was \$18.25 million.
 2. Reform proposals include a public financing plan, stemming from small donors. Generally, small donations would be matched and multiplied.
- D. Disclosure reform
1. General consensus is that disclosure requirements should be overhauled, particularly with regard to Super PACs and 501(c)(4) social welfare groups.
 2. Proposals include requiring more frequent filing deadlines and mandatory 24-hour reporting requirements for large contributions.