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A New Frontier in Campaign Finance Regulation

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Your Turn, NH

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IN RECENT YEARS, the United States Supreme Court has taken what many regard as a doctrinaire approach to campaign finance regulation. It has seized on the indisputable proposition that limits on campaign expenditures and contributions implicate important First Amendment values and, pressing the proposition to logical extremes, invalidated a number of federal and state laws that had imposed such limits.

At present, the court is simply unwilling to defer to legislative judgments that some controls on the flow of the campaign finance money river are necessary to combat corruption, or the appearance of corruption, in the political process. As a consequence, Granite State voters are inundated with vitriolic and misleading political advertisements from candidates and groups across the political spectrum each election cycle.

But what of legislative judgments that controls are necessary to serve interests other than combating corruption or its appearance? Will the judiciary be more deferential in other contexts?

A bill recently introduced in the New Hampshire Senate by Sen. Dan Feltes might well raise these questions. If enacted, the law would establish a fee of 2.5 percent of gross expenditures between $5,000 and $500,000 (the first $5,000 spent would be exempted) per election cycle, and 5 percent of gross expenditures in excess of $500,000, by political candidates, political committees, and political advocacy organizations — i.e., PACs and Super PACs.

The first $500,000 raised through this per-cycle fee would be appropriated to the New Hampshire Department of Justice to fund more vigorous enforcement of the state's election, lobbying, and campaign finance and public disclosure laws. The remainder would fund grants to school districts that adopt and maintain innovative civics education programming.

The legislative judgments underlying this bill are clear. This past November, the Pulitzer Prize-winning Center for Public Integrity gave New Hampshire a D-minus in its comprehensive assessment of state government accountability and transparency.

The center expressed particular concern about the state's enforcement of its political finance system, which received a grade of F. With more money flowing into and through the state each election cycle, these enforcement problems can only be expected to grow. The Justice Department appropriation provision is directly responsive to these enforcement problems.

The proposal to fund an innovative civics education initiative rests on a judgment that civic ignorance and disengagement become all the more dangerous as the flow of money — and the nonsense that it funds — gathers strength. Stated in the abstract, this judgment certainly seems sound. But to many, so did the legislative judgment that some limits on contributions and expenditures are necessary to protect the integrity of the democratic process. Yet this latter legislative judgment has not survived First Amendment scrutiny in recent court cases.

Raphael's School of Athens, a copy of which hangs on my office wall, beautifully captures the dilemma at the heart of judicial review — the process by which judges determine whether democratically enacted law comports with the Constitution.

In the painting's center, Plato and Aristotle engage in philosophical dialogue. Plato gestures toward heaven, arguing that justice lies in the application of fixed and transcendent principles. Aristotle, in contrast, extends his hand forward over the Earth and emphasizes the lessons of human experience.

As the debate over the constitutionality of various campaign finance regulations moves forward, it will be interesting to see whether the present Platonic emphasis on the primacy of the free-speech principle will make some room for the Aristotelian lessons of experience.

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