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## Vote against McCain. Wait, Can I Say That?

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This selection first appeared in the *Wall Street Journal*, October 11, 1997, p. A22. Reprinted with permission of the Wall Street Journal © 1997 Dow Jones & Company, Inc. All rights reserved. A contributing editor of *National Journal*, Rauch considers money in political campaigns inevitable and believes limiting it in one manifestation will simply cause it to be used in a different way. He notes the possibility that McCain-Feingold may in fact forbid the mention of itself in the sixty days before an election. Rauch supports increased disclosure but thinks that public financing would be an improvement over the current system.

**T**he McCain-Feingold bill being debated in the Senate this week has become the default option for campaign finance reformers: If you are an editorialist who needs to suggest something better than today's tumbling system, you press the McCain-Feingold button on your word processor. Well, the system today is rotten, and radical change is needed. But McCain-Feingold, for all its good press and good intentions, is a bad bill. It would do nothing to end the failures of the past twenty years. Indeed, it would unflinchingly compound them.

At the core of today's troubles are two realities that will not yield to any amount of legislative or lawyerly cleverness. The first is that private money—a lot of it—is a fact of life in politics, and if you push it out of one part of the system it tends to reenter somewhere else, usually deeper in shadow. The second is that money spent to communicate with voters cannot be regulated without impinging on the very core of the First Amendment, which was written to protect political discourse above all.

We got into today's mess by defying both of these principles, with predictable results. When reformers placed limits on money spent to support or defeat candidates, lobbies simply shifted to ad campaigns that omitted explicit requests to vote for or against candidates: "issue advocacy," which the courts have ruled is constitutionally protected.

And when reformers placed tight limits on contributions to candidates, donors began giving to political parties instead: “soft money.”

The distinctions between “hard” and “soft” money, and between “express advocacy” and “issue advocacy,” are grounded in legalistic mumbo-jumbo, and so the attempts to enforce them have made campaign law bewilderingly complex without accomplishing any of the law’s goals. Campaigns are neither cheaper nor fairer nor less dependent on private money than, say, thirty years ago—just the opposite, in fact. One conclusion you might draw is that the 1970s-style money-regulating model is bankrupt. Another is that a horsedocor’s dose of the old medicine will finally heal the patient. Enter Sens. John McCain (R, Ariz.) and Russell Feingold (D, Wis.).

Among many things their bill would do: First, it would ban soft money given to political parties. Second, to make the soft money ban work, it would also restrict independent issue advocacy. Voilà—no more money, right?

Wrong. Lots and lots of money, but in different places. Ban soft money, and lobbies would bypass the parties and conduct their own campaign blitzes. Candidates and parties are already losing control of their messages as lobbies—which, unlike candidates and parties, are not accountable to voters—run independent advocacy campaigns. The McCain-Feingold bill would accelerate the alienation of politicians from their own campaigns, and, for good measure, it could also starve the parties of funds.

The sponsors are aware that independent advertising might replace soft money: thus the bill’s remarkable new limits on all ads that mention candidates within sixty days of an election. In the words of Sen. McCain: “Ads could run which advocate any number of causes. Pro-life ads, pro-choice ads, antilabor ads, pro-wilderness ads, pro–Republican Party ads, pro–Democrat Party ads—all could be aired in the last sixty days. However, ads mentioning the candidates could not.” So, for example, I might commit a federal crime by taking out an ad in this newspaper criticizing Sen. McCain for supporting his bill. The Founders would have run

screaming from such a notion, and rightly so: You cannot improve the integrity of any political system by letting politicians restrict political speech.

In real life the courts are likely to strike down McCain-Feingold's speech controls, in which case, of course, the limits would not work. But even if the limits were allowed to stand, they still would not work: Everybody would race to game the system by dressing up political expression in absurd costumes, whose legitimacy would be contested ad nauseam in the courts. Maybe my ad couldn't say "vote against McCain and Feingold," but could it say "show the promoters of the dangerous McCain-Feingold bill how you feel"? Who would decide?

The potential for speech micromanagement is endless. Imagine the fun lawyers could have with the bill's exception for "voter guides"—a permissible voter guide being (hold on tight, now) any printed matter written in an "educational manner" about two or more candidates that (1) is not coordinated with a candidate, (2) gives all candidates an equal opportunity to respond to any questionnaires, (3) gives no candidate any greater prominence than any other, and (4) does not contain a phrase *such as* (my italics) "vote for," "reelect," "support," "defeat," "reject," other words that in context can have no reasonable meaning other than to urge the election or defeat of one or more candidates. Is that clear?

So, after McCain-Feingold, campaign law would become even more complex and mystifying. Politicians would remain mendicants, forced by low contribution limits to beg every day and in every way for donations. Our already weak parties would lose their main source of funds, becoming weaker still. If the speech controls were upheld, political discussion would be both chilled and contorted. And if the speech controls were struck down, political campaigns would be run by lobbies ("independent expenditures") rather than by candidates and parties. Quite a reform.

Even total deregulation would be better than McCain-Feingold, provided disclosure were retained. For that matter, doing nothing would

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be better. Best by a very long measure, however, would be a combination of deregulation, disclosure, and onerous public financing for candidates who forgo private fund-raising—a plan that, instead of trying to eliminate or micromanage private money, would give voters an alternative to it and make the acceptance of private donations an issue in every campaign.

Alas, all of those admittedly imperfect ideas are bitterly opposed by the antimoney crusaders who gave us the system we have now and who still predominate in the “reform community.” To change their minds, campaign finance law will probably have to be made worse before it can be made better. That task, at least, McCain-Feingold would perform admirably.