

Combating Corruption



Campaign Finance,
the First Amendment

&

Restoring the Public's Trust

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Roadmap



☞ *Buckley v. Valeo* (1976)

- Distinction between expenditures & contributions
- Holding

☞ *Citizens United* (2010)

- Issues
- Holding
- Controversy
- Fall out

Roadmap, ii



☞ “Pay to Play” Campaign Finance Restrictions

- *Wagner v. FEC* (D.C. Cir. 2015) (*en banc*)
- other cases

☞ Opportunities & Challenges

☞ EG: Lessons from Texas

- Tools for restoring the public’s trust

Buckley v. Valeo



1976

Buckley v. Valeo (1976)

Expenditure limits

- Severely infringe free speech
 - Limits amount of expression
 - \$ needed for mass comm.
- Less related to corruption
 - Lack of coordination w/ cand.
 - Of less value to candidate
 - And less opp. for deal

Contribution limits

- Only marginal burden on right
 - Really about “association”
 - Which is still allowed
 - Amount shows only “intensity”
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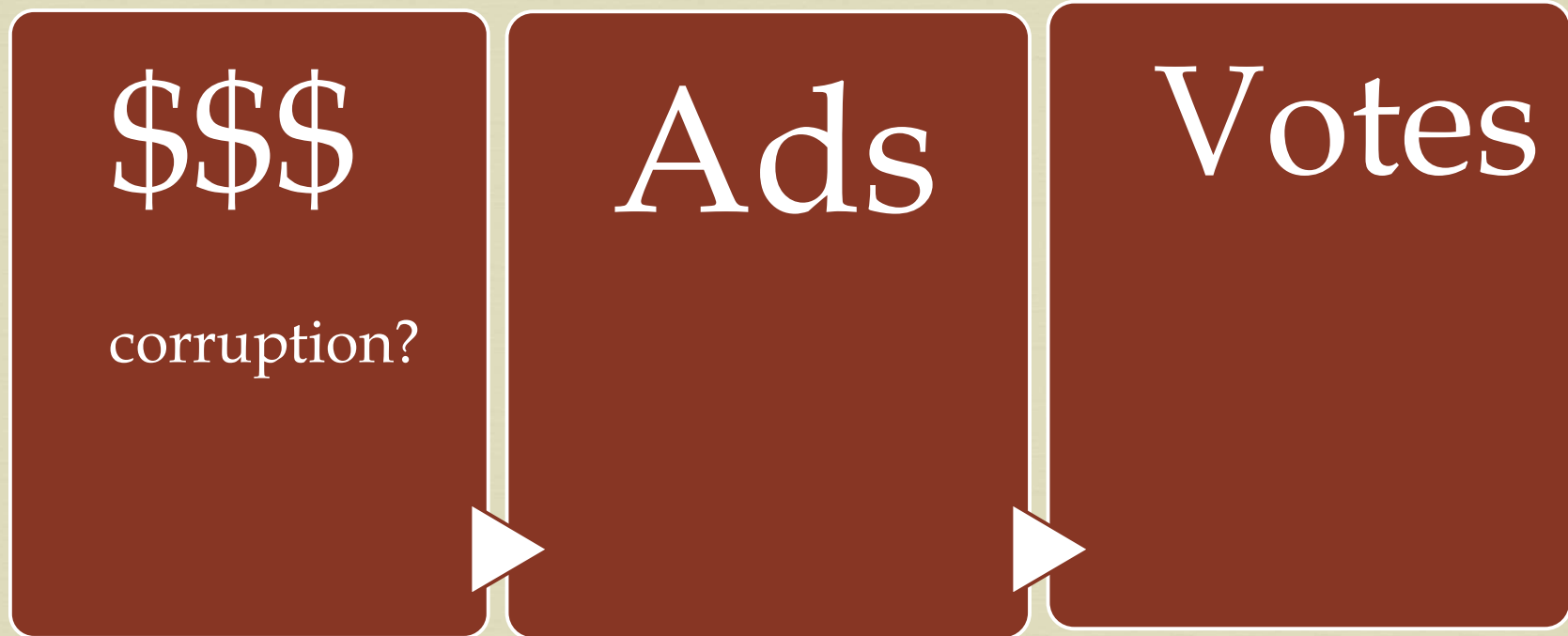
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Buckley on Equalizing



“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”

Where's the problem(s)?



Austin on “Anti-distortion”



MI had a compelling governmental interest in preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”

Citizens United



2010

Section 441b



- ∞ Prohibits **EXPENDITURE** of corporation's \$\$\$
 - “Express advocacy” (1947; Truman’s veto) AND
 - “magic words”

- ∞ (after 2002) “electioneering communication”
 - Broadcast, cable & satellite
 - Clearly identifiable candidate
 - W/in 60 days of general or 30 days of primary election

Citizens United



☞ NON-profit corporation

- About \$12 M annual budget
- Mostly from individuals; some from for-profits

☞ Conservative advocacy group

☞ January 2008: *Hillary: The Movie*

- Sought additional distribution in cable VOD

Citizens United - Majority



- ✧ Rejected anti-distortion rationale
 - Form of forbidden “equalizing”
 - Proves too much

- ✧ Corruption concerns = individual expenditures
 - Disclosure & bribery laws sufficient in both cases
 - “Corruption” = ONLY *quid pro quo*

- ✧ No legal difference between corps & people

Justice Kennedy



Kennedy on Anti-distortion



“All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker’s ideas.”

Kennedy on “Corruption”



“The fact that speakers may have influence over
or access to elected officials does not mean that these
officials are corrupt.”

Disclaimer / Disclosure



☞ Court (8-1) upholds these requirements

☞ Thomas alone dissents

Kennedy In Conclusion



“When word concerning the plot of the movie *Mr. Smith Goes to Washington* reached the circles of Government, some officials sought, by persuasion, to discourage its distribution. Under *Austin*, though, officials could have done more than discourage its distribution – they could have banned the film. After all, it, like *Hillary*, was speech funded by a corporation that was critical of Members of Congress.”

Kennedy Concluding (Cont.)

“Modern day movies, television comedies, or skits on Youtube.com might portray public officials or public policies in unflattering ways. Yet if a covered transmission during the blackout period creates the background for candidate endorsement or opposition, a felony occurs solely because a corporation, other than an exempt media corporation, has made the ‘purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value’ in order to engage in political speech.”

Kennedy on *Hillary*



“Some members of the public might consider *Hillary* to be insightful and instructive; some might find it to be neither high art nor a fair discussion on how to set the Nation’s course; still others simply might suspend judgment on these points but decide to think more about issues and candidates. Those choices and assessments, however, are not for the Government to make.”

Justice Stevens



Dissent (Stevens): Overview



- ❧ Decries majority's lack of "judicial restraint"
 - Overruling TWO prior decisions
 - In any event, might have chosen narrower ground
 - Non-profit v. for-profit corps

- ❧ Some speaker-based restrictions appropriate
 - Corps ≠ humans
 - Broader understanding of "corruption"

- ❧ More speech is NOT always better than less

The Aftermath



Holding Extended by



☞ *SpeechNow.org v. FEC* (D.C. Circuit 2010)

- contributions by individuals

☞ *McCutcheon v. FEC* (2014)

- aggregate contributions by entities in one election cycle

BUT



the current Court????

Questions?



Comments?

“Pay to Play” Restrictions



In the Lower Courts

Wagner v. FEC (D.C. Cir 2015)



- 52 U.S.C. § 30119(a)(1): makes it unlawful for any
 - person “who enters into any contract with the U.S.
 - ... directly or indirectly to make any contribution ... to any political party, committee, or candidate for public office or to any person for any political purpose.” (limited to feds)
 - Prohibition applies
 - “between the commencement of negotiations ... And
 - ... the completion of performance” of the contract.

Upheld by unanimous D.C. Cir.!

D.C. Cir. in *Wagner*:



- ✧ Even PROHIBITIONS on contributions = “closely drawn” std.
- ✧ Gov’t interest *tied tightly* to prevention of qqq corruption
 - And appearance thereof
- ✧ Stressed long “unhappy” history of corruption in fed contracting

Opportunities



Recent unpleasantness

- = need for regulation

Cts tolerant of restrictions → past corruption

Acknowledge need for prophylactic rules

- Not all wrongdoing criminal
- Not all criminality caught and punished
- Need to restore public trust

Challenges



∞ Identifying class implicated in

- Econ dev projects

∞ Closing loopholes

- Entities/individuals
- Family members/3d parties

∞ Timing

∞ Moving goalposts???

BUT



the current Court????

Questions?



Comments?

REBUILDING PUBLIC TRUST

Presentation to the Economic Development Reform Panel

April 23, 2021

REBUILDING PUBLIC TRUST

- Fundamentally, unethical behavior erodes public trust in institutions of government.
- Public trust is hard to build, but easy to lose.
- How to go about developing and implementing comprehensive ethics reform that:
 1. Reestablishes public trust in government;
 2. Enriches public servants' understandings of ethical professional behavior; and
 3. Contributes to the establishment of fairer, more equitable systems in the long-term.

REBUILDING PUBLIC TRUST

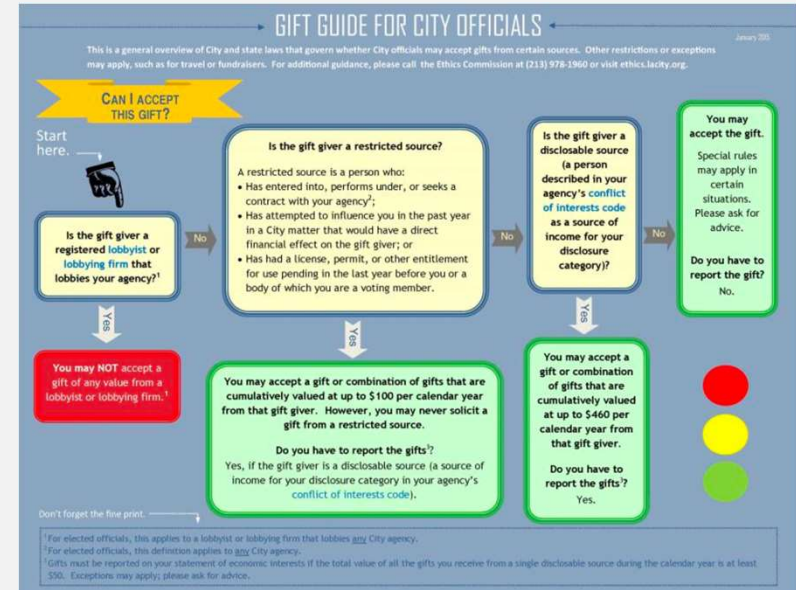
- Categories of trust-building solutions:
 1. Communication
 - e.g., CincyInsights dashboard.
 2. Consultation & Collaboration
 - e.g., EDRP.
 3. Minimization of Wrongdoing
 - e.g., ethics code of conduct + robust training and comprehensive information campaign.

REBUILDING PUBLIC TRUST

- In-house, manager-led training to emphasize support for the program.
 - Presents strategic opportunity to aid general decision-making and transform organizational culture.
- The more ethics education that public employees receive, the more likely they are to think themselves able to identify unethical behavior and have the courage to report it.
 - Prompts:
 1. Will this make me or my supervisor uncomfortable?
 2. Will anyone get, or appear to get, an unfair advantage?
 3. Will this put the city at legal or economic risk?
 4. Will this make an unfavorable headline in the paper?

REBUILDING PUBLIC TRUST

- Materials distributed to all public employees and made accessible online should reinforce established ethical boundaries and encourage seeking an expert opinion when faced with a grey area.
- Specialized materials should be targeted at elected officials, members of city commissions and boards, and employees in supervisory capacities.



Los Angeles City Ethics Commission gift flowchart

REBUILDING PUBLIC TRUST

- For ethical questions that cannot be easily answered by consulting the code of conduct, training programs and public information campaigns help considerably with filling in grey areas and minimizing wrongdoing.
- Training should be adaptable and include mechanisms for trainee evaluation.
- Gauge effectiveness of the campaign and tailor future training to address identifiable deficiencies (e.g., “I know where to look for ethics guidance and am confident that meaningful action will be taken if I report unethical behavior”).

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