REPLY

Political Money and Freedom of Speech: A Reply to Frank Askin

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Frank Askin's thoughtful response to my Barrett Lecture[1] reveals that we have only two disagreements about political money and freedom of speech — one about the theory and one about the facts.[2] We differ conceptually on the question of whether the First Amendment applies to the regulation of campaign finance. We differ empirically in our assessment of whether campaign finance regulation can significantly limit the influence of wealth in politics. Let me consider these disagreements in turn.[3]

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[1] *See* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997).

[2] *See* Frank Askin, *Political Money and Freedom of Speech: Kathleen Sullivan's Seven Deadly Sins — an Antitoxin*, 31 U.C. DAVIS L. REV. 1065 (1998).

[3] Actually, Professor Askin and I do not disagree about everything. He concedes that the First Amendment limits government's power "to restrict the speech of independent advocacy groups that wish to participate in the political process." *See id.* at 1069. He concedes as well that some government interests that have been proffered by campaign finance reformers are illegitimate bases for the regulation of political money. For example, he agrees with me that "our elections are not so localized" that candidates should be forbidden to receive contributions from outside their districts, *see id.* at 1079, and that regulation of sound bites and negative advertising in order to improve the quality of political debate would be impermissible, *see id.* at 1080 & n.53. Finally, he agrees that expenditure limits are more likely to aid incumbents than challengers, thus failing to increase political competition. *See id.* at 1080-81. These are important concessions. First, they establish that the First Amendment necessarily shields some substitutes for campaign expenditures, which is my

Professor Askin opens by proclaiming his "irreconcilable ideological disagreement over whether spending money is in fact speech within the meaning of the First Amendment."[4] With all due respect to reformers who have long posed the same question,[5] it is the wrong question. The issue is not the metaphysical one of whether writing a check to a candidate or a candidate's payment for a broadcast advertisement is speech, but rather the functional one of whether the regulation of such disbursements has the effect of restricting speech.

The answer to that question is surely yes: restricting what one may pay or receive for speech has the effect of restricting speech. A law barring the sale of any political book at a price above twenty dollars undoubtedly would implicate the First Amendment. So too, the Supreme Court has found, does a law banning the receipt by civil servants of honoraria for off-duty speeches and writings,[6] a law banning the use of paid solicitors to gather signatures to place issues on the ballot,[7] a law restricting the amount of money a charitable organization may expend on overhead,[8] and a law requiring proceeds from confessional books about crimes to be placed in escrow for potential restitution to victims.[9] These decisions rightly assume that financial disincentives to speech amount to abridgements of speech, even if the regulated speech is not wholly banned. A similar assumption underlies the many cases in which the Court has reviewed strictly under the First Amendment the selective denial or conditioning of grants of public funds to speakers.[10] The argument

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principal premise. Second, they confirm that content-based regulation is impermissible even in the campaign finance context, which suggests that the First Amendment does apply to political money after all. Finally, these concessions establish that allowing incumbents to regulate what their challengers may spend runs the risk of entrenching the political status quo, which of course is one of the principal reasons we do not normally allow foxes to guard chicken coops or government to regulate political speech.

[4] *Id.* at 1068.

[5] It all began with J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

[6] *See* United States v. National Treasury Employees Union, 513 U.S. 454, 468-77 (1995).

[7] *See* Meyer v. Grant, 486 U.S. 414, 425-28 (1988).

[8] *See* Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 633-39 (1980).

[9] *See* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 115-23 (1991).

[10] *See, e.g.*, Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 839-46 (1995) (invali-

that "money is not speech" would take down in its wake not only *Buckley v. Valeo*[11] but also these other decisions, many of which I suspect Professor Askin would approve.

If one assumes for these reasons, as I do, that campaign finance regulation implicates heightened First Amendment review, then the burden lies with the reformers to show that such regulation will actually serve important or compelling governmental ends unrelated to content. Here is where my empirical disagreement with Professor Askin arises. Professor Askin suggests that a combined regime of contribution limits, expenditure limits, and public financing for those candidates willing to forego private fund raising would serve three purposes: (1) equalizing influence upon legislative agendas and outcomes that is now maldistributed by wealth,[12] (2) increasing the competitiveness of political challengers,[13] and (3) decreasing the diversion of public officials' time and energy into fund raising.[14]

The first of these goals — equalizing access and influence — is not obviously content-neutral, for reasons I sought to explain earlier,[15] but let us assume for a moment that it is — for example, because it is an attempt not to impose a particular conception of democracy but rather to correct a political market failure even under a pluralist conception of democracy. There still remain two problems. To begin with, the reformers have come forward with precious little data to support their routinely repeated assertion that political money buys representatives' votes on legislation. Political scientists who have studied the question closely have found, perhaps surprisingly to many, that the data do not bear out this hypothesis.[16] Lacking hard data, Professor

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dating exclusion of religious magazine from student activity subsidy program at public university); FCC v. League of Women Voters, 468 U.S. 364, 381-402 (1984) (invalidating requirement that recipients of public broadcasting subsidies forego all editorializing). *But see* Rust v. Sullivan, 500 U.S. 173, 192-203 (1991) (upholding restriction on abortion counseling or advocacy by family planning programs funded by federal grants).

[11] 424 U.S. 1 (1976) (per curiam).

[12] *See* Askin, *supra* note 2, at 1076-78.

[13] *See id.* at 1072-76.

[14] *See id.* at 1079-80.

[15] *See* Sullivan, *supra* note 1, at 680-82.

[16] *See, e.g.*, Janet M. Grenzke, *PAC's and the Congressional Supermarket: The Currency Is Complex*, 33 AM. J. POL. SCI. 1, 19-20 (1989) (concluding that in most cases PACs do not substantially affect candidates' actions in office, absent popular approval); John R. Wright,

Askin appeals to anecdotal evidence and common sense,[17] but these are not normally sufficient grounds to limit speech or any other important right.

Moreover, even if this problem were demonstrable, the problem of substitution effects ensures that campaign finance reform would not cure it. If regulation is limited to candidates' formal campaign operations, money will flow away from candidates toward parties and other secondary and tertiary organizations that will engage in independent expenditures designed to influence electoral and legislative outcomes. In addition, background inequalities of wealth and resources will continue to skew the distribution of political opinion away from any imagined egalitarian mean.

For example, campaign finance reform will do nothing to cure the unequal influence of wealth on relative lobbying effectiveness in the period between elections, nor the disproportionate influence on elections themselves of the owners and management of the institutional press.[18] These substitution effects and background wealth distortions cannot be prevented without trenching much further upon widely held First Amendment values than most reformers — including, I suspect, Professor Askin — are willing to go. For example, the institutional press, largely owned by the wealthy and managed by a professional elite, is hardly likely to agree to forego all political editorials or candidate endorsements in their pages during the sixty days preceding an election lest they skew the voters' true preferences. Nor have campaign finance reformers suggested how they might regulate expenditures on lobbying, in which intensely focused interest groups may achieve political influence disproportionate to the numbers of voters they represent.

Contributions, Lobbying and Committee Voting in the U.S. House of Representatives, 84 AM. POL. SCI. REV. 417, 433-35 (1990) (finding that lobbying, not money, affects committee behavior). For a review and critique of such data, see generally Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989).

[17] *See, e.g.*, Askin, *supra* note 2, at 1069-70 n.15 (citing anecdotal observations about "political mating game" by former Labor Secretary Robert S. Reich in article in *The New Yorker*).

[18] *See, e.g.*, Sanford Levinson, *Regulating Campaign Activity: The New Road to Contradiction?*, 83 MICH. L. REV. 939, 945-48 (1985) (book review) (noting financial inequalities in political influence, including disproportionate political influence of media conglomerates).

Professor Askin suggests that at least the substitution effects will be self-limiting because campaign donors really want only face time with the candidates,[19] and "[i]t is unlikely that big contributors would be willing to invest at anywhere near the same levels for access to surrogates."[20] But this assertion would appear to contradict his assumption elsewhere that what the "moneyed classes" really want is "the political subjugation of society."[21] Surely anyone holding that large ambition would be inventive enough to seek independent alternatives for influencing elections and legislative agendas even if cut off from photo opportunities, golf games, and overnight visits with officeholders or candidates.

Professor Askin also suggests that independent political advocacy may be effectively walled off from candidate campaigns through devices such as limiting the number and kind of jobs that political consultants may hold simultaneously.[22] I believe that Professor Askin greatly underestimates the practical problems involved in trying to ensure that secondary and tertiary organizations avoid all coordination with or surrogacy for candidates that would render them effective substitutes from the donors' perspective. For example, should an advocacy organization be considered an adjunct of a candidate's campaign and, thus, be subject to the expenditure limits Professor Askin would uphold, simply because it tries to influence an election in the candidate's favor? Only if the organization uses express words of advocacy explicitly endorsing the candidate? At any time or merely within a certain period before the election? Should it count as candidate advocacy to endorse the candidate's message while coyly declining to state the candidate's name? Such inquiries will inevitably give rise to the sort of "intrusive government monitoring of political campaigns" that Professor Askin rightly concedes "invokes constitutional concern."[23]

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[19] *See* Askin, *supra* note 2, at 1069-70.

[20] *Id.*

[21] *See id.* at 1078.

[22] *See id.* at 1070-71.

[23] *See id.* at 1070. For an illustration of just how difficult it is to draw administrable lines in this regard, consider the provision in a recent version of the proposed McCain-Feingold bill that would have regulated as a de facto campaign contribution any advocacy "containing a phrase such as vote for, reelect, support, . . . defeat, reject, or a campaign

Even if campaigns and independent advocacy could be effectively segregated from one another, I cannot fathom why Professor Askin thinks this would be beneficial to democracy. Any regulatory regime that encourages substitution effects decreases political accountability. Creating incentives to shift political spending and speech away from candidates to secondary party organizations and tertiary advocacy organizations makes it more difficult for voters to influence electoral and legislative outcomes. Voters can discipline candidates and incumbents at the voting booth; they can have no say over policies urged by independent advocacy groups or political action committees, especially if the identity of the real parties in interest behind the ads is obscure. At least political parties, unlike independent organizations, might be seen as somewhat accountable to their members. But Professor Askin would starve parties of money by regulating the amounts of "soft money" that may be contributed to them.[24] While he might well be right that such limits would be sustained under the contributions rationale of *Buckley*,[25] it is not clear why further weakening our political parties is democratically desirable.

This leaves for consideration the two other government interests Professor Askin suggests might justify campaign finance reform: increasing the competitiveness of elections and decreasing the time officeholders devote to fund raising.[26] I am all for both of these goals, but I am hard pressed to understand how Professor Askin thinks contribution limits can advance either of them. Wouldn't candidate Askin have been better off in his 1986 race if he had been able to raise large chunks of seed money for his campaign rather than being able to raise only about "$165,000 in small contributions" while his incumbent opponent outspent him 4.5 to one?[27] Likewise, contribution

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slogan or words that in context can have no reasonable meaning other than to advocate the election or defeat of 1 or more clearly identified candidates." BIPARTISAN CAMPAIGN REFORM ACT OF 1997, S. 25, 105th Cong. § 201(b)(20)(A)(i) (1997).

[24] *See* Askin, *supra* note 2, at 1071-72 & n.19.

[25] The Court has upheld other contribution limits that it has interpreted as backstops against end-runs around candidate contribution limits. *See, e.g.*, California Med. Ass'n v. Federal Election Comm'n, 453 U.S. 182, 197-98 (1981) (upholding limit on contributions to multicandidate committees).

[26] *See* Askin, *supra* note 2, at 1072-76, 1079-80.

[27] *See id.* at 1074.

limits by definition increase the amount of time officeholders must spend to raise a given sum of money by increasing the number of contributors that they must contact. If "hustling bucks" turns governance into a "part-time job,"[28] that is perhaps simply an unavoidable by-product of the contribution limits that Professor Askin endorses on equalization grounds.

Nor are expenditure limits any solution to Professor Askin's concern that too many congressional elections are noncompetitive. As his own unsuccessful campaign experience illustrates,[29] the key variable for a challenger may well be the absolute level of money he or she has to get the message out.[30] Any expenditure limit threatens to submerge a challenger below that key threshold. As Professor Askin concedes, "[i]f a ceiling on political spending is set too low, it will indeed further entrench incumbents," who enjoy numerous inherent advantages that cannot be neutralized by expenditure limits.[31]

Thus, in the end, Professor Askin's hopes rest on public financing with strings attached: specifically, recipients of public monies may not raise private funds.[32] He supports these strings not because he believes them constitutional but rather because he believes them compelled by realpolitik.[33] While I see no constitutional objection to public subsidies as floors,[34] Professor Askin does not confront the considerable problems of administration posed by any such scheme. The problems of selecting among the candidates to be supported and calibrating the amounts to be given them raise serious dangers of partisanship and bias. Such problems might be offset by limiting the ambition of funding schemes — for example, calculating the value of the franking privilege to an incumbent running for re-election and handing out an equivalent sum to all challengers in the

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[28] *See id.* at 1079.

[29] *See id.* at 1073-76.

[30] *See, e.g.*, Bradley A. Smith, *The Siren's Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & POL'Y 1, 29 n.150 (1997) (noting that, in 1996 House elections, incumbents who spent less than $.5 million won every time, and challengers who spent less than $.5 million won 3% of time, but challengers spending between $.5 million and $1 million won 40% of time, and challengers who spent over $1 million won 80% of time).

[31] *See* Askin, *supra* note 2, at 1080-81.

[32] *See id.* at 1081.

[33] *See id.*

[34] *See* Sullivan, *supra* note 1, at 690.

general election. But the less ambitious the funding scheme, the less likely it will provide any real floor for greater political competition. In addition to these practical problems, imposing ceilings on recipients of public funds poses a serious constitutional issue that the *Buckley* Court declined even to acknowledge.[35] The leverage of public funds does not normally entitle government to dictate the use of private resources.

In sum, Professor Askin has not made a persuasive case that his plan is superior to allowing unlimited political contributions and expenditures, subject only to strong and immediate disclosure requirements (for example, over the internet on the day the check is written), and of course to the law of diminishing marginal returns. As in other areas, such as the regulation of hate speech and pornography, there are limits to how far the regulation of speech can be made to do the work of altering underlying problems of material inequality.

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[35] *See* Buckley v. Valeo, 424 U.S. 1, 92-104 (1976) (per curiam) (upholding public financing of presidential elections against First Amendment challenge).