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## Lottocracy

Curtail the First Amendment? Why not just do away with elections?

By Pete du Pont

*Resolved: Congress should pass and send to the states for ratification a Constitutional Amendment:*

*Setting a maximum contribution limit any campaign donor--individual, organization, or interest group--may contribute to any Presidential or Congressional candidate;*

*Setting the maximum amount any candidate for President or Congress may spend in primary or general elections; and*

*Setting the maximum amount any independent organization may spend for their own primary or general election campaign advertising.*

Such was the topic of the annual summer community-center debate in a small town on the coast of Maine. Last year's debate topic was eliminating the Constitution's state Electoral College and having a direct national election of the president. Pretty serious stuff for a small town event.



The most substantial problem in persuading Congress and three-

quarters of the states to ratify a constitutional amendment curtailing the First Amendment--"Congress shall make no law . . . abridging the freedom of speech, or of the press"--is its constitutional history.

In 1789 James Madison proposed that "The people shall not be deprived or abridged of their right to speak, write, or to publish their sentiments." Two years later the First Amendment was ratified.

Justice William O. Douglas wrote in 1957, "It is . . . important--vitaly important--that all channels of communication be open to [the people] during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community."

And in the unanimous *Buckley v. Valeo* decision of 1976 striking down campaign expenditure limits, the Supreme Court observed: "The concept that the 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."

The current Supreme Court also understands the issue. Last year it struck down Vermont's limits on campaign contributions and spending because spending limits were too low--\$300,000 for governor and \$4,000 for the state Senate, for example--and because contribution limits could "harm the electoral process by preventing challengers from mounting effective campaigns against incumbent office holders, thereby reducing democratic accountability."

Just two months ago the court ruled that the McCain-Feingold law went too far in prohibiting broadcast "issue" advertisements by corporations and unions during the final days of an election campaign. Thus Wisconsin Right to Life could run an ad urging both of Wisconsin's U.S. senators, one of whom was running for re-election, to oppose the filibuster of judicial nominees.

As Common Cause concluded after studying the decision, it "is hard to conceive of any law that Congress could pass to rein in independent spending that would withstand review by the current Court." In other words, the only

way to curtail free speech is to amend the Constitution.

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Six years ago, Sen. Fritz Hollings (D., SC) brought up for a vote a constitutional amendment that would effectively exclude campaign speech from the First Amendment, authorizing Congress to regulate all such speech. It lost, but 40 senators voted "yes."

Limiting the First Amendment's free speech protections is a very bad idea. First, if something as significant as campaign speech is removed, our free speech will begin to erode.

Second, it is very challenging for a candidate in a close election to raise the resources to mount a good campaign. That is why Howard Dean, John Kerry, and the current President Bush (twice) opted out of public financing, with its attendant fund-raising restrictions; they needed the resources available in the market to run their campaigns.

Requiring all candidates to spend the same amount of money in a campaign is an incumbent protection policy. To defeat incumbent congressmen is very difficult, for they are usually better known and get more press and more speech opportunities than their challengers, so that only about 10% of them have lost elections over the past half

century. Mandatory equal funding would give incumbents a substantial advantage.

Third, the sums candidates spend on elections aren't as large as they sound. Sen. Hillary Clinton, for example, spent \$30 million on her 2006 re-election campaign. According to the Center for Responsive Politics, nationwide campaign spending totaled \$3 billion in 2000 and \$3.9 billion in the 2004. But that amounts to about 0.03%--1/30th of 1%--of America's Gross Domestic Product, or about \$5 to \$8 dollars per person per year. It's also less than Americans spend each year on potato chips (\$6 billion), greeting cards (\$7 billion), and video machines and games (\$10 billion).

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Nevertheless, the Maine debater that "campaigns have become unreasonable in the amount of money spent and have gone beyond the realm of free speech."

At the reception after the debate, an old lady asked me how, if I were still in Congress, I would vote on proposing such an amendment. I replied that I would have voted against changing the First Amendment to allow Congress to fiddle with our free speech and legislate what we may say, to whom we can say it, and when in a campaign we may say it.

"But what would you *do* about all this horrible fund-raising and

spending that goes on in campaigns?" she asked. With a cheerful smile (and tongue in cheek), I suggested we get rid of all campaign spending by returning to the Pericles plan of the Golden Age of Greece 25 centuries ago: Instead of electing House and Senate members, have them chosen by lottery from people of constitutional age (25 in the House, 30 in the Senate) in each district and state.

Such a lottery democracy would not only end the campaign contribution corruption that had been discussed in the debate, it would make Congress look like America. Instead of just 16 women in the Senate, there would be about 53; there would be more blacks, Hispanics and younger people and fewer millionaires and senior citizens. And it would allow the billions of dollars now spent on campaigns to be used for other things.

In the astonished silence that followed my response, I could hear the coffee brewing. One thing is certain: we won't be hearing Lottery Democracy argued in next summer's community center debate. Hopefully we will also be spared hearing any more about efforts to erode our First Amendment Constitutional rights either.

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