Campaign Finance and State Constitutions

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This paper will discuss State public and private campaign financing laws in the context of whether those laws are embedded in State Constitutions or in general legislation, and consider whether there is any advantage to be gained in terms of the efficacy of such laws by making them part of a Constitution.

Laws limiting political contributions, and disclosure laws, represent attempts by States to prevent the corruption and undue influence that might, and historically has in many cases, resulted from unlimited contributions by certain parties seeking influence with State lawmakers and officials.

There are relatively few States that have embedded campaign finance laws in Constitutions. As of this writing, only Florida, Arizona and Rhode Island have constitutional provisions related to campaign contributions disclosure, and only Arkansas, Nevada, Oregon and Rhode Island have such provisions related to campaign contribution limit[1] In total, thirty-nine States have limits on contributions to candidates, meaning that in thirty-five States those limits were enacted through general legislation. All fifty States have campaign financing disclosure laws meaning that forty-seven enacted those laws through general legislation.

Only two states, Florida and Rhode Island, have public financing in their state constitutions. FL. Const. Art 6 §7 directs the Legislature to establish a public financing system for state-wide office campaigns. R.I. Const. Article IV §10 directs the Legislature to adopt a plan for the public financing of candidates for Governor and other state-wide elected officials. Because the constitutional requirement applies only to state-wide campaigns, state legislative elections are unaffected by public finance requirements in those two states.

So the landscape shows that a constitutional approach, either to public financing or campaign finance restrictions or disclosure requirements, has not been favored by the great majority of States. Of the States that did take the constitutional route, in two cases, Arkansas and Oregon, the addition of campaign contribution limits

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[1] Ark, Const. Article 19, Sec. 28; Nev. Const. Article 2, Sec. 10; R.I. Const. Article IV, Sec.6; Or. Constitution, Article II,Sec. 22 (1)

was the result of a voter petition or initiative. While this is a very small sample from which to draw conclusions it does indicate that pressure from the public might play a role in securing the greater permanence for campaign financing rules that comes from embedding the rules in a constitution as opposed to general legislation.

One need not speculate as to the reasons for the paucity of constitutionally enacted campaign financing provisions. If anything is dear to the heart of a politician it is money. While thirty-nine States have enacted limits on contributions it is much easier, and much more under the control of sitting legislators, to modify, increase or do away entirely with those limits if they have been enacted through general legislation rather than embedded in a constitution. Constitutional change always requires approval by voters, while legislative change needs only the imprimatur of the legislature. It is therefore not surprising that the only constitutional public financing requirements, in both states that have chosen to have them, are limited to executive branch officials, rather than legislative elections. Another timely example would be New York's curious "LLC" provision, that allows donors to form as many limited liability companies as they desire and to make the maximum allowed campaign contribution from each of the LLCs even though they are commonly owned.[2] This gaping end-run around contribution limits, introduced by the State Election Board in 1996, has been challenged by good government groups, leading newspapers and reform groups since its inception but has remained in place. The State legislature, which is the only body that can change this rule, seems unable and unwilling to remove this loophole, through which well over $100 Million has flowed to legislators. Had New York's campaign financing laws, including a definition of an LLC as a "person," been in the State Constitution prior to the ruling by the State Election Board, it is likely that this perversion would not have been possible

New York City has had a 6 to 1 matching public financing system that has worked fairly well, but New York State has none. The best argument for a constitutionally mandated system of public financing of elections is that there is widespread agreement that there is virtually no chance that the Legislature will establish one on its own. But the devil is in the details, and how such a system is implemented is key. Critical to success are issues such as what the match should be, what

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[2] The key provision in the Election Board's ruling on LLC's was that for purposes of the election law an LLC would be considered a "person" and not a corporation, thus allowing an LLC to contribute any amount to a candidate up to maximum amount allowed to be contributed by a "person" , as opposed to the much lower maximum contribution allowed to a corporation. This treatment of an LLC flies in the face of the fact that an LLC has all the attributes of a corporation such as the limited liability of its members or shareholders, and centralized management in a board or a general partner.

threshold of support should be required for access to matching public funds, whether the system should be run by the State Board of Elections or an independent non-partisan board, what auditing requirements and procedures should be put in place, what penalties should be fixed for violations, and whether and when to inform the public of violations by candidates.[3],[4] Once embedded in the state constitution, flexibility and ease of modification may be difficult, depending upon how detailed the constitutional provisions and language are.

What are possible arguments against the constitutional route for campaign contribution and disclosure laws? One is that the subject of these laws, particularly contribution limits, is not static. Changes in limits may make sense and be needed based on economics, for example the cost of advertising and media. Or, a ruling by the Supreme Court, such as McCutcheon v. Federal Election Commission, may require a change in the law.[5] Amending State constitutions can be cumbersome and drawn out, depending on the process, so aligning existing provisions with economic or legal changes can be achieved most expeditiously if the law is one of general legislation. The anti-constitution argument from the ground of changes in State campaign financing laws required because of U.S. Supreme Court decisions is not without some merit based on the record. The following decisions of the Court have impacted State laws in this area:

- Buckley v. Valeo 424 U.S.I (1976); (State contribution limits are constitutional, expenditure limits are not);

- Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000); (States can limit the amount of money that any one individual or group can contribute to a State campaign);

- McConnell v. Federal Election Commission, 540 U.S. (2003); (finding a link between "soft money" and corruption, upholding the bans on "soft money" contributions imposed by the federal Bipartisan Campaign Reform Act (BCRA) and the limits on advertising by corporations and PACs immediately before an election);

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[3] New York City Campaign Finance Board at https://www.nyccfb.info/ (matching funds program

[4] See, Nicole A. Gordon , "The New York City Model; Essentials For Effective Campaign Finance Legislation", at http://brooklynworks.brooklaw.edu/jlp/vol6/issue1/6

[5] 134 S.Ct.1434 (2014) , outlawing "aggregate" lists on contributions by individuals or groups

- Randall v. Sorrell, 548 U.S. 230 (2006); States may not limit independent expenditures, and must ensure that their contribution limits are high enough to enable the candidate to run an effective campaign;

- Davis v. Federal Election Commission, 554 U.S. 724 (2008); “triggering” provisions found in many public financing statutes are unconstitutional;

- Citizens United v. Federal Election Commission, 558 U.S. 310 (2010); States cannot place limits on the amount of money corporations, unions, or PAC’s use for electioneering communications, so long as the group does not align itself with a candidate;

- McCutcheon v. Federal Election Commission, 134 S. Ct. 1434 (2014); States can limit how much any individual or group contributes to one campaign, but cannot impose aggregate limits on how much an individual or a group contributes to all campaigns during an election cycle).

Six of these decisions were handed down by the Supreme Court since 2000, and each could and did have an impact on existing campaign financing laws in one or more States. Following the Buckley decision for example many States implemented contribution limits in line with Federal law at the time, only to see these limits challenged by the Court in the Nixon decision in 2000. Similarly, the decisions in Davis (no “triggering” provisions); Citizens United (no limits on electioneering expenditures), and McCutcheon (no aggregate limit on contributions), all had an impact on laws in one or more States requiring changes in campaign financing laws. The frequency of such required changes in the law, coupled with the need to maintain flexibility to adapt the law to economic developments, argues strongly for a legislative, rather than constitutional, approach to campaign financing law.

The case for a constitutional approach must rely, in the end, on an argument from human nature; namely, that the laws are written by the very people who benefit from political contributions and who have a vested interest in maximizing the amount of financial support they can garner. The most glaring current example is probably New York’s “LLC” rule that, as noted, has generated enormous sums for politicians and has resisted fixing despite the shamelessness of the practice that allows open evasion of contribution limits.