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Banning Political Prediction Markets Would Be Unconstitutional

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Prediction market trades on election-related matters have become one of the most closely tracked gauges of political life in the US.

On these platforms, individuals trade contracts tied to the outcomes of elections, ballot measures, and legislation. The fact that these trades involve issues at the heart of American democracy have put them in regulatory crosshairs.

Can the government ban political prediction contracts without running afoul of the First Amendment?

NEW POLITICAL INDICATOR

Users of prediction market platforms buy and sell yes-or-no contracts keyed to future events. In the political context, these events can include whether a candidate will win a primary, whether Congress will enact a given bill, whether an agency rule will withstand a court challenge, or whether a cabinet nominee will be confirmed.

Regulators at both the federal and state levels have noticed. Minnesota became the first state to enact legislation outlawing the platforms, but the federal government immediately stepped in to halt that prohibition before it became effective.

State-level enforcement has followed, including criminal charges against platform operators and warnings that placing a trade could cost a resident their ballot.

In Congress, Sen. Jeff Merkley (D-Ore.) and Rep. Jamie Raskin (D-Md.) have put forward the STOP Corrupt Bets Act, a bill that would prohibit election trading across the board.

Each of these measures runs into the same First Amendment problem.

SPEECH OR CONDUCT?

The most natural objection is that placing a trade is conduct rather than speech, so it falls outside the First

Amendment's protection. That argument proves too much.

Flag burning and giving to a campaign are also conduct, yet each is protected because it carries a genuine expressive element, and regulating it reaches that element. What matters for the Constitution isn't whether an activity is "speech" or "conduct" in the abstract, but whether the activity carries real expressive or informational content and whether the government's restriction targets that content.

Political event contracts part ways with ordinary financial instruments in one decisive way: They involve the political process. A crude-oil futures contract tells you something about supply and demand; a contract on whether the Senate will confirm a nominee reflects a collective political forecast.

PRICING AS SPEECH

These markets are useful because they aggregate scattered information into a valuable prediction. Every trader's view, registered by placing a trade, feeds into a single price — a probability estimate whose collective informational worth exceeds any one participant's contribution.

The price's expressive value is enhanced by its economic value. A poll costs its respondents nothing but time, but a trade forces participants to stake money on their judgment.

Justice Oliver Wendell Holmes Jr. famously described the First Amendment as protecting "a marketplace of ideas," where truth is meant to win out through open competition. A political prediction market turns that figure of speech into reality.

FIRST AMENDMENT INTERESTS

Restricting these markets implicates three separate First Amendment interests.

The trader's expressive interest. Traders that purchase a contract on an election are voicing their views about how that election will turn out, which constitutes protected political speech.

The US Supreme Court has long treated limits on political spending as substantial burdens on political speech. The court warned in *Citizens United v. FEC*against sustaining"a law that restricts political speech in certain media or by certain speakers" in the face of "rapid changes in technology—and the creative dynamic inherent in the concept of free expression," and in*FEC v. Cruz*, the court held that any measure putting a "drag" on spending money to convey political ideas is presumptively invalid.

The platform's publishing interest. A platform does far more than pair buyers with sellers. It writes the contracts, runs the order book, posts prices, and pushes that information out to the public as it moves.

Such arrangements are important for election coverage, as studies have shown markets can forecast election outcomes more accurately than conventional polling. Banning political event contracts exceeds mere financial regulation by silencing publication of important political information.

The public's right to receive information. The First Amendment safeguards the audience as well as the speaker. It protects the right to consume information, not just to produce it.

Government regulation can’t constitutionally choke off a source of political information merely because that information might sway how people vote.

Polls sway voters. So do endorsements. Shutting down prediction markets because their probability signals could move the electorate is exactly the sort of governmental control over political debate that the First Amendment forbids.

REGULATE, DON’T BAN

That prediction markets are constitutionally protected doesn’t render them untouchable. Election integrity, consumer protection, manipulation, and foreign interference are all legitimate worries. Banning an entire medium of protected expression isn’t the answer.

As with regulating other activities protected by the First Amendment, a defensible regulatory regime could pair neutral operating rules with targeted integrity measures against manipulation, insider trading, and some forms of foreign participation. What it can’t do is forbid election-related contracts while allowing identical contracts on every other subject.

CONCLUSION

Singling out contracts for prohibition because they touch elections, referenda, or legislation — while permitting similar trades on other issues — is discrimination against core political speech based on its content, plain and simple.

The Constitution shields these markets not because betting on politics is admirable or sensible, but because the freedom to produce, combine, and receive political information — whether it emerges as a sentence or as a price — lies at the heart of the First Amendment’s protections. The Constitution demands no less.

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