

## **Ethical Issues In Campaign Finance Reform:**

### **Equality vs. Free Speech**

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**Abstract:** The essay provides a brief, general historical background of campaign finance reform in the 20<sup>th</sup> and early 21<sup>st</sup> century leading up to 2010, highlights the ethical problems with the reform efforts, and analyzes some current options for reform using Rawls' theory of justice. The primary issue in campaign finance reform is reconciling the competing ideals of individual equality and freedom of speech. Championing individuals' right to speak freely through spending creates a disparity among citizens as voters and candidates. Yet, a system regulated to create equality in society may inherently limit the right to spend, and therefore, to speak freely. Instilling a greater measure of ethics into campaign finance thus poses a seemingly impossible task.<sup>1</sup>

#### **Problem**

The competing democratic ideals of individual equality and free speech create a seemingly impossible dilemma for instilling a greater measure of ethics into the American campaign finance system, as demonstrated by the repeating cycle of unsuccessful reform efforts since the early 1920s.

#### **Defining an Ethical Campaign Finance System**

For the purpose of this essay, the desired fusion of ethics into a workable campaign finance system focuses on the concept of fairness. The Rawlsian approach to justice states that individuals in society must have equal rights to basic liberties enjoyed by all, but also that any inherent social and economic

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<sup>1</sup> This essay provides some of my own views and brief fact summaries. It does not provide a complete history of campaign finance reform efforts; it is merely a brief depiction of reform in recent history and a specific application of Rawls' theory of justice to those reforms and present reform ideas.

inequalities must be arranged so they are of the greatest benefit to the least advantaged. An ethical campaign finance system would ideally provide candidates with equal opportunities to raise money while providing voters with equally weighted influence on elections, taking into account the aggregation of individual votes, protected right to speak freely, and capability and willingness to donate to candidates.

### **Rawls' Theory of Justice**

John Rawls bases his idea of justice on a social contract made by people who come together and set aside all particular features that distinguish themselves from one another, essentially forgetting their identities.<sup>2</sup> This way, they will always opt to favor the most disadvantaged in society due to ignorance of their own social and financial status. Rawls synthesized his approach to justice into two principles of justice:

1. Each person is to have an equal right to the most extensive total system of equal and basic liberties compatible with a similar system of liberty for all.<sup>3</sup>
2. Social and economic inequalities are to be arranged so that they are of the greatest benefit to the least advantaged, and so that offices and positions must be open to everyone under conditions of fairness and equality of opportunity.<sup>4</sup>

Rawls' principles create a difficult dilemma for campaign finance regulation. An unregulated system protects each individual's right to free speech, a freedom that US society largely believes to be included in the basic liberties noted in Rawls' first principle of justice. Society's inherent social and economic disparities, on the other hand, create unequal access to resources and free speech. Creating a system to arrange these inequalities in accordance with Rawls' second principle inevitably infringes upon the free speech advocated in his first principle.

### **A Brief Historical Background of Campaign Finance Reform**

Prior to the 1970s, regulation of financial transactions and activities associated with political campaigns sought primarily to curb the influence of labor unions and corporations on the outcome of federal elections, while also restricting

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<sup>2</sup> Thompson, Mel. *Ethical Theory*. 2nd Ed. London: Hodder Murray, 2005. Page 73.

<sup>3</sup> Rawls, John. *A Theory of Justice*. Harvard University Press, 1971.

<sup>4</sup> Id.

the relationship between federal employees and campaign activities. In the 1960s, campaigns began to focus more on individual candidates and less on political parties, forcing candidates to rely less on financial backing from their respective political parties and more on fundraising from private donors.<sup>5</sup> This change led to a wave of campaign finance regulations throughout the 1970s.

In 1971, Congress passed the Federal Election Campaign Act (FECA), which limited individuals' personal contributions to federal candidates, intensified existing disclosure requirements, and restricted advertising through media sources.<sup>6</sup> The illegal campaign contributions and money laundering that were exposed as a result of the Watergate scandal in 1972 prompted Congress to respond to public outrage by amending FECA to further strengthen contribution limits already in place. Amendments also limited coordinated expenditures by political organizations, increased incentives for publicly funded campaigns, and created the Federal Election Commission (FEC) to oversee and enforce campaign finance regulations.

The surge of campaign finance reform provoked debate over the competing interests of voters and candidates and the fundamental right to free speech embedded in the First Amendment. Proponents of deregulation pushed the argument that money is equivalent to speech. Therefore, the stringent regulations imposed on spending by FECA amounted to an unconstitutional infringement on First Amendment rights. Then and now, campaign finance reform advocates insist a democratic government, created most fundamentally to promote self-governance by its citizens, must create equality for its individual participants.<sup>7</sup> According to this notion, allowing money to be subsumed under speech creates inherent inequality between wealthy and non-wealthy classes of individuals.

In 1976, the Supreme Court invalidated the restrictions on independent expenditures by individuals and created an extremely narrow definition of what constitutes a campaign communication.<sup>8</sup> The court declared that the First Amendment was created to "secure the widest possible dissemination of information from diverse and antagonistic sources" to encourage necessary political and social changes in society.<sup>9</sup> The ruling placed a significant burden on

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<sup>5</sup> Farrar-Myers, Victoria A. and Diana Dwyre. *Limits and Loopholes: The Quest for Money, Free Speech, and Fair Elections*. CQ Press, 2008. Pages 10-11.

<sup>6</sup> Id.

<sup>7</sup> Dworkin, Ronald. "The Curse of American Politics," New York Review of Books: 17 October 1996.

<sup>8</sup> Buckley v. Valeo

<sup>9</sup> Buckley v. Valeo quote from LL1.

the federal government's ability to regulate finance in elections.<sup>10</sup> The newly empowered, FEC-created regulations restricted the process for contributions to political parties, but the ensuing two decades saw largely unsuccessful attempts to limit campaign contributions and candidate spending. The raising and spending of soft money<sup>11</sup> soared, and issue advertising began to dominate the media during election seasons. These "loopholes" in existing campaign finance regulations rendered the reform efforts that generated them essentially ineffective.

## **Campaign Finance Reform Since the Turn of the Century**

### **BCRA (2002)**

In 2002, Senators John McCain and Russ Feingold collaborated to craft and pass the Bipartisan Campaign Reform Act (BCRA). The two main components of the legislation consist of a complete ban on soft money fundraising by national political parties and federal candidates and a restriction on all uses of soft money for media broadcasts within 30 days of a primary and 60 days of a general federal election.<sup>12</sup> However, the BCRA also raised (in fact, doubled) permissible independent expenditures to candidates and state/local party committees.<sup>13</sup>

On the surface, the BCRA seems to promote a campaign finance system consistent with Rawls' theory of justice. The restrictions found in BCRA's main components attempt to rectify the social and economic inequalities among individuals and corporations. While it does not achieve actual equality among voters, restricting soft money fundraising by parties and candidates promotes fairness for all contributors by narrowing the gap of influence between wealthy and non-wealthy donors. The increases in permissible independent contributions to candidates promote individuals' right to free speech, which is a step toward satisfying the first principle of Rawls' theory.

However, the BCRA still endorses general limits on individual expenditures and contributions to campaigns, which poses a problem for basic free speech. These limits also redistribute political power away from those who

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<sup>10</sup> Farrar-Myers, Page 7.

<sup>11</sup> Soft Money is a concept referring to donations given to political parties or other organizations, rather than specific candidates or campaigns, for non-election purposes such as voter registration or grassroots "party building" activities.  
<[http://www.fec.gov/members/former\\_members/thomas/thomasarticle06.pdf](http://www.fec.gov/members/former_members/thomas/thomasarticle06.pdf)>

<sup>12</sup> La Raja, Raymond J. *Small Change: Money, Political Parties, and Campaign Finance Reform*. University of Michigan Press, 2008. Pages 106-107.

<sup>13</sup> Id.

are currently in power, which benefits the least advantaged as suggested by the second principle of Rawls' theory while simultaneously infringing on the basic freedoms enshrined in Rawls' first principle. Also, while the BCRA seems to demonstrate a promotion of fair play by both parties (via its bipartisan title and creators), it was passed by an overwhelming number of Congressional Democrats and very few Republicans during a Republican administration.<sup>14</sup> This disproportionate voting suggests the reform effort had more to do with a push for control than promoting ethics or fairness.

### **McConnell v. FEC (2003)**

In 2003, the BCRA's ban on soft money was challenged on First Amendment grounds. The Supreme Court upheld the restriction on soft money, but stated that a *complete* ban on donations and contributions constitute a violation of First Amendment rights.<sup>15</sup> The Court also acknowledges a legitimate government interest in deterring corruption or the appearance of corruption in the campaign finance system.<sup>16</sup>

The decision in McConnell brought the campaign finance system closer to one that satisfies Rawlsian scrutiny, but the ethical issues that emerge from the opinion are still largely the same as the issues in BCRA. The court's rationale in upholding the ban on soft money largely satisfies the second principle of Rawls' theory, but it also limits individual liberties protected in the first principle. However, by stating that a complete ban on donations and contributions is improper, the court makes an effort at striking a balance between First Amendment rights and equality among individuals. Despite falling short, the decision demonstrates a step towards achieving a balance, if one exists, between the two principles of justice in Rawls' theory.

### **Randall v. Sorrell (2006)**

In 2006, a challenge was mounted against Vermont's strict limits on donations to and expenditures by candidates imposed in 1997. The limits were among the strictest in the nation and challenged on First Amendment grounds. Citing its 1976 decision in *Buckley v. Valeo*, the Supreme Court struck down the limits on contributions and expenditures, asserting the harsh limits imposed by Vermont were "disproportionate to the public purposes they were enacted to

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<sup>14</sup> La Raja, Page 113.

<sup>15</sup> *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

<sup>16</sup> *Id.*

advance.”<sup>17</sup> The court reasoned that the extent of the state’s limits put candidates at risk of not being able to campaign effectively.<sup>18</sup>

The Rawlsian critique of the court’s decision in *Randall* is that eliminating expenditure and donation limits results in inequality among candidates vying for office because the wealthiest individuals and organizations can have disproportionate influence on election outcomes. However, in terms of protecting the right to free speech, the *Randall* decision champions the first principle of Rawls’ theory. As with all reform proposals and changes to the campaign finance system, it seems that at least on some level, a choice must be made between favoring individual equality in elections and protecting the fundamental right to free speech.

### **FEC v. Wisconsin Right to Life (2007)**

In 2006, the Wisconsin Right to Life organization, a pro-life group actively involved in promoting the election of socially conservative candidates, financed anti-abortion ads that were broadcasted within the 60 day ban imposed by the BCRA. The FEC sued. Wisconsin Right to Life claimed the ban on issue advertising had a chilling effect on First Amendment rights.<sup>19</sup> The issue ads in question neither endorsed nor specifically mention any candidate for office. The court ruled the interest in reducing corruption or the appearance of corruption, as acknowledged in *McConnell*, does not extend to advertisements that do not mention a political candidate.<sup>20</sup> The FEC’s failed argument was that despite not mentioning a candidate, the ads intended to and likely would affect the outcome of the election.

The ethical issues for campaign finance that arise with issue advertising are seemingly irreconcilable within a Rawlsian approach. Restricting free speech presents a fundamental problem for the first principle of justice. Placing restrictions on advertising seems to be in direct opposition to the basic liberties Rawls seeks to protect. However, allowing for spending on issue advertising creates an inevitable, unequal advantage for candidates supported by wealthy individuals, organizations, and corporations.

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<sup>17</sup> *Randall v. Sorrell*, 548 U.S. 230 (2006).

<sup>18</sup> *Id.*

<sup>19</sup> *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

<sup>20</sup> *Id.*

### **Citizens United (2010)**

In 2010, Citizens United, a conservative lobbying organization, created the movie “Hillary” to discourage voters from supporting Hillary Clinton’s 2008 presidential campaign. The movie violated a section of the BCRA, and Citizens United mounted a challenge against the BCRA’s ban on express advocacy for a candidate within 30 days of a primary and 60 days of a general election.<sup>21</sup> Surprisingly, the Supreme Court moved the campaign finance system toward deregulation by upholding the advocacy. The court championed corporate right to free speech, stating that the government cannot suppress political speech based on a candidate’s corporate identity.<sup>22</sup> Banning such speech was deemed too broad and therefore in violation of the First Amendment.

Like the outcome of *Randall* in 2006, the Rawlsian challenge to the Citizens United decision is that by allowing corporations unregulated express advocacy, a significant advantage is given to candidates supported by wealthy organizations. Although this advantage already existed through corporate use of PACs and other backdoor channels, the decision here firmly asserts a broad definition of the right to free speech and presents an insurmountable challenge to Rawls’ desire to arrange social and economic inequalities so they are of the greatest benefit to the least advantaged.

The decision in Citizens United firmly demonstrates campaign finance reform see-sawing between a regulated and deregulated system, back-and-forth between championing individual equality and protecting a broad right to free speech. Creating a balance where both interests are protected has become seemingly impossible within campaign finance. Scholars and politicians across the nation have proposed ideas that seek to achieve such a balance, many of which are still imperfect from a Rawlsian vision of justice.

### **Some Recent Proposals for Campaign Finance Reform**

#### **“Empowering Small Donors in Federal Elections”**

The idea of empowering campaign contributors who give in smaller increments, as opposed to wealthy donors who perpetuate the perception of corruption in political campaigns, is a great leap toward protecting both the right

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<sup>21</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

<sup>22</sup> *Id.*

to free speech and the interests of middle and lower class citizens. Created and championed by Adam Skaags and Fred Wertheimer of the Brennan Center for Justice at NYU School of Law, a system that empowers small donors matches the donations with public funding at a multiple ratio.<sup>23</sup> This matching provides small donors with a larger voice by incentivizing candidates to answer to a broader range of constituents with varied interests.<sup>24</sup> “Empowering” small donors in this way also encourages further participation in the election process by otherwise politically apathetic segments of society.<sup>25</sup>

The proposed system by Skaags and Wertheimer is similar to the public funding system in New York City elections. The system’s fundamental elements include a 5-to-1 match on in-state contributions up to \$250, a cap on available public funds per candidate per race (amounts vary for candidates for different offices), a reduction of contribution limits by half, and a qualifying threshold to ensure funds are not given to unviable candidates.<sup>26</sup> The proposal points to the recent success of fundraising through small donations due to the technological advances provided by the internet.<sup>27</sup>

The largest ethical hurdle to overcome with the proposal is its strictly voluntary system. While some candidates will undoubtedly choose to participate in a system that provides matching funds at a multiple ratio, as some currently do at the state and local levels, successful candidates at the federal level typically choose to forego matching systems because accepting matching funds requires limiting contributions and personal expenditures on campaigns.

Rawls’ theory of justice requires a social contract between people, which imposes a duty on citizens to act a certain way.<sup>28</sup> Candidates in a Rawlsian society will should ideally, opt into a system that empowers the socially and economically disadvantaged. If the system were mandatory for all federal candidates, it is more compatible with Rawls’ theory of justice than any of the reforms made over the past 40 years.

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<sup>23</sup> See generally: Skaags, Adam and Fred Wertheimer, *Empowering Small Donors in Federal Elections*.  
Brennan Center for Justice at NYU School of Law, 22 August 2012.  
<<http://www.brennancenter.org/publication/empowering-small-donors-federal-elections>>

<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> Thompson, Page 73.



### **“Voting with Dollars”**<sup>29</sup>

The “Voting with Dollars” campaign finance paradigm was created by Bruce Ackerman and Ian Ayres of Yale in the early 2000s. Ackerman and Ayres provide a detailed plan to reform campaign finance, including a lengthy statute that aims at curbing corruption in elections through an anonymous donation system and a “patriot program” to be run by the FEC. Such a system, they argue, increases donations from the lower and middle classes and eliminate favor to big donors.

The “patriot program” gives all registered voters a \$50 electronic ATM card to donate to federal candidates of their choice, with limits on how much is allotted to House, Senate, and presidential candidates. Private donations are still allowed but limited so as not to drown out the “patriot card” donations. Patriot dollars can be given to political parties and PACs if a voter deems that his or her interests are better represented by these particular groups. Private contributions are also anonymous under this system and funneled through a revamped FEC to avoid candidate knowledge of donation sources.

The “Voting With Dollars” system champions the Rawlsian notion of equality by leveling the playing field of donor influence on candidates but may be problematic for free speech advocates. Anonymity and use of the FEC as an intermediary force candidates to address a more widespread array of issues and allow them to spend more time working on public issues instead of constantly fundraising for the next election. The ethical issue that arises with forcing donors to remain anonymous is whether or not forced anonymity violates the right to free speech. The question then becomes whether the right to freely “speak” (donate) also includes the right to be “heard.” A forced disassociation with one’s free speech may be considered an infringement on a basic liberty.

### **“Clean Elections”**

Proponents of strict regulation advocate complete public funding for federal elections throughout the history of campaign finance reform. As the idea suggests, candidates will be unable to receive any private donations or spend any of their own private money for campaign purposes. Full public financing aims at leveling the playing field for candidates supported by different socio-economic classes. Candidates are elected based on their political convictions rather than

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<sup>29</sup> See generally: Ackerman, Bruce and Ian Ayres, *Voting With Dollars: A New Paradigm for Campaign Finance*. 2002.

their ability to out-fundraise opponents. According to Common Cause, a nonprofit, nonpartisan advocacy group, public financing of campaigns will cost each taxpaying citizen about \$4 per year, which amounts to approximately 1/25 of one percent of the federal budget.<sup>30</sup> The organization suggests that a cleaner, less corrupt agenda for elected officials will ultimately result in net savings for the nation by cutting down on pork barrel earmarks and favors given to large private contributors.<sup>31</sup>

Ethically speaking, the benefits of full public funding for federal elections seem overwhelming when compared to other campaign finance reform proposals. These benefits include promoting accountability to public interests rather than special interests, having elections and agendas influenced more by political ideals rather than fundraising capabilities, and providing all citizens with a fair opportunity to engage in the election process. These notions all suggest, and would likely achieve, levels of economic fairness that have been unrivaled since the first campaign finance reform efforts.

However, as with all reform efforts aimed at promoting equality among candidates and voters, issues arise with free speech. With the Citizens United decision in 2010, which championed corporate free speech, a “clean election” system at the federal level would likely be dismissed immediately with any consideration of the First Amendment. If money constitutes speech at any level in campaigning, it has to include personal spending on one’s own campaign. Full public financing bans such a right, which will be seen as a Constitutional violation. As long as the right to free speech is considered a basic liberty that includes the right to spend money, a publicly financed election system will not be consistent with Rawls’ theory of justice.

## Conclusions

Politicians and political operatives seeking a change to the status quo largely drive campaign finance reform efforts. Those in power have generally voted to maintain whatever system used to win elections. This suggests the motives behind reform efforts have little or nothing to do with creating a fair and ethical system of campaign finance, but rather individuals’ insatiable thirst for power and success, regardless of ethics.

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<sup>30</sup> Common Cause. “Money in Politics: Fair Elections Now: Benefits of Fair Elections,” <<http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4773849>> Accessed 03 July 2013.

<sup>31</sup> Id.

Campaign finance reform since the 1970s has been plagued by a cycle of corruption, reform, new loopholes, new corruption, new reform, and so on. As long as the First Amendment right to free speech is widely protected, and free speech is broadly defined to include the use of money, there is no feasible option for reform that will achieve fairness for all individuals while also protecting one of American society's most revered freedoms.

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