The New Campaign Finance Sourcebook

Chapter 11

Reform Agenda

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Updated May 2004

The passage of the Bipartisan Campaign Reform Act of 2002 (BCRA) culminated years of effort to rewrite federal election law. Surprised by the success of reformers, many observers now assume campaign finance will naturally fade from the policy agenda. After all, an extraordinary confluence of problems, events, proposals, and advocacy was necessary to achieve this victory. It is difficult to imagine history repeating itself anytime soon.

While this view appears politically sound, it overlooks factors that will force campaign finance issues back onto the agenda. As documented in Chapter 7, the presidential public financing system has suffered a number of strains in recent election cycles. BCRA exacerbated some of those strains, requiring congressional action to salvage the public financing system. The Act also gave the much criticized Federal Election Commission (FEC) important new rulemaking and enforcement responsibilities that many believe, as discussed in Chapter 9, it is ill-structured to carry out. Indeed, initial rounds of rulemaking on the new law have been very contentious. Proposals to replace or restructure the FEC will be high on the reform agenda.

The new law is relatively modest in its ambitions, designed to repair tears in the regulatory fabric that developed over the last decade or so. It is aimed at preventing the corruption or the appearance of corruption created by huge contributions of soft money solicited by federal officeholders and candidates. It also seeks to prevent circumvention of contribution limits and disclosure requirements through the vehicle of issue advocacy. Thus, BCRA seeks to combat corruption rather than to increase competitiveness and participation. In this sense it is less an end in itself than a prerequisite for additional improvements in the campaign finance system, particularly ones designed to encourage a broader base of contributors and to increase the level of electoral competition. The most prominent ideas include tax credits for small donors, various forms of direct and indirect public subsidies, free or reduced-cost broadcast time for candidates and parties, and increased public affairs programming on television and radio. Advocates will be pressing these proposals in the months and years ahead.

A reform agenda prompted by the need or desire to respond to or supplement the new law by no means exhausts the possibilities. An alternative is to replace the entire regulatory regime. Some critics of the current system argue for a repeal of all limits on contributions, effectively deregulating money in politics and relying exclusively on public disclosure. At the other end of the spectrum, champions of full public financing seek to banish all but nominal qualifying private contributions from election campaigns. This approach, labeled the "Clean Money/Clean Elections" system, is similar to the full public financing program currently in place for presidential general elections. Both of these approaches have been adopted or proposed in some states. A rich variety of state and local experience with these and other campaign finance innovations offers lessons for federal policymakers.

A final item on the reform agenda flows from the digital revolution and the rise of the Internet. Chapter 10 summarizes the current state of federal law as its relates to political fundraising and campaigning on the Internet. Radical changes in modes of communication and forms of political campaigning lie not too distant on the horizon. These may well render obsolete much of the regulatory approach embedded in federal election law and force a major rethinking about how best to manage the problems associated with money and politics.

After the Supreme Court

After a major restructuring of federal campaign finance regulation in 1974, the Supreme Court in *Buckley v. Valeo* found significant parts of the new law unconstitutional. The Court struck down spending limits in House and Senate elections, limits on independent expenditures by individuals and groups, restrictions on the self-financing of federal candidates, and the regulation of electioneering communications broadly defined. It also ruled unconstitutional the role Congress played in appointing four of the six members of the Federal Election Commission. Congress moved quickly in 1976 to resurrect the FEC's legal status and broad responsibilities by lodging the appointment authority in the president. However, nothing was done to adjust to the Court's deletion of other major elements of the regulatory system crafted by Congress. Important components of the new law – contribution limits, public financing of presidential elections, and disclosure – remained in force. But Congress's failure to legislate an alternative definition of express advocacy and to seek new ways of balancing supply and demand for political funds in congressional elections set the stage for the subsequent collapse of the system.

By upholding the constitutionality of the two major elements of the 2002 law – the prohibition of soft money and the regulation of electioneering communications that fall short of the current test of express advocacy – the Court in *McConnell v. FEC* spared Congress the need for a wholesale repair of BCRA. Now the attention of reformers will naturally shift to issues surrounding the law's implementation (including the controversy over when 527 organizations must register as federal political committees and abide by the 1974 limits) and the next stage of the reform agenda.

Adjustments to the Present System

Repairing the Presidential Public Funding System. Public funding has been a centerpiece of presidential elections since 1976, but its role in future elections is very much in doubt. In 2000, George W. Bush was the first successful candidate to decline matching public funds in the presidential nominating process. In 2004, both President Bush and Democratic presidential nominee Senator John Kerry opted out of the public funding system during the primaries, thereby avoiding spending limits tied to the matching public funds. Their exception could well become the rule, in the general election as well as the nominating process, if changes are not made in the system.

Both the matching funds program in the nomination phase and the full public grant in the general election are threatened by a severe shortfall of funds earmarked through the personal income tax check-off and by spending limits adjusted only for inflation, not for rising campaign costs. The increase in contribution limits from $1,000 to $2,000 without a corresponding rise in the maximum amount of a private contribution that is matched with public funds ($250) reduces the value of the public subsidy, especially when weighed against a tight spending limit, and makes it relatively easier for candidates to privately finance their campaigns. Banning party soft money and reining in party issue ads makes more perilous the position of publicly financed candidates who have effectively won their party's nomination but run out of spending room months before the national convention.

A major effort is required to salvage the showcase of public financing in U.S. elections. Replenishing the tax check-off fund – by increasing the amount ($3) that can be designated for public financing on individual tax returns, changing the default position (from no to yes) on the check-off used by tax preparers and in tax software programs, launching public education initiatives, or directly appropriating funds – is essential. Eliminating state spending limits, raising the overall limit, and increasing the value of the public match would make the program more attractive to candidates. Other ideas include raising the amount of hard money parties can spend in coordination with their candidates and providing free or reduced-rate broadcast time for candidates and parties. The Campaign Finance Institute Task Force on Presidential Nomination Financing grappled with the potential collapse of the public finance program and recommended reforms to salvage it.[1]

Strengthening Enforcement. The absence of effective enforcement machinery has long plagued campaign finance law. Congress finally agreed to establish an enforcement agency in 1974, but it took special care – through the bipartisan structure of the Federal Election Commission, the appointment of commissioners, tight budgetary control, complex and time-consuming procedural requirements, and the prohibition on random audits – to ensure that the agency had little independent authority.

Alternative enforcement models – ones featuring less partisan agencies with more independent authority – are available within the United States (e.g. New York City) and in other countries (e.g. U.K.). Ideas for restructuring or replacing the FEC are discussed in Chapter 9. They include replacing the current six-member commission with either a single prominent administrator or an odd number of commissioners recruited in part or whole from nonpartisan settings. Reforms also seek to provide sufficient authority and resources for the Commission to act in a timely manner and to impose appropriate penalties.

Some analysts believe that toughened enforcement of campaign finance law will do more harm than good, encouraging a further criminalization of the political process. From this perspective, it is best to repeal all limitations on contributions and rely on public disclosure to discipline the role of money in politics. Criminal prosecution would be limited to bribery, extortion, a misuse of public facilities for fundraising, and illegal contributions from abroad.

Tax Credits for Small Donors. Only a minute fraction – several percent at most – of adult citizens contribute to federal candidates, parties, and political committees. Moreover, the number and total contributions of small donors (those giving $200 or less) has fallen in recent years.[2] Most fundraising energy has been devoted to courting large soft-money donors and those who are able and willing to contribute up to the maximum hard-money limit. As part of the new law banning party soft money, limits on individual contributions to candidates were increased from $1,000 to $2,000 per election and the aggregate amount any individual can contribute in federal elections to candidates, parties, and PACs was increased from $50,000 to $95,000 during a two-year election cycle. These upward adjustments only partially compensate for the effects of inflation since 1974 but still would appear to reinforce the recent trend of a declining importance of small donors in federal elections. Nonetheless, the 2004 election cycle witnessed an explosion of small-donor fundraising via the Internet, beginning with Howard Dean but then extending to Bush, Kerry, and both political parties.

To build on this experience in 2004, interest is growing in proposals to increase the incentives for the solicitation and contribution of small donations. Legislation has been introduced to reestablish federal tax credits for political donations that originally were initiated in 1972 but then repealed as part of the Tax Reform Act of 1986. In addition, three states – Oregon, Minnesota and Ohio – have considerable experience with tax credits, and three additional states – Arkansas, Arizona and Virginia – recently approved tax credit programs.

Experience at the federal and state levels suggests that tax credits do encourage more active participation in the political process by average citizens but the effects are modest.

Participation averaged just under 5 percent of eligible households in the federal program, generally lower in the states. And not all of the credits went to new contributors and/or small donors; credits were also claimed by old donors, some of whom made a larger contribution than was eligible for the credit. The structure of the tax credit program will clearly shape the level and composition of participation. Is the credit set at 100 percent or some fraction of the contribution? Is it refundable? What is the maximum donation to which the credit applies? Does it apply to contributions to candidates, parties, and political action committees? Does it cover state and local as well as federal candidates? Is it limited to households earning below a certain income? Is it combined with other incentives for candidates and parties to seek small donations (e.g. qualifying for public matches or free air time)?

Concerns about the inefficiency of tax credits and their limited impact have led some reformers to propose a more ambitious voucher program, as a supplement to private contributions or a self-contained substitute for the present system of campaign finance.[3] Registered voters would be given a publicly-financed voucher that they could contribute in whole or part to candidates and political organizations. The strengths of this idea are its universality and egalitarianism. The weaknesses lie with its costs and practical problems of administration.

Public Subsidies. Proposals to extend public funding at the federal level from presidential to congressional elections have always faltered in the Congress, even as a number of states have moved to provide public matching funds tied to voluntary spending limits or full public grants to qualifying candidates. Problems with the presidential public funding system discussed above make it even less likely that Congress will consider any time soon a major public funding initiative in Senate and House elections. Yet the attraction of public subsidies –

to increase the number of competitive races, reduce the dominance of large contributors, diminish conflicts of interest, and slow the money chase – ensures that some variant will remain on the reform agenda. Tax credits are, of course, an indirect public subsidy. Vouchers are a direct public subsidy of campaigns, although delivered via a market-based process that is very different from most public funding schemes. Other forms of public subsidy include free or reduced-cost mailings, voter brochures, and free broadcast time.

Free Air Time. Perhaps the most intriguing and most visible proposal to reduce the barriers to entry for challengers, expand the competitive terrain of congressional elections, and lower the demand for political money is to provide free broadcast time for candidates and parties to air political ads. The cost of political advertising on television has skyrocketed in recent election cycles, as parties and groups running "issue ads" have competed with candidates for prime time on local stations. While the efficiency of television advertising varies greatly across House districts, such ads now absorb, on average, half of the expenditures in competitive congressional elections, substantially higher in some tight Senate races.

The Alliance for Better Campaigns, as part of its Our Democracy, Our Airways Campaign,[4] has developed a plan to finance a system of broadcast vouchers with a small spectrum usage fee on the broadcast industry. Instead of purchasing the air time with taxpayer dollars, this proposal would levy a charge on broadcasters for their use of the spectrum, which is indisputably a public asset. Candidates would qualify for the vouchers by raising a threshold amount from small contributions, after which they would receive a two-for-one match of small donations up to a specific limit set separately for House and Senate candidates. They could spend the vouchers on their local television and radio stations or, if their media markets make such advertising prohibitively expensive, trade the vouchers to finance more efficient modes of political communication. The plan is designed to provide a floor of resources for politically viable candidates in House and Senate elections – to reduce the barriers to entry for potential candidates and to ensure a minimal campaign presence in congressional districts and states across the country. Parties could use their vouchers to support state and local candidates, to boost candidates in competitive federal races, and to create a secondary market for vouchers that promotes their more efficient use.

While free political air time is a commonplace in democracies around the world, its adoption in the U.S. faces formidable opposition from the broadcast industry and a number of constitutional and legal challenges. The latter address First Amendment considerations as well as the "Takings Clause" under the Fifth Amendment.

Public Affairs Programming on Television and Radio. Television and radio stations are licensed to use the broadcast spectrum (they are given exclusive rights to an assigned frequency within a defined geographic area) in return for agreeing to serve "the public interest, convenience and necessity." How seriously stations take this public interest obligation is a matter of some dispute. What is not in dispute is the declining coverage of election campaigns by the national television networks and by local stations. In response to the shrinking news hole for substantive campaign coverage, the Alliance for Better Campaigns has advanced a second proposal: all television and radio stations should be required to air at least two hours a week (half in prime time or drive time) of candidate issue discussion in the month preceding the election. The stations would choose the formats they preferred – debates, interviews, town hall meetings, or something else – as well as the contests covered, length of segments, and time of airing.

While this proposal does not directly affect the financing of campaigns for federal office, it has the potential to reduce modestly the demand for political money, especially among challengers, and convey to a much larger slice of the citizenry at least the semblance of a contested election.

Alternatives to the Present System

Frustrated by the Court's embrace in *Buckley* of a clear distinction in the constitutional protection accorded political contributions and expenditures and by the unanticipated and sometimes perverse consequences of campaign finance laws, some reformers have urged a more radical restructuring or replacement of the present regulatory regime. Three very different alternatives have been championed: full public financing, deregulation, and a new constitutional basis for spending limits.

Full Public Financing. Six states have adopted voluntary full public financing systems for state office, three by initiative (Maine, Arizona, and Massachusetts) and three by state legislative action (Vermont, North Carolina, and New Mexico). Only two – Maine and Arizona – have laws that come close to the plans envisioned by the architects of Clean Money/Clean Elections. The Massachusetts law was repealed by the state legislature before it had any significant impact on campaign finance practices. Full public financing applies to a limited set of offices in the three remaining states: governor and lieutenant governor in Vermont, high-level judicial candidates in North Carolina, and public regulation commission members in New Mexico.

The Arizona and Maine full public financing programs provide public grants to candidates in primary and general elections who meet a low qualifying threshold in small contributions from their districts or state. The public grant, whose size is based on average expenditures in competitive races for that office in previous elections, constitutes a ceiling on permissible expenditures. The idea is to substitute "Clean Money," as labeled by its advocates, for private contributions, thereby producing "Clean Elections." Maine and Arizona permit modest private fundraising for seed money, designed to maintain a candidacy until it is certified for the public grant. They also provide additional public funds to candidates facing a high-spending opponent or independent expenditures.

Maine and Arizona have conducted two rounds of elections – in 2000 and 2002 – under the new public financing system. Assessments of their impact on competitiveness have varied. Advocates are heartened by the experience in both states.[5] They report that a substantial number of candidates for state legislative races participated in the public financing program. The competitiveness of these elections increased, while the spending gap between incumbents and challengers declined. The General Accounting Office, in a study (mandated by BCRA) of the Maine and Arizona programs, was more cautious.[6] They claimed that it was too early to draw conclusions about the impact of these full public financing systems. The most recent study, by Kenneth Mayer and his associates at the University of Wisconsin-Madison, is less ebullient than the advocates but more upbeat than the GAO.[7] The Mayer report concludes that full public funding has increased the pool of candidates willing and able to run for state legislative office and increased the likelihood that an incumbent will have a competitive race.

Whether this bodes well for the continuation and spread of full public financing systems among the states is doubtful. Public Campaign is leading a grassroots campaign in other states in support of this approach to campaign finance reform. But the movement suffered a setback in 2000 when two states – Missouri and Oregon – handily defeated Clean Election ballot initiatives; no other state victories are clearly on the horizon. Skeptics argue that citizen support for full public financing may prove evanescent, especially as Clean Election systems try to gain a foothold in more populous states that feature expensive media-based campaigns. Eliminating all private money in politics, they argue, is neither possible nor desirable. The ability to raise money is one measure of a candidate's political support and of the intensity of preferences. Contributing money to campaigns is one important channel for organized political action, an essential element of representative democracy.

Public Campaign continues to work with activists around the country to press full public financing in state and local elections. If any headway is made, it will almost certainly be at these levels of office. Congress shows no sign of seriously entertaining this reform in House or Senate elections, especially while a similar system on the books for presidential elections is teetering on brink of collapse.

Deregulation. While Clean Election advocates want to banish private money in politics, deregulation champions want to remove all restrictions on its flow. Deregulation has the virtue of simplicity and clarity. Its adherents, ranging from Stanford Law School Dean Kathleen Sullivan and the American Civil Liberties Union (ACLU) on the left to FEC Commissioner Bradley Smith and the National Right to Life Committee on the right, embrace one central argument: the *Buckley* distinction between contributions (which can be regulated) and expenditures (which cannot) is deeply flawed. In their minds, all contribution restrictions, including source prohibitions (from corporate and union treasuries) and limits on amounts, are unconstitutional, unworkable, and unwise.

Most champions of deregulation offer mandatory disclosure of contributions and expenditures as a tool for preventing abusive finance practices, but many opposed the disclosure requirement in BCRA relating to the fastest growing component of campaign finance – electioneering communications that do not meet the Court's current test of express advocacy.

Deregulation advocates disagree on the virtue of public subsidies of election campaigns. Those on the right would repeal the presidential public financing component of existing law. Sullivan and the ACLU instead would extend public subsidies to congressional elections but avoid any link to voluntary spending limits or other mechanisms designed to restrict private donations.

The major "deregulate and disclose" bill in the Congress, sponsored by Representative John Doolittle (R-CA), would remove all restrictions on the sources and size of contributions to candidates and parties, end all public financing, and mandate electronic filing and timely disclosure on the Internet of reports on contributions to candidates for federal office. Doolittle offers an intellectually disarming and emotionally compelling vision of a political marketplace disciplined not by arcane rules and zealous regulators but by rational citizens exercising their franchise.

Skeptics of deregulation question whether any such marketplace is feasible. Voters would find it difficult to use the ballot to discipline extravagant candidates, particularly when large economic interests invest heavily in both parties or contribute to winning candidates after the election, or when each party or candidate attracts campaign contributions from different, but equally offensive, sources. In any case, voters would be unlikely to disregard factors such as party identification, political ideology, peace and prosperity, or the candidate's character and instead focus exclusively and quixotically on the struggle to contain the harmful effects of money in politics.

As a practical matter, deregulation is unlikely to be embraced in the near term by the Supreme Court or Congress. In the Court's most recent decisions on campaign finance -- *Shrink Missouri, Colorado Republican II, Beaumont,* and *McConnell* – only Justices Thomas and Scalia were willing to repudiate the *Buckley* framework and initiate a judicially-imposed march to a deregulated campaign finance system. That minority sentiment on the Court is unlikely to grow until a new Republican presidential term begins. And the Doolittle bill shows little sign of life in Congress. At the peak of its popularity, the bill garnered only 71 House cosponsors and 131 votes on the floor. Given the history of past efforts to limit the direct involvement of corporations and unions in federal election financing and the widespread populist view in the country that political money buys special interest influence, relatively few politicians feel comfortable publicly defending a repeal of all limits on political donations.

Toppling Buckley. Deregulators would like to see fall *Buckley*'s defense of the constitutionality of the regulation of political contributions. Another group of reformers also hopes *Buckley* topples – but in the opposite direction. They would like to persuade the Supreme Court to overrule the parts of the decision that prevent legislatures from enacting reasonable limits on campaign spending.[8] Adherents of this approach concede that campaign spending deserves full First Amendment protection, but they argue that "judges should uphold carefully tailored regulations of such spending that are supported by compelling governmental interests." In addition to preventing corruption or the appearance of corruption, such interests might include expanding the pool of candidates, slowing the money chase, restoring public confidence in the democratic process, equalizing the voices of citizens, reducing the disproportionate influence of concentrated wealth, and promoting the constitutional rights to vote and to petition.

While several members of the Supreme Court, including Justices Breyer and Stevens, have expressed some sympathy with these arguments, prospects on the Court are no brighter for this alternative to *Buckley* than to the one advanced by deregulators. An alternative route to a similar outcome -- a constitutional amendment giving Congress and the states authority to set reasonable limits on funds expended to influence the outcome of elections – has garnered relatively little support on Capitol Hill.

Campaign Finance and the Internet

The FEC has begun to grapple with the challenges of applying the current regulatory framework for campaign finance to a radically different and rapidly changing mode of communication. Many of these issues are elucidated in Chapter 10. The economics of political communication on the Internet is already forcing some fresh thinking about the appropriateness of disclosure and contribution regulations for digital communications. Beyond these immediate regulatory issues, however, lies a more exciting and potentially liberating reform agenda. Internet-based fundraising, reinforced by tax credits, may lead to a dominant role for small donors, thereby easing concerns about the role of big, interested money in elections. And if technology-based transformations in election campaigning dramatically reduce the cost of political communications, demands on campaign finance regulation could well lessen.

[1] The Campaign Finance Institute Task Force on Presidential Nomination Financing, *Participation, Competition, Engagement: Reviving and Improving Public Funding for Presidential Nomination Politics* (2003) <http://www.cfinst.org/presidential/report/index.html>, accessed 19 May 2004.

[2] David Rosenberg, *Broadening the Base: The Case for a New Federal Tax Credit for Political Contributions* (Washington, D.C.: American Enterprise Institute, 2002) <http://www.aeipoliticalcorner.org/NO%20Articles/RosenbergReportIntro.pdf> and <http://www.aeipoliticalcorner.org/NO%20Articles/RosenbergReportMain.pdf>, accessed 19 May 2004.

[3] Bruce A. Ackerman and Ian Ayres, *Voting with Dollars: A New Paradigm for Campaign Finance* (New Haven: Yale University Press, 2002); and Richard L. Hasen, “Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers,” *California Law Review* 84 (Jan. 1996): 1-59.

[4] Alliance for Better Campaigns, “Our Democracy, Our Airwaves Campaign” <http://www.bettercampaigns.org/docs/index.php?DocID=11>, accessed 19 May 19, 2004.

[5] Marc Breslow, Janet Groat, and Paul Saba, *Revitalizing Democracy: Clean Election Reform Shows the Way Forward* (2002), <http://www.followthemoney.org/press/Reports/200201011.pdf>, accessed 19 May 19, 2004.
[6] United States General Accounting Office, *Campaign Finance Reform: Early Experiences of Two States That Offer Full Public Funding for Political Candidates*, GAO-03-453 (May 2003), available at <http://www.gao.gov/new.items/d03453.pdf>, accessed 19 May 2004.
[7] Kenneth R. Mayer, Timothy Werner, and Amanda Williams, "Do Public Funding Programs Enhance Electoral Competition?," prepared for delivery at the Fourth Annual Conference on State Politics and Policy Laboratories of Democracy: Public Policy in the American States, Kent State University, Kent, Ohio, April 30-May 1, 2004.
[8] E. Joshua Rosenkranz and The Twentieth Century Fund Working Group on Campaign Finance Litigation, *Buckley Stops Here: Loosening the Judicial Stranglehold on Campaign Finance Reform* (New York: Century Foundation Press, 1998).