

Chapter 4: Free Speech and Campaign Finance Reform

John Samples, director of the Center for Representative Government at the Cato Institute, and Thomas Mann, the W. Averell Harriman chair and senior fellow in Governance Studies at the Brookings Institution, provided the symposium participants with substantially different perspectives on the contemporary state of federal campaign finance laws in the United States. Once more, after separate presentations, the two panelists entertained audience questions in tag team fashion. Their debate is summarized in the pages that follow, along with recommendations for additional reading and research to supplement the lesson plan on the topic.

Samples, author of *The Fallacy of Campaign Finance Reform*, began with a nod to the nation's Founding Fathers—appropriately James Madison. He called Madison the most “characteristically” American thinker whose deepest concern was individual liberty, which Samples considers the starting point for any discussion of campaign finance laws.

For theoretical guidance, he referenced Douglass North's classification of the world into two categories: the natural state of order and open access order. Along these lines, most of society qualifies as residing in a natural state of limited access. What marks the distinction between the natural and open access state is societal competition; under this distinction, the United States fits into the open access order. Transitioning into the world of campaign finance regulations, Samples contends that there is no “obvious” connection between the spending of personal money and elections in an open access order. He therefore finds Justice John Paul Stevens' argument that money does not equate to speech problematic.

Samples proceeds to link the two, pondering the question: How is money connected to speech and to what extent can it be regulated? Contrary to the views of Justice Stevens, a current majority on the U.S. Supreme Court holds that money is tied to speech and it may, indeed, affect its exercise. Samples proceeded further, suggesting that money acts as speech by conveying information to others, specifically about candidates for public office. He argues that individual contributors speak to what the candidates may do in office and the issue positions they will embrace.

Candidates need to raise money in order to spend it on their political campaigns, and regulations on such fundraising affect every phase of this equation. Samples suggests that to speak of campaign finance reform is to invoke improper terminology, for it assumes that regula-

tion of political fundraising is necessary.

He then listed several of the prohibited sources of campaign funding for federal elections, including foreign nationals and corporations, which cannot make direct contributions. Thus, money raised within the existing campaign finance system comes from individuals via defined limits.

In the past, campaign finance laws also placed restrictions on candidate spending, including limits about money allocated to broadcasting.

Moreover, a slew of regulations affect the disclosure of funding sources, but most of the existing rules focus on donation limits. The landmark case that established these boundaries in the wake of post-Watergate reforms was *Buckley v. Valeo*, decided in 1976. Current limitations affect how much individuals can give to a single candidate in a specified election cycle, thus affecting their level of financial influence in such campaigns. According to Samples, these limits have a tremendous impact on fundraising, forcing candidates to rely upon a myriad of sources to raise the immense sums necessary to compete in the contemporary political landscape.

Samples referenced Senator Eugene McCarthy's long shot bid for the Democratic presidential nomination in 1968 as an example of the pre-Watergate campaign finance regime, where the dark horse finished a surprising second to incumbent President Lyndon Johnson in the New Hampshire Primary. McCarthy's campaign was bankrolled primarily by a handful of wealthy donors.

According to Samples, modern regulations, by comparison, actually raise the price of political involvement given the time that must be devoted to raising funds from a sea of sources. This is ironic because these same regulations actually reduce the amount of spending allowed in campaigns.

The contribution limits for candidates for federal office have been in place since 1974, but were not indexed to inflation until 2002 with the passage of the Bipartisan Campaign Reform Act, otherwise known as McCain-Feingold, the last names of its two primary Senate sponsors, Senators John McCain (R-AZ) and Russ Feingold (D-WI). As a result, the real value of these contribution limits eroded with the passage of time.

Since the most recent reforms, Samples sees a “rapid change” in “hard money” fundraising for individual candidates. Hard money refers to personal contributions to individual candidates. McCain-Feingold made severe restrictions on “soft money” contributions to political parties; “soft money” contributions are funds that cannot be spent advocating the election of an individual candidate,



Senators John McCain (R-AZ) and Russ Feingold (D-WI) were co-sponsors of the Bi-partisan Campaign Reform Act of 2002.

but may be used to attack his or her opponent.

McCain-Feingold also placed limits on so-called "issue ads" aired close to an election that reference a candidate for federal office. In 2007, the U.S. Supreme Court found this blanket provision in violation of the First Amendment's freedom of speech in the case *Federal Election Commission v. Wisconsin Right to Life*.

Most recently, the Court considered the Millionaire's Amendment attached to McCain-Feingold in *Davis v. Federal Election Commission*. It included a progressive loosening of fundraising requirements for federal candidates who face wealthy, self-funded opponents, raising individual contribution ceilings under the premise of leveling the proverbial playing field. In a June 2008 opinion, a majority on the Court concluded that the Millionaire's Amendment ran aground on First Amendment principles. The prevailing premise since *Buckley v. Valeo* was that contribution limits are permissible to reduce corruption or public perception of it. Because the Millionaire's Amendment does not address this concern, but merely seeks to level the playing field, the Court dealt yet another blow to McCain-Feingold.

Based on his survey of our recent forays into campaign finance reform, Samples concludes that these restrictions infringe upon free speech. To him, the remaining question is whether or not this burden on the First Amendment is justified. According to Samples, the current majority on the Supreme Court begins with the premise of liberty as it evaluates campaign finance laws. The alternative approach used by those in the minority is to begin with an objective of equality where democracy

is the embodiment of one person, one vote. In *Davis*, the Court determined that individual candidates who want to spend more on their campaigns need not justify themselves. In doing so, Samples sees the majority shifting away from the premise of equality, which places the burden of integrity on the individual donor or self-funded candidate.

If campaign finance restrictions are indeed an infringement upon personal liberty, specifically freedom of speech, how are these "intrusions" then justified? Samples returned to the notion of preventing the appearance of corruption. However, he reveals that there is no strong finding of any relationship between campaign contributions and roll-call votes. He admits that this may not be the only area of legislative influence for political donors, but argues that the presumption of liberty embedded in American institutions and political culture requires deeper evidence of corruption in order to maintain free speech restrictions.

Samples also allowed that there is an educational aspect to campaign finance laws, specifically disclosure requirements. Sources of campaign funds may inform voters of who an individual candidate has allegiances to and how, if elected, he or she may vote on specific issues.

Samples concluded with a reference to the limited access order he described at the outset of his presentation, where both major political parties attempt to harm one another via the manipulation of campaign finance laws. Moreover, incumbents, he contends, write these laws to increase the safety of their respective

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seats, further heightening their re-election prospects.

Samples confessed that campaign finance restrictions are popular with the public, but tempered this enthusiasm with data suggesting that support for freedom of speech in concrete situations does not garner strong majority sentiment. Campaign contributions, he charges, are but one example where regulations are aimed at groups – the wealthy, corporations and labor unions – who are widely disliked by national majorities.

Samples then handed over the podium to his counterpart on the subject, Thomas Mann, who began by lamenting the degree to which the polarized debate over campaign finance laws are emblematic of our national political atmosphere as a whole. He contends that ideology is the “bane” of governance and politics, where both conservatives and liberals on either end of the spectrum cling to “utopian views.” Where the left seeks to banish private money in its entirety from the political scene – offering direct funding and individual vouchers as substitutes – the right wants to deregulate the system to allow the political marketplace to manage the role of money in politics.

Mann was an advocate of a “soft money” ban like that included in McCain-Feingold, but has since explored other campaign finance-related topics. More than anything, he is tired of the “stale” debate, yet does see signs of progress. Regardless of where one stands on the issue, Mann predicts further erosions of campaign finance regulations given the current composition of the Supreme Court.

Mann addressed Samples’ freedom of speech concerns about campaign finance restrictions with the contention that the right to speak diminishes in significance without the money to do so. He contends that the manner by which campaign cash is raised and spent can undermine the legitimacy of politics. Mann recognizes an “underlying tension” between economic inequality and political equality, where the former can exasperate the latter. However, “necessary” restrictions in order to attain political equality may conflict with the bedrock protections of the First Amendment.

Mann maintains that the tools available to promote political equality through campaign finance regulations are universal across the world. They include regulation of campaign activities, limits on fundraising and/or spending, public financing of some aspects or all parts of the campaign process, and disclosure requirements for political contributions.

He allows that the “appearance of corruption standard” first articulated in *Buckley* has proven nothing

more than a “failure.” Taken together, the tools listed above are “blunt,” according to Mann, and reformers inevitably end up disappointed. At the same time, he suggests, proponents of reform conclude that deregulation is not the answer. Among the concerns of an unregulated political marketplace are outright bribery, conflicts of interest and the money “chase” itself.

Reformers are thus left with a conundrum: there are no panaceas. Democracies are left to find ways to manage the political marketplace without damaging the very institutions that make campaigns possible. Freedom of speech is one of these vital institutions, and it is arguably threatened by campaign finance regulations.

Mann proceeded to trace campaign finance regulations across American history. He lampooned the tendency across time to pass laws, but never enforce them. One such foray was the Tillman Act of 1907, which prohibited campaign contributions from corporations and national banks to federal campaigns. The most substantive reforms were embodied in the Federal Election Law Campaign Act, which provided for disclosure requirements, along with limits on fundraising and even spending on media. The latter provision was struck down in the *Buckley* case. According to Mann, amendments three years later in the wake of Watergate created a regulatory regime with real enforcement powers, namely in the form of the Federal Election Commission (FEC).

In balance, Mann feels that some of the regulations worked “pretty well,” yet they were “eroded” over time, particularly by former President Bill Clinton and his adviser Dick Morris in the mid-1990s. Also to blame, Mann contends, was the use of money at state level to air “issue ads.” When challenged, the FEC “punted,” and thus we entered the “world of soft money.”

Mann turned next to McCain-Feingold, which he suggested has modest objectives, and basically restored the status quo achieved during the post-Watergate era. It did, however, place “teeth” in bans on corporate and union-funded issue ads.

He also confronted critics of McCain-Feingold, most prominent of them columnist George Will. He faults Will for claiming that recent reforms infringe upon freedom of speech, yet failing to provide concrete examples of any such violations.

Currently, Mann fears that the contemporary campaign finance regime is on the brink of collapse. Major candidates began casting aside the federal matching monies during primary season beginning with George W. Bush in 2000. Most recently, the general election funding system is increasingly endangered, too, as presumptive

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Democratic nominee Senator Barack Obama (D-IL) conducted a “bait and switch,” first committing to public funding, and then making an unprecedented move to raise money independently and spend without restrictions. His opponent, Senator John McCain (R-AZ), did accept public funding for the general election phase of the campaign.

Despite a fractured regime, Mann highlighted a number of signs for inspiration relative to campaign financing in United States politics. He considers the large sums of money raised throughout the 2008 cycle a “sign of strength.” Furthermore, McCain-Feingold’s curb on soft money has not led to new channels for this relatively unregulated money to flow. Also, Mann finds the “surge” in small donors encouraging. For example, during the 2008 primary season, Senator Obama raised roughly half of his record-setting campaign coffers from contributions of \$250 or less.

Mann contends that money did not play a decisive role in either party’s nomination process. McCain was vastly outspent by rival Mitt Romney, and although Obama outraised his primary challenger Senator Hillary Clinton (D-NY), his lavish spending in select states did not always equal victory. One needs to look no further than the results of the Ohio and Pennsylvania primaries for evidence of this phenomenon.

Finally, Mann reports that “outside groups” have been discouraged by the Obama camp from inserting themselves in this election, and there is a general lack of enthusiasm for such independent expenditures on the right. The political parties themselves, however, are spending a great deal independently.

He concludes that free speech is alive and well in the post-McCain-Feingold world. Mann considers the *Wisconsin Right to Life* Supreme Court case to be “lame,” as the search to find a situation where an independent group was affected by the issue ad ban was difficult. He noted that campaigns are changing dramatically, and, as a result, the efficacy of campaign finance limits is eroding. Campaign finance regulation as a whole, Mann argues, is due for reconsideration, especially in light of new Digital Age realities. He encourages us to allow new information to change our minds as we explore practical ways of updating the regulatory regime.

Their individual presentations complete, Mann and Samples opened the floor to questions from symposium participants. The first question pondered whether the current \$2,300 per person limit on individual contributions to federal candidates in a single election, which

requires candidates to solicit funds from a bevy of sources, produces better fundraisers than political leaders. Mann responded by comparing Senator Obama in 2008 with Senator McCarthy in 1968. While Obama raised roughly \$1.7 million from small donations, McCarthy was funded by a few millionaires. Mann contends that McCarthy would have been a “dreadful” president, and that Obama is a much better candidate.

Samples failed to see a connection between the two candidates. He referenced McCarthy earlier only to hold him up as an example of what the system looked like prior to the restraints imposed after 1971. He considers the restraints placed on the ability to raise money the central issue of concern.

A second participant wondered whether any of the issues raised over the course of the panel discussion were valid in light of the changes precipitated by the Internet. Samples suggested that campaign finance regulations are rooted in the progressive tradition of American political thought; “Madisonian liberals” like himself have a healthy distrust of such measures. Moving forward, however, it may be difficult for any level of government to regulate campaign finance, a realm Samples equates with political speech, given the many different available outlets.

Mann feels that we are not there yet. The impact of the Internet is just now beginning to penetrate the system, he suggests. Mann believes that, increasingly, campaigning will embrace the Internet as the preferred mode of communicating with voters, thus lowering costs. He does not see value in large political contributions to candidates, but finds the solicitation of small donations healthy for our democracy.

The next question asked was: How do any of these campaign finance measures promote democracy? Mann repeated his contention that money did not play a decisive role in the 2008 primary process, so democracy, in his mind, stands on firm ground. Samples raised the issue of whether citizens are more or less informed as a result of campaign finance regulations. He cited a study by political scientist John Coleman, who found that higher levels of campaign spending expand the knowledge base of potential voters. These effects are distributed across the economic spectrum, and those with the lowest overall levels of political knowledge gained the most.

The final question was a particularly appropriate given the theme of the symposium. A participant asked: What problems does the Digital Age present to political campaigns? Samples weighed in first, arguing that the dis-

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closure system works well given the instantaneous flow of information, where the burden of proof in terms of funding sources is placed on the candidate. He also believes that political speech is strengthened by the emergence of the Internet given its democratizing effects. Nowadays, Samples contends that it is less plausible for the wealthy to dominate political discourse.

Mann is also an optimist in this respect, but finds the fact that the Internet tends to empower those with

the motivation to be interested in politics and public information problematic. Despite the openness of the digital domain, Mann feels there remain too many barriers to political participation in the contemporary political environment.

The sources that follow were either referenced directly by the two speakers in the course of the panel discussion or provide additional information about campaign finance regulation at the federal level in the

Additional Reading and Research:

"*Buckley v. Valeo*." Oyez: U.S. Supreme Court Media. Available Online: Oyez.org/cases/1970-1979/1975/1975_75_436.

Campaign Finance Institute: A non-partisan, non-profit institute, affiliated with The George Washington University, that conducts objective research and education, empanels task forces and makes recommendations for policy change in the field of campaign finance. Available Online: Cfinst.org.

Civic Disengagement in Our Democracy. 2008. McCormick Foundation Conference Series. Available Online: McCormickFoundation.org/publications/civildisengagement.pdf.

Coleman, John. 2001. "The Distribution of Campaign Spending Benefits across Groups." *The Journal of Politics*, Vol. 63, No. 3 (Aug.), Pp. 916-934. Available Online: Polisci.Wisc.edu/coleman/colemanjop2001.pdf.

"*Davis v. Federal Election Commission*." Legal Information Institute: Supreme Court Collection. Cornell University Law School. Available Online: Law.Cornell.edu/supct/html/07-320.ZS.html.

Federal Election Commission. Available Online: FEC.gov.

"*Federal Election Commission v. Wisconsin Right to Life*." Oyez: U.S. Supreme Court Media. Available Online: Oyez.org/cases/2000-2009/2006/2006_06_969.

Mann, Thomas E. 2007. "Campaign Finance: Is Unregulated Spending the Most Effective Way to Ensure Citizens Have the Power to Speak to Their Government?" Brookings Institution. Available Online: Brookings.edu/opinions/2007/0713_campaignfinance_mann.aspx.

North, Douglass C. 2007. "*A Conceptual Framework for Interpreting Human History*." Available Online: Criss.wustl.edu/publications/2007north.pdf.

OpenSecrets.org. Center for Responsive Politics. Available Online: OpenSecrets.org.

Samples, John. 2006. *The Fallacy of Campaign Finance Reform*. Chicago: The University of Chicago Press.

Lesson Plan

Topic: Free Speech and Campaign Finance Reform

Critical Engagement Question: Do proposed campaign finance reforms promote or hinder free speech in the political arena?

Overview

Since the Federal Election Campaign Act of 1971 (FECA), Congress has pressed for legislation to limit the financial contributions individuals can make to political campaigns in order to lessen the influence of money in politics. Although the Supreme Court struck down major provisions of this act construed as unconstitutional restrictions on free expression and association, several amendments to FECA over the past thirty years have bolstered its main tenets. For example, the Bipartisan Campaign Reform Act of 2002 (also known as McCain-Feingold) addressed the issue of “soft money” and banned the broadcast of “issue ads” within a certain time period before an election.

Despite such amendments, pertinent questions still remain. Chief among them is: Are political contributions a form of free speech that merit protection under the First Amendment? And, if so, is there adequate justification to limit what individuals, groups, and organizations may give in support of a political candidate or issue?

Objectives

- To familiarize students with key terms and concepts associated with campaign finance reform.
- To aid students in understanding the connection between free speech and campaign financing.
- To enable students to identify both the potential positive and negative impacts of reform efforts.
- To assist students in evaluating arguments for and against campaign finance reform.

Standards

NCHS: Era 10, Standard 2D, 2E

NCSS: Strands 5, 6, and 10

Illinois: Goal 14, Standard C, D, and F; Goal 18, Standard B

Student Materials

Internet access

Worksheets A and B

Time and Grade Level

Two 45-minute class periods with pre- and post-activities.

Recommended for grades 9–12.

Warm-Up

1. Define the following terms: interest group, political action committee, soft/hard money, public financing, issue ad. Discuss the significance of these terms as they relate to political campaigns.
2. Distribute brief summaries of *Buckley v. Valeo* (1976) and *Federal Election Commission v. Wisconsin Right to Life, Inc.* (2007). Have students review each summary in groups of two or three. Once finished, conduct a discussion of the case backgrounds and main arguments.

Activity

1. Instruct students to complete Worksheet A in pairs, using the Web resources listed below and on Worksheet A. Once completed, review each term with the class so as to familiarize everyone with their importance.
 - Center for Responsive Politics: OpenSecrets.org
 - Federal Election Commission: FEC.gov
 - A Money in Politics Glossary: CampaignFinanceSite.org/structure/terms.html
 - Oyez: U.S. Supreme Court Media: Oyez.org/cases
2. As a class, review the Web site OpenSecrets.org, which tracks individual contributions to congressional and presidential campaigns, as well as contributions made by political action committees and private industries. Students should become familiar with how to navigate the site, especially the “Politicians and Elections” and “Influence and Lobbying” tabs. This can be accomplished through a teacher-guided exploration of the site, or by having students work in pairs.
3. In the computer lab, distribute Worksheet B to each pair of students. Students are to look up a Representative or Senator from their state and complete the worksheet by finding the information on the Web site.

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Homework

Have each pair of students write a 1-page report on the elected official they researched. This report should be a brief summary of (1) the contributions made to this politician by individuals, political action committees and private industries and (2) how much he/she spent during the last campaign. Other relevant discussion points may be added by the teacher, such as the First Amendment right of interest groups to petition the government for redress of grievances, a practice that often assumes the more pejorative term of "lobbying." Students should be prepared to share their findings with the class.

Extensions

1. Have students choose a 527 group on which they will do an in-depth study. Information on various 527 groups can be found at OpenSecrets.org/527s, PublicIntegrity.org/527 and FEC.gov. This study can be in the form of a report or poster.
2. Watch and discuss the documentary *Moyers on America: Capitol Crimes*. This video can be accessed online at PBS.org/moyers/moyerson-america/capitol. This documentary addresses campaign financing and the influence of money in politics, as well as the Jack Abramoff scandal and its fallout.

Student Worksheet A

Name: _____

Campaign Finance Reform: Key Concepts and Definitions

Directions: Write the definition for each term below. Once completed, fill in the timeline at the bottom of the worksheet with all important events and dates discussed in class. Please use the following Web sites as sources for information.

Center for Responsive Politics: OpenSecrets.org

Federal Election Commission: FEC.gov

A Money in Politics Glossary: CampaignFinanceSite.org/structure/terms.html

Oyez: U.S. Supreme Court Media: Oyez.org/cases

First Amendment:

Interest Groups:

Incumbency:

Public Financing:

Soft and Hard Money:

527 Groups:

Political Action Committee (PAC):

Federal Election Campaign Act (FECA, 1971):

Federal Election Commission (FEC):

Buckley v. Valeo (1976)

Bipartisan Campaign Reform Act (McCain-Feingold, 2002):

Federal Election Commission v. Wisconsin Right to Life, Inc. (2007):

Campaign Finance Reform Timeline

1965

2008

Student Worksheet B

Name: _____

Following the Money: A Worksheet for OpenSecrets.org

Directions: Select a Congressperson or Senator from your state. Complete this worksheet for this elected official, using information found on the Web site OpenSecrets.org.

Elected official's name: _____

Year of most recent election: _____

Total amount raised: _____

Amount contributed by political action committees (PACs): _____

Money contributed by individual candidate: _____

Did the elected official have any money left after the campaign ended? If so, how much? _____

In your opinion, should politicians be allowed to spend less than they raise in a given election cycle, or should they be required to spend every dollar that was given to them for the purpose of their campaign? Explain your answer.

Who was the top contributor, and how much did they give? _____

List the top five industries that contributed to this elected official's campaign:

1. _____
2. _____
3. _____
4. _____
5. _____

For the most recent campaign financing cycle, find the list of PACs that contributed. Choose one sector and fill in the following data:

Name of sector (ex. health, labor, education): _____

Total amount given: _____

Click on the sector you chose and list the top-giving area within this sector: _____

Look at the PAC Contribution Breakdown for the most recent cycle. List the top three groups and their percentage of overall contributions: _____

On the left-hand column, click on "Personal Financial Disclosure," and then type the elected official's name in the search box on the right.

List their net worth and their ranking among all members: _____

Look at the bar graph on the right. How does this elected official's financial assets compare with the average? _____

Concluding Questions:

Should private companies, industries, and organizations be allowed to give as much money as they wish to a certain candidate? Why or why not?

Do you believe these companies, industries, and organizations hope to receive political favors in return for the financial contributions? If so, what form might they take?

Do limitations on campaign contributions from individuals who represent certain companies, industries, and organization infringe upon their First Amendment freedom of speech? Explain.
