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## **Equality of Participation: A Rawlsian Critique of U.S. Federal Campaign Finance**

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**Equality of Participation:  
A Rawlsian Critique of U.S. Federal Campaign Finance**

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## Table of Contents

Chapter I: Introduction .....	3
Chapter II: Justice as Fairness- an Overview .....	5
A: Motivations and Focus .....	6
B: Primary Concerns .....	9
C: The Argument from the Original Position .....	15
D: The Two Principles of Justice .....	22
E: The Four-Stage Sequence .....	29
F: The Role of Adjudication .....	33
Chapter III: Federal Campaign Finance- Historical Context.....	36
A: Early Developments .....	37
B: The Federal Election Campaign Act of 1971 .....	43
C: <i>Buckley v. Valeo</i> (1976) and the FECA Amendments of 1976, 1979 .....	48
D: Supreme Court Decisions prior to 2002 .....	52
E: The Bipartisan Campaign Reform Act of 2002 and <i>McConnell v. FEC</i> (2003) .....	55
F: <i>Citizens United v. Federal Election Commission</i> (2010) .....	59
Chapter IV: Textual Critique of Representative Cases .....	62
A: <i>Buckley v. Valeo</i> (1976) .....	63
1. Opinion of the Court- Contribution and Expenditure Limits .....	63
2. Opinion of the Court- Disclosure Requirements and Public Financing .....	72
B: <i>Austin v. Michigan State Chamber of Commerce</i> (1990) .....	76
C: <i>McConnell v. Federal Election Commission</i> (2003) .....	80
D: <i>Citizens United v. Federal Election Commission</i> (2010) .....	84
Chapter V: Rawlsian Program for Campaign Finance Reform .....	89
A: Review of Secondary Literature .....	90
1. Joshua Cohen- “Money, Politics, Political Equality” .....	90
2. David Estlund- “Political Quality” .....	93
3. Other Remarks .....	98
B: Proposal for Reform .....	100
1. Argument for Public Financing .....	101
2. Shape of the Proposal .....	106
3. Feasibility of the Proposal .....	109
Chapter VI: Conclusion .....	112
Notes .....	115
References .....	127

## Chapter I: Introduction

In the United States over the past century, the relationship between monetary expense and political success has grown both increasingly apparent and increasingly troubling. This trend is perhaps best manifested in issues surrounding the financing of campaigns for federal office. Despite substantial efforts at campaign finance reform in recent years, an easy solution to the problem at hand continues to prove elusive. The problem is this: how may the current system be reformed so as to produce an optimally-just financing arrangement for U.S. federal election campaigns? The considerations involved in answering this question are not merely ones of economic efficiency or political pragmatism. We are concerned here with, among other things, a *problem of justice*. Accordingly, in attempting to resolve the problem of U.S. federal campaign finance, we must broaden our focus so as to consider the deep ethical implications of the problem.

In this paper, I will attempt just such a moral-philosophical approach to the issue of campaign finance. Specifically, I will apply the work of American philosopher John Rawls to the problem of determining the most just financing arrangement for U.S. federal election campaigns. I will not attempt a defense or critique of Rawls' work; that line of inquiry has been elsewhere pursued exhaustively over the past four decades. Instead, I will produce a Rawlsian critique of the current state of U.S. federal campaign finance, and from that understanding, I will set forth an initial sketch of a Rawlsian program for reform. The critical aspect of this paper will focus most heavily on current U.S. Supreme Court jurisprudence on campaign finance. I have selected this target of critique for several reasons, which include constraints of time and space and considerations of clarity. Most importantly, however, it will become apparent throughout this paper that the Supreme Court has played an essential role in shaping the current system of campaign

finance reform. Moreover, the Court's jurisprudence on this subject is an especially-promising mode of critique, as I will be able to directly compare the reasoning employed by the Court in several important cases with Rawls' own thinking on problems of justice. This focus on the Court's role will not, however, unduly limit the scope of this paper. I will also provide a general overview of the development of U.S. campaign finance, and I will situate the Court's decisions within the appropriate historical context.

The paper will be divided into four main parts. Chapter II will offer the reader a succinct, yet comprehensive overview of the relevant aspects of Rawls' philosophy. I will necessarily exclude discussion of a number of interesting and important parts of Rawls' work, instead focusing only on the concepts and claims that will bear directly or indirectly on the problem of campaign finance. This chapter will, in sum, lay out a general method of critique to be used later in the paper. Chapter III will provide a historical overview of the United States' evolving system of federal campaign finance. I begin early in the nation's history, with the rise of modern political campaigning, and proceed to the current day. Significant actions of Congress related to campaign finance will be detailed, as will the major decisions of the Supreme Court. Chapter IV will then consider four of those cases in greater detail: *Buckley v. Valeo* (1976), *Austin v. Michigan State Chamber of Commerce* (1990), *McConnell v. Federal Election Commission* (2003), and *Citizens United v. Federal Election Commission* (2010). In my view, the Court's decisions in these four cases have most critically shaped the current system of campaign finance. I will then critique the Court's reasoning in those cases within the framework of Rawls' moral philosophy. Based on the conclusions reached therein, Chapter V will set forth the conditions necessary for realization of a Rawlsian conception of justice in the realm of campaign finance. I will consider the writings of several philosophers on the subject at hand and will determine the plausibility of their accounts. I

will then lay out my own recommendations for a Rawlsian program of reform. I will conclude with a discussion of the practical feasibility of actualizing such a reformative system.

Ultimately, I will argue that the current system of U.S. federal campaign finance falls far short of realizing a Rawlsian conception of justice. Moreover, I will demonstrate the essential incompatibility of the Court's reasoning on these matters with a Rawlsian approach to justice. Accordingly, drastic reforms to the current system will be necessary if the financing arrangement for federal election campaigns is to be considered, in the appropriate Rawlsian sense, just.

## **Chapter II: Justice as Fairness- an Overview**

At the heart of any Rawlsian critique of public policy must be a careful reading of Rawls' moral and political philosophy. For Rawls, the theoretical framework for a just society is not merely a mode of analysis or method of criticism in a study of actual society. Instead, the implications for his theory of distributive justice are far more practical. The social institutions of a just society in the Rawlsian conception are *built* upon these theoretical principles; without them, the society will be prey to economic and political deprivations of an unwarranted character. As such, Rawls' philosophy essentially begins with a "focus on the *basis structure*" [emphasis mine] of societies; that is, the major social institutions that allow for all human interaction.<sup>1</sup> Moving upward from this bedrock, Rawls' methodology is characterized by a passage of analysis from the foundational to the super-structural.

In this chapter of the paper, I will follow the same pattern. I will begin by outlining the most fundamental philosophical assumptions and claims made by Rawls, including his own motivations for beginning the project of *A Theory of Justice* (1971). From there, I will give an overview of Rawls' contractarianism and the means by which a society's basic structure is formed. Next, we will proceed to the core of Rawls' philosophy: the notion of 'justice as

fairness' and the corresponding Two Principles of Justice. Given its particular relevance to the subject of this paper, I will pay special attention to the First Principle and will offer a careful reading thereof. This will require an explanation of the First Principle's demand that the *fair value* of the *political* liberties be guaranteed. With that understanding, I will next discuss the four-stage sequence of the formation of a society, which includes the above deliberations of the ideal contractors and the positing of the Two Principles. The latter stages of the sequence are, respectively, characterized by the construction of a constitution, the writing of particular statutes and creation of public policy, and the final adjudication of particular conflicts and application of established rules and regulations to everyday social interaction.<sup>2</sup> I will then conclude with an overview of the proper role of adjudicative bodies, e.g. the United States Supreme Court, and their function as the highest embodiment of *public reason*. This will provide the necessary introduction to Rawls' view of the Supreme Court in matters of constitutional analysis, including the difficult topic of judicial review. This will also lay the groundwork for my subsequent discussion of Supreme Court jurisprudence in the area of campaign finance, which will largely constitute the remainder of this paper.

As should be clear from the outline just given, my presentation of Rawls' philosophy will pass upwards along a chain of thought, moving from the core political philosophy of Rawls' theory to a more focused narrative on adjudicative bodies and constitutionalism. As we progress from the foundational to the particular, I will increasingly narrow my focus to highlight the most relevant aspects of Rawls' thinking. For the time being, however, we will begin at the bedrock level.

## **A: Motivations and Focus**

Historically, Rawls' theory of justice developed from his own growing sense of dissatis-

faction with the prior work done in the realm of public morality. In Rawls' view, the philosophical discipline of ethics had, thus far, failed to apply itself adequately to societies and their institutions. Ethics, according to Rawls, had become "increasingly unable to cope with morally significant aspects of modern societies".<sup>3</sup> While ethicists had produced excellent work in the limited area of the "moral assessment of conduct and character" of individual actors, the same amount of careful scrutiny was not given to macro-level collectives of these actors, especially those of the modern nation-state.<sup>4</sup> It was into this vacuum that Rawls sought to place himself with a focus not on the individual, but rather on the collective.

In Rawls' view, ethics (in his day) had essentially developed into a false dilemma, i.e. a choice between unacceptable alternatives. On the one hand, utilitarianism, in its various forms, presented the most systematic and rigid ethical theory. However, the conclusions of utilitarian calculations were often at odds with our most basic moral intuitions, thus leading to "implausible prescriptions".<sup>5</sup> On the other hand, the claims of intuitionism, as the name would imply, generally correlate with our all-things-considered moral judgments. Nevertheless, intuitionistic ethical theories seemed inadequate in the light of the general desiderata required of a systematic moral theory. Thus, Rawls felt "forced to choose between utilitarianism and intuitionism", neither of which would provide a satisfactory account of public morality.<sup>6</sup>

Instead, Rawls develops in his *A Theory of Justice* a new methodology for tackling these problems, albeit a methodology with classical origins. His *contractarianism* is built upon the Enlightenment era thinking of "Locke, Rousseau, and Kant" and is modified to avoid "the more obvious objections often thought fatal to [contractarian views]".<sup>7</sup> In other words, Rawls is working in the social contract tradition, in which normative considerations are subsequent to and derived from the basic ordering of a society. However, as Rawls' statement above should



indicate, social contract theory had been rendered largely inert via heavy criticism before *A Theory of Justice*. As such, to distinguish between Rawls' theory and the work of his Enlightenment predecessors, I will follow the usual custom of referring to the former by the term *contractarianism*. While the notion of a social contract is still central to Rawls' philosophy, the concept has matured considerably since Kant.<sup>8</sup>

The core concept of *A Theory of Justice* is, obviously, the idea of justice. As Rawls indicates, "many different kinds of things are said to be just and unjust".<sup>9</sup> The focus of Rawls' work, however, is narrower than such a broad definition of justice (e.g. the general description of justice as given in Plato's *Republic*). The specific focus here is on the notion of "social justice", which deals primarily with the justness or unjustness of social institutions.<sup>10</sup> Of course, the term 'institution' is rather vague and requires further explication. Thomas Pogge gives a definition of 'social institution' as he believes Rawls to mean the term, and I shall rely on this formulation throughout this paper. According to Pogge, social institutions are "the practices and rules that structure relationships and interactions among agents".<sup>11</sup> As stated above, Rawls' ethical theory operates at a higher level than the usual focus of ethics: the actions of individuals. Thus, Rawls focuses on those institutions of a society which enable individuals to interact with one another, both in matters of everyday prudential reasoning and in matters of moral significance. Because "the social institutions... have a substantial influence on the options available to its members and even on the formation of their characters", Rawls recognizes a lexical priority in analyzing the justice of institutions first and the actions of individuals later.<sup>12</sup> Thus, Rawls' methodology emphasizes a study of the "basic structure of a society" as "the primary subject of justice".<sup>13</sup> The *basic structure* of any particular society is the arrangement of its social institutions, including the constitution, statutory law, economic structure, adjudicative process, etc.<sup>14</sup>

Stated simply, Rawls' project is an analysis of the means by which a society's basic structure may be said to be just. Central to this study is the notion of a *public conception of justice*, or a shared principle (or principles) of distributive justice which constrain the formation of the basic structure. In later sections, I will discuss the applicable concept of justice in greater detail.

## **B: Primary Concerns**

Rawls begins *A Theory of Justice* with the statement that "justice is the first virtue of social institutions".<sup>15</sup> This is not merely a casual proposition holding that justice is of value to these institutions. Rather, this constitutes the claim that justice is of the *highest* value to social institutions, i.e. that these practices and rules are to be judged by their justness or unjustness. This, however, raises the question of what exactly is meant by the term 'justice.' In Rawls' model, social justice is a three-tiered system. The top tier is achieved through a "contractualist thought experiment", i.e. the original position, by which citizens of a society select a "public criterion of justice".<sup>16</sup> The middle tier is the procedure by which citizens, using this criterion of justice, create the basic structure of the society (as discussed above).<sup>17</sup> The bottom tier is the everyday activity of the citizens in following the "rules and practices" of the basic structure they instituted.<sup>18</sup> As such, the development of a particular conception of justice is left up to the citizenry. Nevertheless, these individuals are guided in this activity by universal qualities of human behavior that Rawls takes as assumptions. A variety of possible conceptions of justice are available to the citizens; however, the range of possibility here is constrained by aspects of human nature that Rawls believes to be fundamental and universal. The end result of the process of selection (which I will describe in the next section) should be what Rawls terms *justice as fairness*.

Before describing Rawls' own favored conception of distributive justice, I will briefly explain

the primary concerns that, in Rawls' view, should be addressed by *any* adequate conception of distributive justice. I must first note that, despite the somewhat misleading title *A Theory of Justice*, Rawls' aim in the articulation of justice as fairness is not the presentation of a general theory of human justice, much less a theory of right conduct. Instead, the focus here is narrowly confined to *distributive justice*, or the "allocation of the benefits and burdens" of human social cooperation.<sup>19</sup> Rawls' own theory of distributive justice is primarily concerned with the arrangement of a society's basic structure that will *tend* to lead to the most just allocation of social primary goods.<sup>20</sup> Primary goods, in turn, are the "various social conditions and all-purpose means that... enable citizens adequately to develop the two moral powers".<sup>21</sup> I will soon describe what Rawls means here by the *two moral powers*, but for now, I will elaborate further on the types of goods that may be considered 'primary' within the realm of social interaction. Rawls states that any listing of social primary goods will depend on "various general facts about human needs and abilities".<sup>22</sup> In other words, there is no universal set of primary goods; the list depends necessarily on considerations of what is needed for persons to live meaningful political and social lives. However, several broad categories of primary goods may be identified as being, to some degree, crucial to the lives of persons in (at least) democratic societies.<sup>23</sup> These are 1) "basic rights and liberties", 2) "freedom of movement and free choice", 3) "powers and prerogatives of offices", 4) "income and wealth", and 5) "the social bases of self-respect".<sup>24</sup> We may summarize what has been said so far as follows: Rawls' primary project is the development of a theory of the arrangement of a society's main institutions (its basic structure) which will tend to most justly allocate these primary goods to the various groups of the society.

These remarks bring to light several more fundamental concerns that underlie Rawls' work. These include both the basic role of human society and what are, in Rawls' view, the proper aims

of a theory of justice. As mentioned before, the just allocation of social primary goods is aimed primarily at the maximization of the exercise of the *two moral powers*. These may loosely be described as the faculties of *rationality* and *reasonableness*.<sup>25</sup> The former refers to the “capacity to have, to revise, and... to pursue a conception of the good” or, in other words, the ability to define for oneself a conception of what makes life valuable and then to work to realize that conception.<sup>26</sup> No limits (other than the general bounds of human psychology) are placed on what this conception may entail; the ends of rationality may be founded upon “religious, philosophical, or moral doctrines” peculiar to individuals.<sup>27</sup> What rationality does entail, however, is the ability to make decisions that will tend to advance the goals set by one’s conception of the good. The second moral power, *reasonableness*, involves the “capacity to understand, to apply, and to act from... the principles of political justice that specify the fair terms of social cooperation”.<sup>28</sup> These ‘political principles’ set forth rules intended to allow citizens to simultaneously pursue their own individual conceptions of the good, i.e. to act rationally. In essence, reasonableness is the ability to respect others’ conceptions of the good or, more succinctly, to develop “a sense of justice”.<sup>29</sup> Now, it should be obvious that at times, or perhaps even frequently, these two moral powers may come into conflict. *My* efforts to pursue my own favored conception of the good may limit *your* ability to do likewise. How are these conflicts to be resolved and the two moral powers reconciled? In Rawls’ view, answering this question is the primary task of justice.

According to Rawls, a just basic structure can achieve this very goal. He holds that citizens can “live together in harmony despite conflicting ideals of the good” if they “share a moral commitment to [their] society’s basic structure”.<sup>30</sup> Because of this, Rawls accepts and embraces the “*fact of reasonable pluralism*”, or the claim that a plurality of valid individual conceptions of

the good may arise among reasonable people.<sup>31</sup> However, if we desire that all of these persons be able to act rationally (i.e. to pursue these particular ends), there must exist some force to prevent the collapse of society from irreconcilable conflicts. This expresses the need for what Rawls terms *overlapping consensus*. In a state of overlapping consensus, a mutual commitment to a shared “political conception of justice” exists and allows for communal acceptance of the basic structure that arises from this conception.<sup>32</sup> Thus, despite conflicting personal conceptions of the good, all persons will nevertheless recognize the justness of the society’s institutions.

Overlapping consensus is to some degree an ideal and one which leads further to the Rawlsian view of an ideal society. This is the notion of the “well-ordered society”, or the society that is “effectively regulated by a public conception of justice”.<sup>33</sup> In such an ideal association, overlapping consensus is achieved by public acceptance of a shared conception of justice. Moreover, the society is ‘effectively regulated’ by this conception, i.e. its basic structure conforms to and reflects the principles of justice which emerge from the public conception of justice. Several features of well-ordered societies should be apparent. First, in such a society, “everyone accepts and [everyone] knows that everyone else accepts” the same conception of justice.<sup>34</sup> This involves the notion of *publicity*, which I shall discuss shortly. Second, in a well-ordered society, everyone knows that the society’s basic structure fulfills (or aims to fulfill) the shared conception of justice.<sup>35</sup> Finally, such a society leads to the development of a sense of justice (i.e. the ability to apply the shared principles of justice in practice).<sup>36</sup> For Rawls, this depiction of human association is an ideal by which to measure actual societies. In the effort to reform or reconstitute social institutions so as to make them more just, one should attempt to advance one’s own society so as to be as close as possible to the ideal.

I have thus far delayed in providing a formal definition of ‘society’ for Rawls’ theory.

However, the formal statement will now be clearer in the light of my above considerations.

Society consists of (or should consist of) a “fair system of social cooperation over time from one generation to the next”.<sup>37</sup> Several concepts are embedded in this somewhat ambiguous proclamation. First, the notion of ‘fairness’ is of great importance, and will be explored more fully in my discussion of Rawls’ favored conception of distributive justice: justice as fairness. In essence, shared acceptance of a single conception of justice is impossible without a generally-recognized belief that the conception and the resultant basic structure are fundamentally fair. Second, the fact that society is a system of ‘social cooperation’ should be apparent from my earlier discussion of the reconciliation of the two moral powers. If all persons are assumed to develop and pursue a plan of life, which in turn may conflict with the life plans of others, it must be the primary role of society to reconcile these two forces, i.e. to ensure cooperation. Third, the society must persist ‘over time’. It is to this final requirement for successful human cooperation that I will now turn.

The idea that a society must persist from generation to generation expresses Rawls’ concept of *stability*. As Pogge notes, the criterion of stability is “not merely a prudential but also a moral one”.<sup>38</sup> The requirement is moral in that the citizens of a society have “a moral interest in securing the long-term survival of their values and forms of life”.<sup>39</sup> As stated before, the moral power of rationality involves the ability not only to develop a conception of the good, but also to work to realize it. A person obviously cannot be expected to do so if either 1) her society collapses or experiences a drastic shift in institutional structure, or 2) the fear of such eventualities inhibits the pursuit of personal ends. It is only in a “peaceful and harmonious society” that both moral powers may be fully exercised.<sup>40</sup> That the criterion of stability is directly embedded in Rawls’ definition of society should indicate its great importance to his theory. We

may thus say that, for Rawls, a just society is one in which the exercise of the two moral powers is stably and fairly achieved. Closely related to the notion of stability is that of *publicity*, mentioned above in the description of the well-ordered society. It was stated that such a society is founded on a *public* criterion of justice that everyone accepts and everyone knows that everyone else accepts. This is, in essence, the requirement of publicity. Without the realization of publicity, 1) overlapping consensus will not be possible, thus 2) no shared public conception of justice will exist, and thus 3) no stable cooperation will exist. It is Rawls' hope to provide a favored conception of justice that will fulfill the criteria of publicity, stability, and fairness, among others.<sup>41</sup>

Before concluding this section, it is necessary to note several other constraints on Rawls' project. First, Rawls' theory of distributive justice focuses exclusively on the justness of the basic structures of societies. It is not Rawls' aim to discuss the wider spectrum of general social justice, which has as its subjects alternative forms of human association (e.g. "families, tribes, states, universities, churches", etc.)<sup>42</sup> Second, justice as fairness will operate as a solution to the above problems of human cooperation only in conditions of *moderate scarcity*, as has been the case with other contractarian theories. Moderate scarcity is the condition whereby sufficient resources will allow the "comfortable survival of all members of a society" if allotted appropriately; however, these resources are not "so abundant that each can have all his heart might desire".<sup>43</sup> Rawls' favored conception will not apply to situations of severe scarcity or, for example, triage. Finally, it is important to note that Rawls is working in the context of *ideal theory*.<sup>44</sup> In proposing justice as fairness as the best conception of justice for the realization of all conditions discussed in this section, Rawls has assumed that comparisons of competing conceptions of justice occur in the theoretical realm (as in the argument from the original

position below). While Rawls' theory has many practical implications, it is not meant to suggest that justice as fairness should be fully realized in *all* relevant human situations. Rather, justice as fairness is an ideal by which social institutions are to be scrutinized and reformed.

In this section, I have attempted to define the primary goals of Rawls' work and the conditions which affect the justness of social institutions. I have further sought to describe the constraints on Rawls' theory of distributive justice, i.e. to lay out the limits of justice as fairness. In the next section, I will set forth the primary means by which Rawls has argued for the favored status of justice as fairness as a public criterion of justice. This argument- that from the original position- should be viewed in the context of the primary concerns and goals of distributive justice that were described above.

### **C: The Argument from the Original Position**

It is impossible to adequately describe the Rawlsian conception of justice as fairness without a discussion of the original position. Thus, I will now turn to this thought experiment. This is essentially the Rawlsian equivalent of the *state of nature* of which the original social contract theorists wrote. However, it is important to note that Rawls does not believe that this state has ever or will ever actually occur. It is, to use Pogge's terminology, a "fiction" or "thought experiment" intended to provide the theoretical justification for a society's basic structure.<sup>45</sup> The *argument* from the original position, then, constitutes Rawls' justification for favoring justice as fairness over its rival conceptions of justice. The argument consists in the fact that the parties to the original position *would* select justice as fairness as the conception by which to order the basic structure of their society.

In this sense, the original position and resultant agreement form a decision procedure by which a person considering the problems of distributive justice may choose the best conception



of justice. We may thus think of the argument from the original position as a matter of procedural justice. ‘Procedural justice’ refers to the means by which systems that distribute outcomes are deemed fair or unfair. Rawls describes three forms of procedural justice in *A Theory of Justice*. The first two are perfect and imperfect procedural justice. In both of these cases, there exists “an independent criterion for what is a fair division”.<sup>46</sup> Perfect procedural justice involves cases where such a standard exists (i.e. where the fair outcome is known prior to the process being carried out) *and* the process of division guarantees this outcome.<sup>47</sup> As an example of perfect procedural justice, Rawls discusses a case where a certain number of individuals wish to equally divide up a cake.<sup>48</sup> One person is tasked with cutting up the cake and then all other people are allowed to select a piece before her. To ensure that she receives as large a slice as possible, she will (if rational) cut the cake into equal pieces. By contrast, in imperfect procedural justice, an independent standard for a fair outcome exists, but no procedure exists by which to guarantee this outcome.<sup>49</sup> Rawls gives the example of a criminal trial, in which the fair outcome is known beforehand (i.e. the defendant will be found guilty if and only if she is actually guilty). However, there is no certain procedure (that we currently know of) that will realize this outcome in every case, i.e. erroneous verdicts will always exist.

The final form of procedural justice is pure procedural justice, which “obtains when there is no independent criterion for the right result”.<sup>50</sup> Instead, the *process itself ensures the fairness of the result*. By virtue of the arrangement of the selection process, any outcome that results therefrom will be fair.<sup>51</sup> For this form, Rawls provides the example of gambling. Given a “series of fair bets”, the end distribution of monetary rewards will be fair regardless of the *actual* distribution of resources.<sup>52</sup> Now, in Rawls’ view, the agreement reached in the original position reflects pure procedural justice. Because the thought experiment is intended to show us the best

conception of justice, we obviously cannot know the outcome beforehand. However, Rawls believes that the original position may be formulated so that *any conception of justice selected therefrom will be fair*. Two insights are apparent from this point: 1) this fact expresses the central idea of ‘justice as fairness’, as this conception is the favored outcome of a fair process of pure procedural justice, and 2) from this, we see how the basic structure creates a ‘fair system of social cooperation’, as described in the previous section. Rawls thus sets out to define the terms of the original position so that the selection-process contained therein will both reflect pure procedural justice and guarantee the selection of justice as fairness. If this is successful, Rawls may reasonably expect that his favored conception will produce fair terms of cooperation.

If the thought experiment of the original position is formulated correctly, certain principles of justice should result therefrom. The fruits of the agreement are “the principles that free and rational persons concerned to further their own interests would accept in *an initial position of equality*” [emphasis mine].<sup>53</sup> They are the principles of justice that such *ideal contractors* would select given the above stipulations and when posed with the question of “defining the fundamental terms of their association”, i.e. the basic structure of their future society.<sup>54</sup> This is the essential form of the Rawlsian original position, by which the citizens of a society select a public criterion of justice. Given a correct description of the original position and appropriate theoretical constraints described in the previous section, the criterion of justice selected will always take the shape of *justice as fairness*. Rawls defines this concept as the particular conception of justice which will “insure that the fundamental agreements reached in it are fair”: hence, ‘justice as fairness’.<sup>55</sup> As was stated before, there are many possible conceptions of justice. However, Rawls believes that justice as fairness is “more reasonable” than the alternatives, or, that it would be selected by these contractors above all others.<sup>56</sup> This is

simply because, when all relevant factors are considered, justice as fairness will result in the society with the most fair arrangement of social institutions and, thus, the most fair distribution of social primary goods.

Several conditions for the original position were given above but not elaborated upon. These include the qualifications that the ideal contractors be 'free', 'rational', and 'concerned to further their own interests', and that the original position be 'equal'. To begin, Rawls assumes the validity of rational choice theory, which holds that individuals will always *attempt* to act in a way that maximizes their personal allotment of goods.<sup>57</sup> This implies the ability of actors to perform a cost-benefit analysis in any given situation and determine the most beneficial course of action. Accordingly, they must also be concerned *solely* with the pursuit of their own interests.<sup>58</sup> Of course, we might question *why* it is the case that the contractors need be rational, i.e. why they must be solely concerned with personal maximization of value. In contrast, we could suppose that the contractors in such a thought experiment are *altruistic*, or partly altruistic and partly rational. However, it is important to bear in mind that the purpose of this thought experiment is to morally justify the basic structure of a society, especially in terms of the coercive rules that the contractors would impose on their fellow citizens. The Rawlsian initial agreement, then, is an attempt to justify the rules and regulations mandated by the basic structure of a society. The justification is simply that *any* free and rational persons in a state of initial equality (as explained below) would accept such impositions *because* of their rational concern for their own interests.<sup>59</sup> This need will become clearer as we consider Rawls' 'veil of ignorance'.

Two concepts remain unexplained from the formulation of the original position given above: 'free' and 'equal'. Regarding the former, Rawls takes it as uncontroversial the contractors must

be free with respect to a selection of a criterion of justice, i.e. that arbitrary limitations cannot be imposed on their selective powers. The only acceptable limitations are those which would be “reasonable to impose on [any] arguments for principles of justice”.<sup>60</sup> In other words, Rawls will only limit the scope of the contractor’s powers in trivial or uncontroversial ways, and this is achieved through what Rawls terms the “veil of ignorance”.<sup>61</sup> In essence, the contractors in this thought experiment do not have access to certain information that would be irrelevant, or even damaging, to a proper discussion of justice. Rawls provides three ‘reasonable’ limitations of this form. First, if the contractors are to decide on the just arrangement of society, including the allotment of goods and wealth, then “no one should be advantaged or disadvantaged by natural fortune or social circumstances”.<sup>62</sup> In other words, the deliberations of the contractors must not be influenced by natural abilities or disabilities (e.g. intelligence, strength, courage, etc.) or by social standing (e.g. wealth, fame, etc.). Correspondingly, Rawls believes that “it should be impossible to tailor principles [of justice] to the circumstances of one’s own case”.<sup>63</sup> Finally, personal prejudices, biases, moral inclinations, or ambitions must be exorcised from the deliberations of the contractors.<sup>64</sup> Rawls believes that, ideally, all of these rational limitations should be imposed on the contractors when they select the society’s fundamental principles of justice. However, how are these limitations to be imposed? Realistically, it would seem almost impossible to fulfill these criteria.

It is important to remember that the original agreement of the contractors is a thought experiment, i.e. a theoretical attempt to morally justify society’s basic structure. As such, the Rawlsian initial position is an *ideal*, rather than *realistic*, notion. The purpose of the experiment is not to advocate for this process actually being carried out, but rather that the results it produces hold moral significance for evaluations of the justness of institutions. Accordingly, the three

fundamental limitations described above are achieved through the ‘veil of ignorance.’ In Rawls’ original position, the ideal contractors are stripped of all information prohibited by these limitations. They are left only with information *relevant* to deliberations on justice, and, of course, they remain free, rational, and equal human beings. As Rawls puts it, “one excludes the knowledge of those contingencies which sets men at odds and allows them to be guided by their prejudices”.<sup>65</sup> To see clearly the reason for this, let us consider Rawls’ example of a wealthy individual involved in the initial agreement. Let us say that she is considering the question of whether or not the wealthy should be taxed to provide for several welfare measures. Clearly, if this individual is rational, she will argue that the principle advocating this procedure is unjust.<sup>66</sup> Similarly, a poor individual would likely argue that this principle *is* just. Both contractors are guided here by desires to tailor the society’s principles of justice to benefit their particular social situations. This is clearly impermissible if a fair conception of justice is desired. So, by the veil of ignorance, the contractors will have no knowledge of their personal financial standing or *any other information that is not relevant to deliberations on justice*. It follows from this description that the contractors are also ‘equal’, the last of the undefined terms from our definition of the original position. All parties have an equal ability to “make proposals, submit reasons for their acceptance, and so on”.<sup>67</sup> Moreover, because of the veil of ignorance, no person can steer the deliberations toward an end that will unduly benefit herself. Thus, the contractors are fully equal within the original position.

Of course, the parties *must* have access to some information. Rawls states that it is uncontroversial to require “first principles [of justice] to be general and universal”.<sup>68</sup> As such, the parties must have sufficient information to produce a general, universal public conception of justice. Accordingly, the veil of ignorance does not exclude knowledge of the general facts of

human social science (sociology, psychology, etc.) or economic and political theory.<sup>69</sup> Further, the parties are by necessity aware of the fact that they are selecting principles of justice which shall constrain the basic structure of a *human* society.<sup>70</sup> The parties are thus able to apply the general facts of human social science to the problem of defining the fair terms of human cooperation. Rawls believes that this knowledge will be sufficient to allow the parties to accomplish their appointed task. In later writings, Rawls limits the scope of justice of fairness by including in the parties' knowledge the fact that they are selecting principles for a constitutional democracy.<sup>71</sup> Aside from the knowledge available to them, the parties are assumed to be *persons* in the relevant Rawlsian sense. That is, the parties have, to at least a "minimum sufficient degree", the ability to exercise the two moral powers.<sup>72</sup> However, they are not cognizant of their own conceptions of the good or any other facts of their own particular psychologies. It is apparent through these considerations that the parties have access to only *general* facts about humans and human experience.

In sum, the thought experiment proceeds as follows. A certain number of free, equal, and rational persons are gathered and presented with the task of determining a public criterion of justice for a new society. These individuals have no knowledge of their natural abilities, social standing, personal prejudices or beliefs, etc. They submit various proposals for different principles of justice and implement those upon which they can agree. Because each person is ignorant of their own standing and abilities, an individual will be unable to tailor the principles to suit her own situation. However, because the parties are rational, they will wish to achieve the greatest possible benefit for themselves. Thus, in Rawls' view, the outcome of these deliberations will be a conception of justice that produces the fairest possible arrangement of social institutions. Hence, the original position will end with a public criterion of *justice as fairness*,

from which the society's basic structure will be extrapolated.

Earlier, it was said that this thought experiment constitutes an *argument* for the favored status of justice as fairness. In essence, the argument is thus: from the list of possible candidates for conceptions of justice, the parties will select justice as fairness. In *A Theory of Justice*, Rawls provides a tentative list of candidates, which includes justice as fairness, the principle of average utility, the classical principle of utility, the principle of restricted utility, perfectionism, egoism, etc.<sup>73</sup> By means of pairwise comparisons among these candidates, the parties proceed by process of elimination until one conception remains.<sup>74</sup> The parties judge between two conceptions in the context of the general facts they are given and with the desire to rationally promote their own interests. Now, it is not necessary here to elaborate on the reasoning by which justice as fairness would, in Rawls' view, triumph over every other candidate. Such an explanation would be merely tangential to the aims of this paper, as I am not attempting to critique *or* defend Rawls' theory of distributive justice but rather to apply the theory itself as a model for critique. Nevertheless, it should be noted that the greatest challengers to justice as fairness in this decision procedure are the principles of average and restricted utility. It will be sufficient here to say that, on Rawls' view, the parties will choose justice as fairness over these alternatives. The secondary literature on the conflict between these three conceptions of justice in the original position is extensive, and so I will not attempt a similar analysis here. Instead, I will move forward with further exploration into Rawls' favored conception of justice.

#### **D: The Two Principles of Justice**

Rawls believes that the formulation of justice chosen by the contractors will take a particular form, that is, the 'Two Principles of Justice'. In his view, the necessary outcome of the initial agreement, as appropriately described above, is justice as fairness as the society's public

criterion of justice. Justice as fairness, in turn, is best expressed in the form of the Two Principles. Accordingly, a society built upon these principles will hold the most just possible arrangement of social institutions, i.e. the most just basic structure. Thus, the Two Principles are simply a formal statement of the more abstract notion of justice as fairness.

I will begin by presenting the principles as stated by Rawls. They are:

‘First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

Second: social and economic inequalities are to be arranged so that they are both

(a) reasonably expected to be to everyone’s advantage, and

(b) attached to positions and offices open to all’.<sup>75</sup>

I shall refer to these principles as the ‘First Principle’ and ‘Second Principle’, respectively.

Within the Second Principle, (b) is often referred to as the ‘Fair Equality of Opportunity’ principle and (a) is often referred to as the ‘Difference Principle’.<sup>76</sup> In later writings on justice as fairness, Rawls reformulated the Different Principle to read that social and economic inequalities are “to be to the greatest benefit of the least-advantaged members of society”.<sup>77</sup> The positions of (a) and (b) are often switched in Rawls’ later work, as Fair Equality of Opportunity is seen to have lexical priority of importance over the Difference Principle.<sup>78</sup> These alterations will not be of great consequence for my work, as we shall be primarily concerned with the First Principle throughout the duration of this paper.

Given that fact, I focus my explanation of justice as fairness on the First Principle, the language of which has direct bearing on the question of campaign finance. As with the Difference Principle, Rawls reformulated the language of the First Principle throughout his life. Thus, the version of the principle that I shall use is slightly different than that given above. The



modified First Principle holds that “*each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value*”.<sup>79</sup> According to Pogge, Rawls never fully distinguishes between ‘rights’ and ‘liberties’ in his work, in fact using the terms interchangeably.<sup>80</sup> As such, we may consider the distinction (if any exists) irrelevant to the questions at hand.

Rawls provides a brief (and non-exclusive) list of the basic liberties entailed by the First Principle, i.e. those which would follow clearly from the selection of justice as fairness by the contractors. There are four categories of basic liberties: “political liberties... liberty of conscience and freedom of association... freedom and integrity of the person... [and] rights covered by the rule of law”.<sup>81</sup> The first category includes the basic freedoms of political speech, press, assembly, and (importantly) the right to vote.<sup>82</sup> As should be clear from this list, Rawls believes that the notion of justice as fairness entails certain aspects of democracy or republicanism. While many basic structures of government may be compatible with justice as fairness, the concept requires at least some sense of popular input in governance.<sup>83</sup> The second category of liberties is primarily aimed at freedom of religion and corresponding belief-systems (or systems of thought).<sup>84</sup> The third category refers to the freedoms enjoyed by persons against “slavery and serfdom and... psychological oppression, physical injury, and abuse”.<sup>85</sup> Finally, the rule of law ensures “protection from arbitrary arrest and seizure, habeas corpus, the right to a speedy trial, due process,” etc.<sup>86</sup> While this list is not exhaustive, in Rawls’ view, it covers the most basic and most essential liberties entailed by the First Principle.

Note, however, that the modified First Principle requires only ‘a fully adequate scheme of equal basic rights and liberties’ [emphasis mine], not a specific scheme.<sup>87</sup> This implies that many

possible schemes of liberties are compatible with justice as fairness. How then are we to judge among the various schemes and determine which are acceptable? According to Pogge, Rawls identifies two fundamental concerns that underlie the First Principle. Should a scheme of liberties adequately address these concerns and protect against abuses, that scheme will be compatible with justice as fairness. First, in a just society, a citizen “must be able to participate in the political life of [her] society and to express [her] opinions freely”.<sup>88</sup> The reason for this concern should be obvious, given the above description of the original position. Indeed, if the basic structure of society is to be decided upon by its citizen in ideal conditions, then these citizens must have some significant access to the proper functioning of the basic structure. Second, an individual must “be free to choose and to change one’s values and aims”.<sup>89</sup> It was said earlier that the contractors of the original position must be free. It follows from this condition that these contractors will wish to preserve that liberty of conscience in the society post-contract. The concern here is also more philosophical in origin: it is assumed that persons must be free to pursue and achieve their own particular “conception[s] of the good”.<sup>90</sup> As should be clear, the first two categories of liberties given above are easily guaranteed by these two fundamental concerns. The third and fourth categories are supportive in nature, i.e. the first two categories are not possible without personal integrity and the rule of law.<sup>91</sup> In this manner, a scheme *similar* to Rawls’ list of liberties follows from the basic notion of justice as fairness.

Thus I have explained the first two portions of the First Principle, that ‘ [1] each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, [2] which scheme is compatible with the same scheme for all’. [1] is simply a basic statement of that which was said in the last paragraph. [2], on the other hand, is merely a logical extension of [1] and the concept of justice as *fairness*. Clearly, if the notion of justice selected is to be *fair*, it cannot be reserved

for an elite or privileged class. Accordingly, the First Principle requires such a scheme of liberties to be implemented for all persons in the society. I will now turn to the final portion of the First Principle, that '[3] the equal political liberties... are to be guaranteed their fair value'. This final provision is of great importance for my purposes in this paper. As will be seen, the notion of 'fair value' has direct bearing on the power of citizens to participate in elections.

It is important to note here that [3] requires only that the *political liberties* be guaranteed their fair value. What this means is that the basic structure of society must ensure the "worth or usefulness" of the right and the ability of citizens to "enjoy or take of advantage" it.<sup>92</sup> For the other three categories of rights, Rawls does not require that the basic structure actually aid the citizenry in making use of the liberties therein. It is only for the first category, that of political liberties, that fair value must be guaranteed. However, it is not entirely clear why this is the case. Rawls merely provides the justification that it would be impossible for the fair value of all basic liberties to be guaranteed. Such a scenario would essentially "rule out inequalities" of the socioeconomic variety, and the Difference Principle requires that such inequalities exist when they are to the advantage of the worst-off social group.<sup>93</sup> Accordingly, the fair value requirement must be restricted to only *some* of the basic liberties in order to preserve the consistency of Rawls' theory. In Rawls' view, the primacy of the political liberties indicates that, if fair value is to be required for any subset of liberties, it must be so for the political.

I wish to pause here to consider the conditions under which the *fair value* provision was added to the First Principle subsequent to *A Theory of Justice*. Such an explanation may facilitate better understanding of the provision and emphasize its great importance. The amendment was made in response to a troubling objection raised by Normal Daniels in his "Equal Liberty and Unequal Worth of Liberty".<sup>94</sup> In essence, Daniels argues that the potentially-

large socioeconomic inequalities licensed by the Difference Principle are incompatible with the First Principle's requirement of a 'a fully adequate scheme of equal basic rights and liberties'.<sup>95</sup> This is a result of the fact that the equality of a liberty among persons does not guarantee the equal *worth* of that liberty. Daniels argues that it is a historical fact, admitted by Rawls, that inequalities in wealth and power tend to produce inequalities in the worth of liberties.<sup>96</sup> For example, even where universal suffrage exists, equal access to the voting booth does not guarantee equal sway over the results of an election. Members of the most-favored groups of society have a greater ability, as a result of the wealth and offices they hold, to "select candidates, to influence public opinion, and to influence elected officials".<sup>97</sup> Daniels notes that even constitutional provisions may be inadequate to address this discrepancy, as relatively-little information about *actual* election mechanisms is available to the parties (even in the constitutional stage of the four-stage sequence, as will be discussed in the next section).<sup>98</sup>

Now, in *A Theory of Justice*, Rawls does distinguish between liberty and the "worth of liberty".<sup>99</sup> However, Daniels finds the distinction here inadequate to solve the problems described above. On Daniels' reading, Rawls (at this point) holds that the worth of liberty should be distributed in accordance with the Difference Principle.<sup>100</sup> Clearly, such a scheme would do little to decrease the likelihood of massive discrepancies in the usefulness of various political liberties (i.e. the value thereof) to representative members of different groups. Ultimately, through reasoning too complex to describe here, Daniels determines that the selection of principles of 1) equal liberty and 2) the equal worth of liberty, are both equally rational in the context of the original position.<sup>101</sup> Moreover, without the guarantee of equal worth, the First Principle seems only a "hollow abstraction lacking real application".<sup>102</sup> As such, Daniels believes that the parties to the original position would reject justice as fairness as it stands, as this

conception fails to guarantee the usefulness of the liberties it provides.

The response to this forceful objection came in the form of the *fair value* provision of the First Principle. This addendum carries the cost of requiring a far more extensive egalitarianism in the political sphere than was originally contemplated in *A Theory of Justice*. Nevertheless, by *Justice as Fairness: A Restatement*, Rawls has fully accepted the need for a provision to ward off the worries brought to light by Daniels. The importance of this provision for my purposes in this paper should be clear from the examples provided by Daniels and described above. Using wholly legal means not inconsistent with justice as fairness, the wealthy could, in the absence of a fair value provision, wield significant influence over the outcomes of elections. While the right to vote is guaranteed by the First Principle in its original formulation, the equality of the value of this right is not. Moreover, the general rights of political participation described by Rawls would indeed seem ‘hollow’ if *actual* participation were, in effect, unequal. I shall continue to explore the theoretical implications of the fair value provision throughout this paper as I analyze the degree to which various U.S. Supreme Court decisions reflect this aspect of justice as fairness.

Rawls also considers how a society may ensure this fair value in theory, although he notes that he cannot adequately state “how this fair value is best realized” in practice.<sup>103</sup> In *A Theory of Justice*, Rawls finds economic inequality to have historically devalued political liberty for certain members of societies.<sup>104</sup> He states that “disparities in the distribution of property and wealth that far exceed what is compatible with political equality” have been allowed in most, or even all, constitutional systems.<sup>105</sup> Pogge notes that, in later writings, Rawls has emphasized the need for “insulating the political sphere from financial interests” in order to ensure the fair value of political liberties.<sup>106</sup> This has mainly taken the form of an advocacy of campaign finance reform and reform of general federal election law. In addition, Rawls thinks it likely that the “public

funding of elections... more even access to public media, and certain regulations of freedom of speech and press” will be necessary to ensure the fair value of political liberties.<sup>107</sup>

For now, however, it is sufficient to state that Rawls recognizes the critical need for the fair value of political liberties, especially regarding voting rights and campaign finance. Given that the First Principle holds lexical priority for Rawls over the Second, and given that of all the liberties entailed therefrom, only political liberties are guaranteed fair value, the high importance of this specific category of rights in the context of justice as fairness should be clear.

### **E: The Four-Stage Sequence**

I have thus far described the original position, the resulting initial agreement, the conception of justice as fairness produced by this agreement, and the Two Principles that serve as the expression of this conception. However, I have not yet discussed the means by which the Two Principles translate into the actual basic structure of a society, i.e. the means by which the institutions of society emerge from justice as fairness. It is to this element of Rawls’ theory that I will now turn.

From the *ideal* state of the original position Rawls derives the *ideal* procedure for the formation and operation of society. Once more, this is not intended as a *historical* account of the birth of constitutional democracies. Instead, this process offers the theoretical framework by which the practices and rules of existing societies may be justified. As such, we may think of this process as an extension of the thought experiment described earlier (i.e. the contractualist original position). Rawls terms this process the ‘four-stage sequence’, each stage of which I will now briefly explain. The stages are as follows:

- The Original Position Stage
- The Constitutional Stage

- The Legislative Stage
- The Adjudicative Stage

I have already described (1) at length, and so I will begin this explication at the end of the first stage. After the selection of the public criterion of justice (i.e. justice as fairness), the ideal contractors become, in essence, delegates to a constitutional convention.<sup>108</sup> The delegates select a particular political form for their government and then author a constitution. As they have already agreed upon the selection of justice as fairness, the Two Principles serve as the overriding constraints on the content of this constitution. All constitutional provisions and, indeed, the basic form of government must correspond with the Two Principles.<sup>109</sup> However, it would be impossible for the delegates to adequately form a society without some further knowledge as to the context in which it will exist. Thus, at stage (2), “the veil of ignorance is partially lifted”.<sup>110</sup> The delegates now gain general information about their society, including “its natural circumstances and resources, its level of economic advance and political culture, and so on”.<sup>111</sup>

The object of this stage is the formation of a document which “satisfies the principles of justice” and lays the foundation for future legislation.<sup>112</sup> Accordingly, the constitution sets forth the basic structure of society. In this manner, the basic structure emerges from the concept of justice as fairness because *all provisions of the constitution must accord with the Two Principles*. However, a constitution must clearly set forth more than a mere arrangement of institutions. Such a document must also provide the basis for the operations of society. Hence, the end result of the constitutional stage is both 1) a basic structure that exemplifies justice as fairness, and 2) proper groundwork for the subsequent legislative stage. Rawls also addresses a concern about the predictive power of the delegates regarding the future justness of their society. Put simply, some

constitutional systems will be more just than others, even among the range compatible with the Two Principles.<sup>113</sup> How then are the delegates to determine which system will be most just? Rawls states that “some schemes have a greater tendency than others to result in unjust laws”.<sup>114</sup> Strict compliance with the Two Principles, i.e. the formation of a constitution *most heavily based on the language of the principles*, will prevent such an inadequate scheme from being implemented. While no scheme will be perfect, the delegates, given the information allowed to them at this stage, will be able to select an adequate constitutional system.

At the conclusion of the constitutional stage, the legislative stage (3) begins. The delegates thus become legislators and are tasked with determining the “justice of [proposed] laws and policies”.<sup>115</sup> The results of this stage (i.e. laws) must now comply both with the Two Principles and the constraints imposed by the constitution. Because the individuals are now dealing with particular issues rather than broad generalizations (as in (1) and (2)), perfection must not be expected. Legislators often must decide on issues with less information than would be ideally available.<sup>116</sup> However, the scope of just legislative options available to them is refined by several limitations. First and most clearly, no law may violate the First Principle by producing inequalities in basic liberties.<sup>117</sup> Second, the Difference Principle will be of particular use to the legislators in their attempt to ensure a fair allocation of resources.<sup>118</sup> Indeed, while the Difference Principle is of little relevance in the constitutional stage, it holds great weight during the legislative stage. Ultimately, each of the Two Principles holds special importance for a particular stage of the four-stage sequence. The First Principle is most controlling over the constitutional stage, in which the basic liberties and structure of government are outlined. The Second Principle (including the Difference Principle) bears most heavily on the legislative stage, when legislators must resolve issues of socioeconomic inequality. As a general conclusion, Rawls states that the



legislators must work, first and foremost, to avoid the enactment of laws that clearly violate the Two Principles.<sup>119</sup> Beyond such legislation, a greater range of alternatives is available to them than in stages (1) and (2). It is also important to note that the veil of ignorance is, once more, partially lifted upon the commencement of stage (3). The legislators now have access to the “full range of general economic and social facts”.<sup>120</sup> While they still do not have knowledge of their particular social standings or financial circumstances, they now hold adequate information for the construction of the day-to-day operations of society.

While the legislative stage is clearly an ongoing process, its original culmination in a workable system of statutory law begins the final stage, that of adjudication. In this stage, “judges and administrators” conduct the “application of rules to particular cases”.<sup>121</sup> The veil of ignorance is now fully lifted, with full information available to all parties. In the subsequent section, I will provide a fuller account of Rawls’ view on the proper role of adjudicative bodies. I will conclude this section with several remarks on the purpose of this four-stage sequence. As was stated above, Rawls does not intend this sequence to be an accurate historical picture of the formation of societies, nor even a plan or model for future cases.<sup>122</sup> Instead, the four-stage sequence offers a method of analysis by which the justness of a society’s institutions may be judged. For example, in examining a particular society X, we may wish to determine whether or not X possesses a just constitution. To answer this question, we merely must ask whether “rational delegates subject to the restrictions of the second stage would adopt” the constitution of X.<sup>123</sup> Similarly, regarding a particular statute  $x_n$  enacted in X, we would determine the justness of this statute by asking whether rational legislators would enact  $x_n$  given the limitations of the legislative stage. By these means, we may ascertain the justness of any particular society.

It is of great importance to note that Rawls’ theory of justice as fairness is not intended to

select any particular society (i.e. a basic structure with a full set of laws and policies and officials to enforce them) as being the *most just* of all options.<sup>124</sup> Rawls' aim in *A Theory of Justice* is not to prescribe one single model of human society as that which should, or must, be adopted. Instead, the purpose of his theory is to define "the range of justice" and the forms of society that lie within that range.<sup>125</sup> In addition, the theory "singles out with greater sharpness the graver wrongs" that may arise from an unjust society.<sup>126</sup> Thus, while we may not be able to describe the ideal Rawlsian society with any degree of confidence, we may clearly state which societies (or which constitutions, laws, and policies thereof) fail to apply the Two Principles. The thought experiment of the four-stage sequence offers the means by which to make such determinations.

#### **F: The Role of Adjudication**

I will now briefly outline Rawls' views on the proper role of legal adjudication in society, with special attention paid to the role of the United States Supreme Court in this particular society. As mentioned before, the application of the practices and rules set forth in stages (2) and (3) to the conduct of individual actors and collective bodies is accomplished in the fourth stage. This process is carried out by administrators and judges, each category of which holds purview over one aspect of this process. Administrators oversee the proper functioning of the institutional system set forth in the prior stages, while judges determine questions of law regarding individual conduct in relation to the institutional system. In this fourth stage of adjudication, the greatest topic of concern is the "following of rules by citizens".<sup>127</sup> If the rules to be followed are just, i.e. if they are in compliance with the constitution and the Two Principles, then citizens possess a duty to abide by them.<sup>128</sup> If this does not occur in any particular case, appropriate measures are taken to remedy the wrong from the same set of just laws which led to the violation. It is thus the role of judges to ensure the just application of the law to particular breaches of duty.

I do not wish to discuss at length the role of judges in state and lower-federal courts in this Rawlsian scheme, as such concerns are not strictly relevant to the topic at hand. Instead, I wish to emphasize Rawls' thought on the United States Supreme Court and, by extension, high courts in democratic systems generally. Central to this discussion is the topic of judicial review, or the power of the judiciary to review the actions of the executive or the legislature. If found unconstitutional, these acts may be invalidated by the court. Rawls indicates that the doctrine of judicial review is neither prescribed nor prohibited by justice as fairness, i.e. that it exists within the range of options available to delegates in stage (2).<sup>129</sup> If the judiciary of a society is empowered by judicial review (as is the case in the United States), then it falls to the judiciary to determine the justness or unjustness of statutes. In other words, the courts become the arbiters of questions regarding the compliance of legislation with the constitution and the Two Principles.

Accordingly, the U.S. Supreme Court holds a place of great importance in the Rawlsian system. In *Political Liberalism*, Rawls claims that "in a constitutional regime with judicial review, *public reason* is the reason of its supreme court".<sup>130</sup> The term 'public reason' refers to the doctrine that citizens must "be able to justify their political decisions to one another using publicly available values and standards".<sup>131</sup> This idea is rooted in the four-stage sequence described above. In the original position, for example, citizens define the public criterion of justice based on mutual agreement and from a position of equality. In the constitutional stage, these citizens further define the liberties valued by the society from the framework of the criterion of justice. Thus, the values of the society are dependent upon the agreement of the parties involved; these values do not precede the social contract. For example, consider a judge who makes a ruling in a case based on her personal religious views.<sup>132</sup> This ruling would be, in the Rawlsian scheme, unjust because the action involved cannot be justified by publicly-held

values (unless, of course, the society in question were built on the values of a particular religion). In this case, the judge's action would violate the doctrine of public reason.

According to Rawls, the U.S. Supreme Court is the highest “exemplar of public reason”.<sup>133</sup> This is a result of an important distinction made by Rawls between “higher law” and “ordinary law”.<sup>134</sup> The former refers to the constitution and its manifestation of justice as fairness; the latter refers to legislation enacted by the people or their representatives. A danger exists in constitutional systems of the higher law being usurped by the ordinary; that is, of constitutional provisions being ignored and contradicted by ordinary law. As was described in the four-stage sequence, all actions of the legislative stage must be constrained by its predecessor, the constitutional stage. Thus, if ordinary law is allowed precedence over higher law, the resulting rules and practices of the society will be unjust. A vanguard, then, is required to safeguard the higher law against encroachment. In a system with judicial review, such as that of the United States, the Supreme Court fills this role, acting as one of the “institutional devices to protect the higher law”.<sup>135</sup> As stated above, all political actions must be justified to other citizens relative to the set of publicly-held values. In addition, these values are embodied in the Two Principles and in the constitution. Thus, for any action to be justified by the doctrine of public reason, it must be justified in relation to the constitution or the principles of justice it manifests. Where judicial review exists, the Supreme Court is empowered to determine the correlation (or lack thereof) of actions of the executive and legislature with the constitution. If these actions contradict the constitution, then by the doctrine of public reason, they are unjust. Accordingly, it follows that the Supreme Court is the highest arbiter of public reason. According to Rawls, the “political values of public reason the Court's basis for interpretation” of statutes.<sup>136</sup> As a result, if the Court does not act in a manner consistent with public reason, the Rawlsian must hold that the Court has

acted unjustly. Should a Supreme Court justice make a determination in a case for reasons other than those justified by publicly-held values, her actions would be unjust.

It should be evident from this description that a Rawlsian critique of Supreme Court jurisprudence in a particular area must focus on the Court's embodiment of public reason. At a higher level, however, this entails a comparison of the reasoning of Supreme Court justices with the concept of justice as fairness. Moreover, such a critique requires an evaluation of this reasoning in light of the First Principle's requirement that the fair value of an individual's political liberties be guaranteed by the constitution and, accordingly, protected by the Court. In the subsequent chapters of this paper, I will strive to offer just such an analysis. The above outline of Rawls' moral and political philosophy is intended as a brief summary of those aspects of his theory which are of particular relevance to this project. I have necessarily excluded discussion of certain important and interesting views advanced by Rawls. In general, however, I have attempted to provide both the basic shape of Rawls' theory of justice as fairness as well as more focused discussions on topics of special importance.

### **Chapter III: Federal Campaign Finance- Historical Context**

In this chapter, I will offer a brief overview of historical developments in federal campaign finance throughout the past two centuries. This will provide the necessary context for the Rawlsian textual critique of relevant U.S. Supreme Court decisions that will constitute the bulk of the subsequent chapter. Accordingly, I will focus this historical overview on the interplay between statutory law, administrative actions, and judicial decision-making that has come to characterize the current state of campaign finance for federal elections in this nation. I will pay particular attention to the role of the Supreme Court in bolstering, constraining, or invalidating the efforts of Congress to establish a strong "regulatory regime for financing federal elections".<sup>1</sup>

I will take as the commencement point of the modern era of campaign finance the enactment by Congress of the Federal Election Campaign Act (FECA) of 1971 and the subsequent FECA Amendments of 1974. The second section of this paper will discuss these reformative measures in detail. I will now outline, in broad strokes, the historical events and circumstances which led to the adoption of FECA and its Amendments.

### **A: Early Developments**

The debate over campaign finance is, in Corrado's view, essentially a product of the long-standing conflict in political thought over the reconciliation of "basic notions of political equality... with fundamental political liberties, such as the freedoms of speech and political association".<sup>2</sup> It should thus be of little surprise that the problem of financing elections may be traced back as far as the 1830s. Spurred on by the "rise of Jacksonian democracy", the development of well-organized and well-funded political parties created new concerns for the financing of campaigns where none had existed before.<sup>3</sup> Indeed, before the tumultuous political events of the mid-1820s, political 'campaigning' in the modern sense of the term did not truly occur. The only expenditures required of candidates for offices were, broadly speaking, those incurred by printing pamphlets and "'treating' constituents to food and drink on election day".<sup>4</sup> The well-known 'spoils system', associated with the rise to prominence of Jackson's Democratic Party, put an end to the simplicity of the early system of campaigning. Under the spoils system, those successfully elected to office rewarded fellow party members and political supporters with government offices.<sup>5</sup> One product of the spoils system was the 'assessment system', by which officials elected or appointed to office with party support were expected to "contribute a percentage of their salaries to the party".<sup>6</sup> These funds were then used to finance further election efforts. Concerns over the spoils system, the assessment system, and the generally-rapid increase

in party power soon resulted in efforts to reform the system, but to little avail. A bill, sponsored by Representative John Bell of Tennessee, sought to put an end to assessments but was never enacted.<sup>7</sup> In 1867, Congress enacted a law that prohibited the solicitation of assessments from workers in naval yards; however, because the scope of the law extended no farther than naval workers, it had little to no effect on federal election financing.<sup>8</sup> Thus, from the 1820s to the Reconstruction Era, the assessment system directly funded federal campaigns and was left largely unchallenged.

The first efficacious reforms to the system appeared during Reconstruction. Indignation over the corruption of President Ulysses S. Grant's administration led eventually to congressional action that "barred government workers not appointed by the president from imposing assessments on other government workers".<sup>9</sup> President Rutherford B. Hayes further bolstered this rule by prohibiting, via executive order, the involvement of government officials in the management of campaigns for federal office.<sup>10</sup> This order did not, however, constrain the rights of elected or appointed officials to vote or to publicly express their views on election contests. These measures were codified in the Pendleton Civil Service Act of 1883, which effectively put an end to the assessment system and strictly "restrained the influence of the spoils system".<sup>11</sup> This was achieved by the creation of a system of competitive examinations required for the holding of non-elected offices. As Corrado notes, one unexpected outcome of this law was the increased reliance of political parties on "corporate interests, especially the industrial giants in oil, railroads, steel, and finance".<sup>12</sup> With the assessment system essentially dismantled, parties began to turn outward to the private sector for the funding of election efforts. This trend would continue to the current day, resulting in many of the concerns which underlie modern efforts at campaign finance reform. By the end of the nineteenth century, industrial and financial actors

had become the “principal source” for the funding of campaigns.<sup>13</sup>

Public recognition of this fact, especially among intellectual circles, resulted in reformative efforts throughout the Progressive Era that sought to curb the monetary influence of corporations on federal elections. The 1904 presidential election, which featured a high-profile contest between Democrat Alton Parker and incumbent President Theodore Roosevelt, further incited public concern over large corporate contributions. Parker alleged that Roosevelt had solicited funds from wealthy industrialists on the promise that they would be regularly consulted on governmental matters.<sup>14</sup> Although Roosevelt denied these allegations, an investigation by the New York state legislature provided evidence that the Republic National Committee had accepted massive contributions from Wall Street financial institutions (e.g. a \$48,000 contribution from New York Life).<sup>15</sup> Upon reelection, Roosevelt began to call for the enactment of anti-bribery and anti-corruption legislation, as well as (in 1906) a general prohibition of direct corporate contributions to federal campaigns.<sup>16</sup> Although Roosevelt did little more than offer words on the subject without any proposed legislation, such reformative measures were to some degree realized in 1907. The Tillman Act of 1907, introduced by Senator Benjamin Tillman of South Carolina, banned monetary contributions from nationally-chartered corporations in federal elections.<sup>17</sup> State-chartered corporations were exempted from the Act, although donations from *all* corporations were prohibited in the campaigns for election of the President, Vice-President, Congressional Representatives, and Senators. The Tillman Act was then strengthened by the Publicity Act of 1910 (also known as the Federal Corrupt Practices Act), which required post-election reporting of monetary contributions and expenditures in House elections.<sup>18</sup> The 1911 Amendments to the Publicity Act greatly expanded the scope of the law. Accordingly, reporting of both House and Senate election contributions and expenditures was required, and (for both



primaries and general elections) it was made mandatory for party committees to provide pre-election and post-election reports of their finances.<sup>19</sup> In addition, the 1911 Amendments established the first limits on campaign expenditures, with caps at \$5,000 and \$10,000 for House and Senates contests, respectively.<sup>20</sup>

The constitutionality of the Publicity Act was challenged in *Newberry v. United States* (1921), in which the U.S. Supreme Court invalidated several provisions of the law.<sup>21</sup> In this case, the Court determined that Congress' power to regulate elections "did not extend to party primaries and nomination activities".<sup>22</sup> Accordingly, the Court struck down the provision of the Act which set limits on federal campaign expenditures.<sup>23</sup> The Court modified its interpretation of congressional authority in *United States v. Classic* (1941), holding that Congress may regulate a party primary where "where the primary is by [state] law made an integral part of the election machinery" or where the primary is likely to "determine the ultimate choice of the representative".<sup>24</sup> This broadened interpretation of congressional authority in regulating primary campaigns would later serve as justification for FECA in 1971 and its 1974 Amendments. The *Newberry* decision, along with the 1922 Teapot Dome scandal, further increased awareness of the need to reform federal regulations of elections. This resulted in the 1925 Federal Corrupt Practices Act (an updated version of the amended Publicity Act), which conformed with *Newberry* by eliminating provisions regarding primary campaigns.<sup>25</sup> The 1925 law increased disclosure requirements by mandating quarterly financial reports from all national party committees.<sup>26</sup> The cap on non-primary campaign spending for Senate elections was increased to \$25,000, while the House cap of \$5,000 remained the same.<sup>27</sup>

The Federal Corrupt Practices Act (FCPA) completed the cycle of legislation that began with the Tillman Act. The 1925 law would remain "the basic legislation governing campaign finance

until [FECA in 1971]”.<sup>28</sup> However, despite the ambitious restrictions on campaign finance its language promised, FCPA did little to solve the problems that originally led to the adoption of the Tillman Act. With no “effective regulatory regime”, no clear penalties on failure to report under the disclosure provisions, and no real mechanism for enforcement, the FCPA was largely ignored by federal election candidates.<sup>29</sup> Most candidates filed disclosure reports only infrequently and campaign spending limits were generally disregarded and rarely enforced. Moreover, loopholes in the FCPA and Tillman were abundant and commonly exploited. Multiple party committees were established for single candidates, allowing evasion of spending ceilings by filtering contributions through several entities.<sup>30</sup> A corporation could contribute money *indirectly* to candidates, in violation of the spirit (though not the language) of Tillman, by providing bonuses to employees who donated to the corporation’s favored candidates. Perhaps most telling is the track record of enforcement: in the forty-five year history of the FCPA (1927-1971), only two persons were ever prosecuted for violation of the statute, both during the first year in which the law was in effect.<sup>31</sup>

The New Deal Era also produced several measures aimed at regulating federal campaign finance, although these laws met generally with as much as success as the FCPA and Tillman Act. The Hatch Act of 1939 prohibited both the collection of assessments from workers on “federal public works program payrolls” (e.g. the Works Progress Administration) and any substantial political activity by these workers.<sup>32</sup> 1940 amendments to the Hatch Act further limited individual monetary contributions to federal candidates and party committees and restricted the amount that these committees could spend annually.<sup>33</sup> However, the amended Hatch Act was subject to many of the same loopholes that enabled exploitation of the FCPA and Tillman Act. Moreover, because the Act only capped contributions to ‘party’ committees, no

limit was put in place for contributions to ‘independent’ political organizing committees, which immediately began to appear in great number.<sup>34</sup>

The Taft-Hartley Act of 1947 broadened the scope of the Tillman Act to prohibit direct contributions *and expenditures* for federal campaigns from both corporations and now labor unions.<sup>35</sup> The response to these new restrictions would prove to be of great consequence for the future of federal campaign finance in this nation. Labor unions (and later corporations) began to form *political action committees* (PACs) designed to channel contributions from members and employees to political candidates. The number of PACs expanded rapidly during the 1950s and 60s; by 1968, thirty-seven active labor PACs existed and spent a combined \$7.1 million on federal election campaigns that year.<sup>36</sup> During this same period, new technological developments drastically changed the campaigning methods employed by federal election candidates. The advent of television broadcasting led to a more personal style of campaigning, with the focus not on concerted party efforts but on individual candidates.<sup>37</sup> Candidates increasingly used radio and television to spread personal visions and messages not tied to, or perhaps in conflict with, party policy. As such, problems with monetary contributions to individual candidates became more and more important, while Congress took little action to address the rise of PACs or still-existing exploitations of the FCPA. Senator Russell Long of Louisiana attempted to create a system for the public funding of campaigns in 1966; however, while the bill to enact these measures was passed by Congress, it was rendered “inoperative” in 1967 when Congress voted to postpone its effectuation.<sup>38</sup> As such, between 1947 and 1971, almost nothing was done to curb the ever-worsening problem of federal campaign finance. Moreover, after the Pendleton Civil Service Act of 1883 first led to corporations becoming the primary sources of campaign funding, no measure adopted since had truly succeeded in curbing the influence of corporate interests on the outcomes

of federal elections.

It was in this historical context that Congress debated and enacted the Federal Election Campaign Act (FECA) of 1971. I will discuss this landmark statute, along with its 1974, 1976, and 1979 amendments, in the following sections.

### **B: The Federal Election Campaign Act of 1971**

The FECA was originally passed by Congress in 1971 and went into effect in 1972 after being signed by President Richard M. Nixon. The law replaced the FCPA as the governing legislation for federal election campaigns and was intended to “address problems stemming from the inadequacies” of the FCPA.<sup>39</sup> Moreover, the designers of the FECA hoped to curtail the alarming trend of rising campaign costs. In this section, I will explore the architecture of the original 1971 law as well as the changes imposed on that structure by its 1974 Amendments.

The FECA of 1971 sought to remedy the problems described in the last section by three means: 1) restraining “personal contributions”, 2) establishing “specific ceilings for media expenditures”, and 3) mandating “full public disclosure of campaign receipts and disbursements”.<sup>40</sup> I will discuss each of these goals in turn. First, the act focused its limitations on personal contributions to those by the candidates themselves and their family members. For the combined amount provided by candidates and family, contributions were limited to a total of \$50,000, \$35,000, and \$25,000 for presidential/vice-presidential, Senate, and House election campaigns, respectively.<sup>41</sup> These caps applied not merely to monetary gifts to one particular PAC or party committee, but rather to the aggregate sum that a candidate and his or her family could contribute to a campaign in which that individual was a candidate.

Second, the FECA of 1971 limited the amount that any federal election campaign could spend on media presence, including “radio, television, cable television, newspapers, magazines, and

automated telephone systems”.<sup>42</sup> The caps on media expenditures applied individually to campaigns for primaries, general or special elections, and run-off elections. The limit for these expenditures was set at “\$50,000 or... \$.10 multiplied by the voting-age population of the [relevant] jurisdiction”.<sup>43</sup> Whichever amount was greater would serve as the limit on media spending for that particular election campaign. Further, the law declared that “no more than 60 percent” of media expenditures for a campaign could be in the form of television and radio spending.<sup>44</sup> Finally, the FECA of 1971 set firm requirements on public disclosure of contributions and expenditures. Candidates and political committees were required to issue quarterly reports with every contribution or expenditure greater than or equal to \$100 listed, along with information on the contributor or recipient.<sup>45</sup> In addition, contributions of \$5,000 or more had to “be reported within forty-eight hours of receipt”.<sup>46</sup> The legislation also stated the appropriate offices with which these reports were to be filed and required additional reports prior to elections. These financial reports were made available to the public upon filing.

While the original 1971 legislation was somewhat effective in curbing media spending, it did little to reduce the overall rise in campaign expenditures. Total spending increased by approximately \$125 million between the 1968 and 1972 election cycles, with the latter occurring after the FECA went into effect.<sup>47</sup> The 1972 presidential election saw a marked increase in total expenditures, with incumbent Nixon doubling the amount his campaign spent in 1968 and Democrat George McGovern quadrupling the expenditures of Hubert Humphrey in 1968.<sup>48</sup> These facts alone led to general concern over the effectiveness of the FECA of 1971. The Watergate scandal, which culminated in President Nixon’s resignation in 1974, further heightened these concerns. In the aftermath of Watergate, congressional investigations into the Nixon campaign in the 1972 presidential election “revealed a substantial number of large

contributions and an alarming number of improprieties”.<sup>49</sup> Perhaps most alarmingly, investigators found evidence of secret slush funds filled with campaign contributions, with these monies being used (in part) to fund the Watergate break-in. In response to the public outcry over these revelations, Congress passed the FECA Amendments of 1974, which were designed to prevent further abuses of this kind.

The reforms produced by the 1974 Amendments completely overhauled the 1971 system. Most importantly, the Amendments established the Federal Election Commission (FEC), an agency tasked with “administering election laws and implementing [a new] public financing system”.<sup>50</sup> The FEC consists of six members (originally, with two each appointed by the President pro tempore of the Senate, the Speaker of the House, and the President) who are responsible for collecting finance reports, investigating alleged breaches of election law, and enforcing these laws. The FEC serves as the primary agency for oversight in federal election campaigns and was intended to be the main means for enforcement of the other provisions of the 1974 Amendments. I will now briefly discuss the various comprehensive reforms instituted by these Amendments.

First, the Amendments left intact the 1971 provisions limiting contributions by candidates and their immediate family members. However, the 1974 legislation added further restrictions on contributions by individuals in general. The limits for individual contributions were set to 1) \$1,000 to any single candidate for any primary, run-off, or general election, and 2) \$25,000 for total contributions by an individual to all federal election candidates.<sup>51</sup> Political committees were limited to \$5,000 in contributions to any candidate for a particular election.<sup>52</sup> Further limits on independent expenditures made *on behalf* of a candidate for federal office were also put in place. In addition, the 1974 Amendments replaced the 1971 law’s constraints on media spending with

general limits on total campaign spending. The following table depicts the aggregate spending constraints imposed in 1974, as well as the limits set for expenditures by national party committees made on behalf of their favored candidates in general elections:

	<u>Primary Election(s)</u>	<u>General Election</u>
<b>Senate Candidate</b>	\$100,000 <i>or</i> \$0.08 x Voting Population	\$150,000 <i>or</i> \$0.12 x Voting Population
<b>House of Reps. Candidate (multi-district state)</b>	\$70,000	\$70,000
<b>House of Reps. Candidate (single-district state)</b>	\$100,000 <i>or</i> \$0.08 x Voting Population	\$150,000 <i>or</i> \$0.12 x Voting Population
<b>Presidential Candidate</b>	\$10,000,000 (for nomination campaign)	\$20,000,000
<b>National Party Committee- Senate Campaign</b>	N/A	\$20,000 <i>or</i> \$0.02 x Voting Population
<b>National Party Committee- House Campaign</b>	N/A	\$10,000
<b>National Party Committee- Presidential Campaign</b>	N/A	\$0.02 x Voting Population

Source: Corrado, p. 23

These figures were all “indexed to reflect increases in the Consumer Price Index [CPI]”.<sup>53</sup> Moreover, candidates could spend an additional amount, equal to 20 percent of the cap for each election, on fundraising.<sup>54</sup> These spending ceilings, combined with the above limits on individual contributions, were intended to force candidate to fund campaigns through contributions by small donors. Further limits were put in place for expenditures on nominating conventions by both major and minor parties. The disclosure requirements of the 1971 law were also bolstered by the 1974 Amendments. Most importantly, candidates were required to “establish one central campaign committee through which all contributions and expenditures had to be reported”.<sup>55</sup> In

election years, finance reports had to be filed with the FEC each quarter, ten days prior to an election, and thirty days after the election. In non-election years, finance reports were due at the end of the year.

Thus, the 1974 Amendments greatly strengthened all three areas of focus in the FECA of 1971: personal contributions, campaign spending, and public disclosure. The 1974 legislation also achieved the landmark goal of establishing a system of public funding for presidential campaigns. In general elections, major party candidates were entitled to receive \$20 million in funds *if* “they agreed to refrain from raising any additional private money”.<sup>56</sup> As should be clear, this amount was equal to the ceiling on general election spending in the above table. Minor party candidates were allowed access to a sum proportionate to the number of votes they received in the last election. For primary elections, presidential candidates could receive up to half of the spending cap for primaries (\$10 million) if they met certain criteria.<sup>57</sup> Public funding was also available for national party conventions at a rate of \$2 million per major party.<sup>58</sup> This system was administered by the FEC and funded by a “voluntary tax check-off established... by the Revenue Act of 1971”.<sup>59</sup> Monies collected from this check-off were placed in the Presidential Election Campaign Fund, with the FECA Amendments of 1974 modifying the Revenue Act to meet the above parameters. The system was set to go into effect in time for the 1976 presidential election.

The establishment of the FEC, the strengthening of relevant provisions of the 1971 law, and the institution of public financing all were promising efforts toward solving the problems of federal campaign finance. This legislation unquestionably represented the most comprehensive reform of campaign finance yet enacted. However, by the time of the 1976 election cycle, substantial changes in the FECA had been forced by the United States Supreme Court’s decision in *Buckley v. Valeo* (1976). Several of the more radical provisions of the 1974 Amendments did



not survive the Court's judgment. It is to this case that I will now turn.

### **C: *Buckley v. Valeo* (1976) and the FECA Amendments of 1976, 1979**

I will now explore the Supreme Court's controversial decision in *Buckley v. Valeo*, a landmark case that dealt specifically with the FECA of 1971 and its 1974 Amendments. As with the three other Supreme Court cases I will discuss in this paper, I will not offer her a critique of the Court's reasoning or rule in *Buckley*. The Rawlsian textual critique of these four cases will constitute the bulk of the next chapter of this paper. For now, I will offer only a brief summary of the background facts, ruling, and impact of each case. I will begin with *Buckley*.

On January 2, 1975, a "coalition of both conservatives and liberals filed suit" against Francis R. Valeo, Secretary of the United States Senate, as a representative of the federal government.<sup>60</sup> The coalition, which included Senator James Buckley, former Senator Eugene McCarthy, activist Stewart Mott, the ACLU, the American Conservative Union, etc., challenged the constitutionality of the amended FECA in the U.S. District Court for the District of Columbia.<sup>61</sup> The District Court upheld the act; further, on appeal, the Court of Appeals for the District of Columbia found only one provision of the law unconstitutional.<sup>62</sup> Upon appeal, the Supreme Court issued a writ of *certiorari* and heard oral arguments for *Buckley et al. v. Valeo* on November 10, 1975. The appellants alleged that various provisions of the FECA violated the First Amendment's speech and association clauses and the Fifth Amendment's equal protection clause.<sup>63</sup> The provisions under attack included: 1) limits on individual and group contributions to single candidates, 2) limits on total contributions to federal election candidates by individuals, 3) expenditure ceilings for campaigns by candidates, PACs, and party committees, 4) public disclosure requirements, 5) the system of public financing of presidential elections, and 6) the appointment methods for FEC members.<sup>64</sup> In general, the appellants claimed that monetary

contributions constitute protected speech under the First Amendment.<sup>65</sup> Prior to 1976, the Court had not addressed the question of whether campaign donations were to be construed as protected speech.

The Court delivered its decision on January 30, 1976, in time for its judgment to apply to the presidential election of that year.<sup>66</sup> Offered *per curiam*, the opinion of the Court did not claim authorship by any particular justice; indeed, only Justices Brennan, Stewart, and Powell joined in the opinion in its entirety.<sup>67</sup> The other justices and Chief Justice Burger (with the exception of Justice Stevens, who took no part in the decision) wrote opinions that joined in part and dissented in part with the Court's opinion. The Court's decision upheld the relevant provisions of the FECA for (1), (2), (4), and (5) above, but struck down (3) and (6). That is, the Court determined that the FECA's caps on independent expenditures, candidate expenditures, and party or PAC expenditures violated the First Amendment's protection of free expression.<sup>68</sup> Moreover, the Court concluded that the need for "preventing the actuality or appearance of corruption" *did not* constitute a sufficiently-strong governmental interest to license the curtailing of political speech through spending caps.<sup>69</sup> In the case of contribution limits, however, the Court found that the need to prevent corruption *did* constitute a compelling governmental interest. However, the Court concluded that candidates themselves may spend unlimited amounts of their own money on their campaigns. In addition, the Court struck down the means of appointment for FEC members under the 1974 Amendments as a violation of the Constitution's appointment clauses under Article II, Sec. 2, Clause 2.<sup>70</sup> Essentially, the Court found that the joint appointment of FEC members by the President pro tempore of the Senate, the Speaker of the House, and the President ran contrary to the doctrine of the separation of powers. Because FEC members wield executive authority, the Court determined that only the President had the constitutional authority

for appointment.

The *Buckley* decision is notable for many reasons. First and foremost, the Court determined that campaigns contributions *do* constitute speech, which may only be limited in the presence of a compelling governmental interest (see: *United States v. Carolene Products* (1938), footnote 4). In addition, the Court upheld both the contribution caps and the system of public financing set forth in the 1974 FECA Amendments. The Court's distinction between contribution and expenditure ceilings, with the former being constitutional and the latter not, set a jurisprudential precedent that is both finely-drawn and controversial. Perhaps most importantly, however, the *Buckley* decision necessitated hasty congressional action in revising the FECA in time for the 1976 election cycle. This resulted in the 1976 FECA Amendments, which I will now briefly discuss. First, to comply with the Court's ruling on FEC appointments, the Amendments require that FEC members be appointed by the President and confirmed by the Senate.<sup>71</sup> Stripped of its power to appoint FEC members, Congress granted itself veto power over all rules and regulations produced by the FEC. Second, Congress raised the "limit on individual contributions from \$1,000 to \$5,000".<sup>72</sup> Third, the Amendments restricted solicitation efforts by PACs and set forth stricter reporting requirements for these groups.<sup>73</sup> Fourth, the law set limits at 1) \$15,000 in contributions from PACs to national parties, and 2) \$17,5000 from national parties to Senate candidates.<sup>74</sup> In sum, the architects of the 1976 Amendments sought to compensate for the serious losses to the 1974 Amendments that occurred subsequent to *Buckley*.

A final set of amendments was passed by Congress in 1979 in response to criticisms of the FECA after the 1976 election. Disclosure requirements were generally lessened in response to claims from candidates that the existing requirements were too "burdensome".<sup>75</sup> Other provisions revised the scope of FEC enforcement power and adjusted the amounts candidates could receive

from public funding. Perhaps most notably, the 1979 Amendments allowed ‘hard’ money (i.e. donations made for advocacy of specific candidates) to be used to “fund narrowly defined activities without having the expenditures count against the limits on” party contributions to candidates.<sup>76</sup> This allowed state and local party committees to exercise greater influence over federal election campaigns. Corrado notes that, contrary to common belief, the 1979 Amendments did not create the distinction between ‘hard’ and ‘soft’ money, nor did the statute directly cause the sharp rise in soft money usage throughout the 1980s and 1990s.<sup>77</sup> However, the 1979 Amendments did create a large amount of flexibility in national party compliance with campaign finance law.

These and other measures contributed to the prominence of soft money (i.e. independent expenditures used for party purposes other than specific candidate advocacy) in subsequent decades. Soft money was used to indirectly finance election campaigns by means of get-out-the-vote efforts, grassroots organizing, etc. Moreover, the increasing prominence of PACs, which intensified following the ‘sanctioning’ of PACs by the FECA, presented another disturbing trend.<sup>78</sup> Two factors contributed to this trend in the 1980s and 1990s: 1) the amended FECA set higher caps on contributions for PACs than individuals, thus incentivizing the formation of PACs, and 2) the FEC allowed (and often *encouraged*) the formation of PACs by corporations and labor unions.<sup>79</sup> This latter factor allowed wealthy corporations to fund campaigns easily and efficiently by simply forming a PAC that represented corporate interests. Accordingly, while the FECA of 1971 and its Amendments made significant efforts toward curtailing abuse in campaign finance, the legislation failed to prevent many exploitations of the system that arose soon after 1979. By 2000, total party acceptance of soft money had risen to \$495 million annually; at the same time, PACs were able to circumvent much of the ‘spirit’ of campaign finance law.<sup>80</sup> During

these decades, the FEC's continued refusal to address these problems only worsened the state of campaign spending in the United States. Few significant efforts were made by Congress prior to 2002; minor revisions to the FECA were occasionally passed, but major reforms were not enacted. The only significant reform of campaign finance law in this period came in the form of an amendment to the tax code in 2000, which closed a loophole that allowed tax-exempt 'political organizations' under section 527 of the Internal Revenue Code to avoid FEC regulations.<sup>81</sup> Otherwise, neither Congress nor the FEC took any substantial action to address the problems left untouched by the FECA.

#### **D: Supreme Court Decisions prior to 2002**

In the period between *Buckley* in 1976 and the passage of the Bipartisan Campaign Reform Act of 2002, the Supreme Court significantly addressed the question of campaign finance in three cases. I will briefly describe the material facts, reasoning, and judgment for each case.

Two years after *Buckley*, the Court decided the case *First National Bank of Boston v. Bellotti* (1978). This case involved a Massachusetts criminal statute that prohibited "a corporation from spending money to influence referendums on questions that did not materially affect the property, business, or assets of the corporation".<sup>82</sup> The appellant, the First National Bank of Boston, sought to fund an advertisement opposing a proposed state income tax to be decided by referendum. It was uncontroversial that, under Massachusetts law, taxation of individuals was considered to not affect corporations' material interests.<sup>83</sup> However, on appeal to the Supreme Court after the criminal statute was upheld by the Massachusetts Supreme Judicial Court, the former found the statute in question unconstitutional. The Court reasoned that the worth of speech (and thus its status of protection under the First Amendment) depends not on the source of the speech, but the speech itself.<sup>84</sup> Accordingly, the statutory distinction between corporations

and individuals in this context was found to be unconstitutional. Furthermore, the advertisement in question would not have gone to further a particular candidate's campaign, and thus no "quid pro quo" could be sought by the corporation (as perhaps would be sought through donations to a candidate for office).<sup>85</sup> As such, there did not exist any compelling governmental interest to license the abridgment of corporate speech, as no actual or apparent corruption could exist. Accordingly, the Court invalidated the Massachusetts criminal statute in question.

Of course, the above case concerned a ballot referendum rather than a political campaign. The precedent established by the *Bellotti* case is thus narrowly tailored to the context. In 1986, however, the Court did take up the question of corporate expenditures for political campaigns in *Massachusetts Citizens for Life, Inc. v. Federal Election Commission*. This case concerned a pro-life group called the Massachusetts Citizens for Life (MCFL), which paid for and distributed print media endorsing particular candidates for office.<sup>86</sup> The FEC determined that this act violated the FECA's prohibition on direct corporate expenditures in federal elections. The Court disagreed, finding that the FEC's ruling overly-burdened the corporation's speech by restricting the form of the speech, rather than the speech itself.<sup>87</sup> Because corporations could still pay for the administration of PACs to achieve the same ends (i.e. influence in the public forum), the FEC had prohibited only the corporate *form* of speech. In the Court's view, this unfairly burdened corporations by imposing additional constraints on corporate speech that were not present for individuals. As such, the FEC's interpretation of the relevant FECA provision violated the First Amendment. At first, this opinion may seem to run contrary to the Court's decision in *Buckley*, in which the Court upheld the prohibition on direct contributions from corporations to campaigns. However, Ortiz notes that much of the Court's opinion in this case is dictum, as the issue at hand involved only expenditures by 'ideological' corporations like the MCFL.<sup>88</sup> Despite

the rhetoric of the opinion, the Court's judgment was not binding for regulations concerning traditional 'economic' corporations, i.e. businesses. This issue would not be resolved until *Austin v. Michigan State Chamber of Commerce* (1990).

In the *Austin* case, the Michigan State Chamber of Commerce sought injunction against a provision of Michigan state campaign finance law. The Michigan law essentially mirrored the FECA (as amended in 1979) by prohibiting "corporations from making independent expenditures" for political campaigns but allowing corporations to create "separate segregated funds" not directly filled by the corporate.<sup>89</sup> The Chamber of Commerce claimed in this case that, in extension of *Bellotti* to campaigns in addition to referendums, corporate campaign expenditures constitute protected speech under the First Amendment.<sup>90</sup> After determining that the Chamber of Commerce constituted an 'economic' corporation, the Court took up the question of whether speech by such institutions could be regulated. As with all attempted governmental regulation of speech, the Court considered whether a compelling governmental interest existed to license the limitation of 'economic' corporate speech. In this case, the Court *did* find such a compelling interest to exist: namely, the prevention of undue influence over public opinion by "immense aggregations of [corporate] wealth".<sup>91</sup>

The Court's primary concern in this case was rooted in the danger that corporations, which may or not hold general public support, could sway the results of campaigns *contrary* to general public opinion. In general, the Court concluded that the corporate form itself (though only for economic corporations) poses the threat of apparent or actual corruption if corporations are allowed to directly finance political campaigns. It is not, as Justice Marshall's opinion makes clear, the mere aggregation of capital that produces a compelling governmental interest in the limitation of corporate speech. Instead, economic corporations by virtue of their state-charted

structures are subject to limited political speech. As Justice Scalia notes powerfully in his dissenting opinion for this case, the rationale employed here by the Court contradicts the reasoning that underlies the *Buckley* opinion.<sup>92</sup> I will explore this inconsistency more fully in the next chapter, in which I will analyze the reasoning behind both cases. Further discussion of the contradiction here will prove fruitful in my attempt to determine the degree to which various Court opinions have complied with the Rawlsian framework for questions of justice.

### **E: The Bipartisan Campaign Reform Act of 2002 and *McConnell v. FEC* (2003)**

On March 27, 2002, President George W. Bush signed into law the Bipartisan Campaign Reform Act (BCRA), often called the McCain-Feingold Act after its primary sponsors, Senators John McCain and Russ Feingold. The law was enacted by Congress with the explicit goals of reducing the influence of soft money on federal election campaigns and resolving outstanding problems with “issue advocacy advertising”.<sup>93</sup> The latter concern refers to the distribution of media intended to stir public awareness about a particular issue or policy, often in relation to specific candidates for office. ‘Pure’ issue advocacy media does not declare that viewers or listeners should take any specific stance on the relevant issue or vote in any particular war. However, the distinction between pure and impure issue advocacy, i.e. that which suggests a certain stance that should be adopted, is often difficult to judge. Along with the regulation of soft money and several other prevailing concerns with federal campaign finance, the BCRA sought to address problems with issue advocacy advertising.

First and foremost, the BCRA banned the collection or use of soft money at the federal level by prohibiting national party committees from “soliciting, receiving, spending, transferring or directing... any funds that are not subject to” federal election law, i.e. soft money.<sup>94</sup> Thus, parties could no longer collect or distribute funds not bound by contribution limits, spending caps,



reporting requirements, etc. Candidates and federal office-holders were also prohibited from collecting or distributing soft money. To close off any potential loopholes, the BCRA further prohibits national, state, and local parties “and their agents... from soliciting funds for or otherwise financially supporting tax-exempt organizations”.<sup>95</sup> This provision was intended to preclude the use of soft money for funding organizations like get-out-the-vote initiatives or IRC sec. 527 organizations. For the past two decades, tax-exempt organizations of this sort had been used by national parties to indirectly support specific candidates in the absence of FECA regulation. The BCRA now made this party strategy difficult to realize.<sup>96</sup>

The legislation also prohibited the use of soft money by state or local party committees in the financing of media that “promotes, supports, attacks, or opposes a candidate”.<sup>97</sup> This provision was intended to close the “issue advocacy loophole” in the FECA, by which state and local party committees could distribute advocacy media not subject to federal regulation.<sup>98</sup> The BCRA particularly targets ‘express’ advocacy advertising, or that which is intended to support or oppose particular candidates. The legislation defines express advocacy in terms of “electioneering communications” and prevents labor unions and corporations from funding such media.<sup>99</sup> Individuals who financed such media were required to disclose expenditures and report contributions over certain amounts. Moreover, all express advocacy *not* funded from these courses that featured federal candidates had to be financed through hard money. Under additional provisions, voter turnout, registration, and identification drives were regulated under the BCRA and, when a federal candidate was on the ballot, no soft money could be used in their financing.<sup>100</sup>

As should be clearly, the BCRA virtually eliminated the significant use of soft money in federal election campaigns. To compensate for the sudden loss in funding for federal election

campaigns, the BCRA also raised contribution limits for both PACs and individuals. The law nearly doubled the total amount individuals may give to candidates, party committees, and PACs per election cycle, as well as increasing the amounts that individuals may contribute to specific candidates, national parties, and state parties.<sup>101</sup> The following table depicts a sample of the difference in several forms of allowable individual contributions between 1979 and 2002:

<b><u>Permissible Individual Contributions:</u></b>	<b><u>FECA (1979)</u></b>	<b><u>BCRA (2002)</u></b>
<b>Aggregate per Election Cycle</b>	\$50,000	\$95,000
<b>National Party Committee</b>	\$20,000	\$25,000
<b>State Party Committee</b>	\$5,000	\$10,000
<b>Federal Candidate</b>	\$1,000	\$2,000

Source: Corrado, p. 41

The legislation did not, however, alter the permissible amounts for individual contributions to PACs or for PAC contributions to party committees.<sup>102</sup> Further, except for contributions to state party committees, these caps are indexed relative to the Consumer Price Index and have increased over time.

The BCRA represented a significant effort toward addressing the problems in federal campaign finance that had arisen since 1979, especially with the increase in soft money usage. However, it did little to address the growing influence of PACs and, much as the FECA and its Amendments had previously, seemed to even tacitly endorse this trend. Nevertheless, the legislation was far from uncontroversial. Almost immediately upon adoption of the law, eleven separate suits were filed against the BCRA in the U.S. District Court for the District of Columbia.<sup>103</sup> Moreover, the law contained a provision calling for expedited judicial review, given that it was widely expected to be challenged constitutionally prior to its passage.

Accordingly, the District Court merged the eleven complaints into one legal action, *McConnell v. Federal Election Commission*, which was quickly tried before a special three-judge panel.<sup>104</sup> Upon the conclusion of argument, the panel found some parts of the law unconstitutional and upheld others. The expedited judicial provision also called for automatic appeal to the Supreme Court upon conclusion of this trial, and so the Court heard oral argument for *McConnell* by September 2003. The Court issued its opinion on December 10, 2003 and, to the surprise of many, “upheld all of the major provisions of the law”.<sup>105</sup>

Appellants challenged the constitutionality of almost all major provisions of the BCRA, claiming that these provisions violated the First Amendment’s speech and assembly clauses. Justices Steven and O’Connor delivered the opinion of the Court regarding Titles I and II of the BCRA, which regulate the use of soft money and the financing of issue advocacy media, respectively.<sup>106</sup> The Court upheld all challenged parts of Title I except for a minor provision “that would have required party committees to decide whether to make independent or coordinated expenditures in support of a candidate”.<sup>107</sup> All other provisions were found neither to violate the speech nor assembly clauses of the First Amendment; further, the Court determined that Congress held appropriate authority under Article I to enact said provisions. Chief Justice Rehnquist authored the opinion of the Court for Titles III and IV of the BCRA, determining for most challenges thereto that appellants lacked standing.<sup>108</sup> The Court did, however, strike down a provision prohibiting political contributions by minors (i.e. individuals aged seventeen years or younger) as a violation of these minors’ First Amendment rights. Justice Breyer authored the Court’s opinion in regard to Title V, holding that no facial violation of the First Amendment occurred in any challenged provision.<sup>109</sup> Accordingly, the Court upheld all but two relatively-minor provisions of the BCRA. However, various parts of the Court’s judgment were reached by

“the narrow margin of 5-4”.<sup>110</sup>

Perhaps the most contentious aspect of *McConnell* was the question of constitutionality regarding issue advocacy advertisement. While the District Court panel had invalidated several provisions of the BCRA regarding this issue, the Supreme Court upheld virtually every portion of the law dealing with this subject.<sup>111</sup> A central component of the argument provided by appellants was that the BCRA failed to distinguish between ‘issue’ and ‘express’ advocacy.<sup>112</sup> According to *McConnell et al.*, individuals hold an “inviolable First Amendment right to engage in [that] category of speech”.<sup>113</sup> Appellants distinguished issue and express advocacy by defining the latter as containing ‘magic words’, a term taken from the *Buckley* decision. These magic words, e.g. ‘vote for’, ‘support’, ‘elect’, allegedly constitute the speech’s tendency to support or oppose candidates.<sup>114</sup> The Court, however, disagreed with this analysis. Instead, the Court found that the First Amendment does not erect “a rigid barrier between express advocacy and so-called issue advocacy”.<sup>115</sup> In the Court’s judgment, an advertisement may be clearly intended to support or oppose specific candidates, and may thus be regulated under law, even in the absence of magic words. Accordingly, the Court rejected appellants’ argument that the BCRA violated the First Amendment by limiting ‘inviolable’ speech rights.

*McConnell* would cement the BCRA as the primary governing legislation for federal campaign finance until the current day. However, despite the Court’s initial upholding of all major provisions of the law, the BCRA would face a serious challenge to its constitutionality seven years after *McConnell*. It is to the discussion of this case that I will turn next and with which I will conclude this chapter of the paper.

#### **F: *Citizens United v. Federal Election Commission* (2010)**

The Court’s landmark decision in *Citizens United v. Federal Election Commission* (2010)

both invalidated several key provisions of the BCRA and overturned prior Court precedent. I will now discuss the material facts of the case and briefly describe the Court's reasoning and judgment. In the next chapter of this paper, I will explore the reasoning underlying the Court's opinion, as well as the case's various concurring and dissenting opinions, in detail.

In the middle of the primary season for the 2008 presidential election, a non-profit corporation called Citizens United produced a film entitled *Hillary: The Movie*.<sup>116</sup> The film was clearly critical of then-Senator Hillary Rodham Clinton, at that time a candidate for the Democratic Party nomination. In January 2008, Citizens United produced television advertisements to promote the film, which was set to soon air on cable television via video-on-demand.<sup>117</sup> Citizens United, concerned that the advertisements for this film would violate the BCRA's prohibition against electioneering communication within thirty days of a primary, sought declaratory and injunctive relief.<sup>118</sup> The corporation claimed that the provisions of the BCRA which 1) prohibited corporate funding of campaign expenditures (§ 441b), and 2) required disclaimers and disclosure reports for media communication (§ 201 and § 311), were unconstitutional. The District Court for the District of Columbia denied the corporation this relief and granted the FEC summary judgment.<sup>119</sup> Citizens United then appealed to the Supreme Court, which granted *certiorari* and heard oral argument in March 2009. The case was reargued in September 2009 after the Court instructed the parties to prepare briefs concerning whether or not *Austin* and relevant portions of *McConnell* should be overturned.<sup>120</sup> On January 21, 2010, the Court delivered its opinion, invalidating the long-standing federal ban on corporate independent campaign expenditures but upholding the relevant disclaimer and disclosure provisions of the BCRA.<sup>121</sup>

The Court first determined that *Hillary* and its advertisements did constitute 'electioneering

communication’ and that these videos were clearly forms of express advocacy media.<sup>122</sup> Further, because part of the funding for the film came from for-profit institutions, the Court found that *Hillary* did not meet the exception set forth in the *Massachusetts Citizens for Life, Inc.* case, even though Citizens United itself was a non-profit corporation.<sup>123</sup> As such, the Court dismissed the corporation’s as-applied challenges to the regulation of *Hillary* by the FEC. Clearly, the film was the type of expenditure intended to be regulated under relevant provisions of the BCRA. The Court then addressed the facial challenge to the constitutionality of these provisions. The Court notes that, pursuant to the *Bellotti* case, the right to free speech *does* extend to corporations.<sup>124</sup> However, contrary to *Austin*, the Court in this case concluded that no compelling governmental interest exists to justify the limitation of this speech.<sup>125</sup> Essentially adopting the view of Justice Scalia from his dissenting opinion in *Austin*, the Court determined that the positing of this interest contradicted the ruling in *Buckley* and was not sufficiently compelling to curtail political speech. However, the Court found no conflict between the disclaimer and disclosure requirements of the BCRA and the *Buckley* decision.<sup>126</sup>

In sum, the Court ruled as follows: 1) § 441b of the BCRA, which prohibits corporate campaign contributions, violates the First Amendment; 2) § 201 and § 311 of the BCRA, which mandate disclaimers and disclosure reports for political communications, are valid; 3) *Austin* is overturned; and 4) the portion of *McConnell* which upholds § 441b is overturned. The court’s judgment in this case struck down only one provision of the BCRA, and certainly this law remains the governing legislation for campaign finance in U.S. federal elections. However, the invalidation of the federal ban on corporate and labor union campaign expenditures has great consequences for the future of campaign finance in this nation. Moreover, as Gilpatrick notes, *Citizens United*’s greatest significance will likely be “not for what it means for corporate

campaign spending, but for what it signals for the future of campaign finance reform".<sup>127</sup> I will not attempt to speculate here as to what this future will be, nor will I attempt to analyze current data regarding campaign expenditures to determine the present impacts of this case. Such analyses would go far beyond the scope of this project.

Instead, in the subsequent chapter, I will focus on the text of the four most significant Supreme Court cases discussed above: *Buckley*, *Austin*, *McConnell*, and *Citizens United*. I will seek to identify the legal reasoning employed by the various opinions of each case and to, if possible, pick out strands of thought reflective of a Rawlsian conception of distributive justice. Where this is not possible, I will highlight the disparities between the Court's reasoning and the Rawlsian model for public reason. I will conclude by emphasizing that the above historical background has been offered solely to provide context to the textual analysis of the next chapter. While this overview has been necessary, it has not been my goal to offer a comprehensive account of federal campaign finance reform. Instead, I have merely attempted to situate the focal points of this paper's textual analysis within a meaningful historical context.

#### **Chapter IV: Textual Critique of Representative Cases**

In this chapter, I will offer a Rawlsian textual critique of what are, in my view, the four most important U.S. Supreme Court decisions in the realm of federal campaign finance. These are: *Buckley v. Valeo* (1976), *Austin v. Michigan State Chamber of Commerce* (1990), *McConnell v. Federal Election Commission* (2003), and *Citizens United v. Federal Election Commission* (2010). I will leave the other cases mentioned in the previous chapter to the side, as I believe the above four cases adequately represent the relevant undercurrents in Court reasoning since the adoption of the FECA. As mentioned before, my aim here is not to study the tangible effects of each case, but rather to critique the reasoning employed by various Court justices in the light of

Rawls' theory of distributive justice. My ambition will be to pick out from each opinion the legal rules or principles relied upon therein, and then to determine whether the use of these principles accords with justice as fairness or, more broadly, Rawls' framework of thought on justice.

For each case, I will focus solely on the majority opinion of the Court, leaving to the side concurring and dissenting opinions (given the limited space I have here). As I move through each opinion, I will play the role of the Rawlsian commentator and will present critiques of the Court's reasoning from this perspective. In general, I will ignore the material facts of the case, as these were largely discussed in the preceding section. I will employ several metrics in evaluating this reasoning, including (but not limited to) 1) the language of the Two Principles, 2) the fair value provision, 3) the value of stability, 4) the value of publicity, and 5) the nature of the basic structure that will (or would) result therefrom. Finally, I will end this chapter with some remarks on the general trends in thought that emerge from these four cases.

#### **A: *Buckley v. Valeo* (1976)**

##### **1. Opinion of the Court- Contribution and Expenditure Limits**

The opinion of the Court was delivered *per curiam* in this case, and so the reasoning contained therein may not be ascribed to any particular justice. The Court first determines that the case at hand presented a true *case* or *controversy* as set forth in Article III, § 2 of the Constitution, thus allowing the Court jurisdiction to decide the case.<sup>1</sup> Moreover, there was no question of standing, as "at least some of the appellants [had] a sufficient 'personal stake'" in the outcome of the case.<sup>2</sup> Therefore, the only issues before the Court were those concerning the constitutionality of various challenged provisions of the FECA, as amended in 1974.

The Court first addresses the statute's caps on campaign contributions and expenditures. Following the decision in *United States v. Classic* (1941) (see above), the Court finds the



regulation of federal elections to fall under the constitutionally-granted authority of Congress.<sup>3</sup> As such, regarding contribution and expenditure limits, the Court would only consider whether the FECA violated the First and Fifth Amendments, as alleged by the appellants.<sup>4</sup> First, the Court considers whether monetary contributions and expenditures invoke the First Amendment at all. In essence, this involves a determination of whether contributions and expenditures constitute ‘speech’ or merely ‘conduct’. Applying the reasoning found in *United States v. O’Brien* (1968), the Court determines that the spending of money related to political campaigns, while certainly constituting ‘conduct’, also constitutes ‘symbolic speech’.<sup>5</sup> That is, although the exchange of funds is not *in itself* speech, activity of this kind aimed at political advocacy amounts to speech. The Court emphasizes that essentially all modes of political communication (e.g. television ads, radio messages, flyers, pamphlets, etc.) require the spending of money.<sup>6</sup> Thus, to limit the amount one may spend/contribute is to effectively limit one’s speech.

In deciding this point, the Court relies on past precedent that broadly defines expressive conduct as speech.<sup>7</sup> Although the Court has traditionally contrasted ‘pure speech’ with ‘mixed speech’, or that which amounts to a combination of mere conduct and symbolic or expressive elements, the *Buckley* Court finds that political contributions and expenditures contain a sufficient degree of expressive content as to produce First Amendment protection. This results largely from the Court’s determination that money and political communication are, in the modern arena of politics, inseparably intertwined. Does this accord with the Rawlsian conception of justice as fairness? In answering this question, we must look first and foremost to the First Principle and Rawls’ corresponding discussion of the ‘political liberties’. Notably, Rawls makes a distinction (absent in the U.S. Constitution) between the rights of freedom of speech and participation in the political process.<sup>8</sup> Thus, it seems to me that conduct that is not *in itself*

speech, but which is aimed broadly at expressive advocacy, more neatly falls into the latter category. Political spending would, in the Rawlsian context, fall into the category of activities that includes (for example) joining a political party or volunteering at a campaign fundraiser. Neither of these activities constitutes speech in itself, but rather they are aimed at supporting or opposing particular candidates. While the categories of speech and participation share overlapping goals (namely, advocacy), they are certainly distinct. Accordingly, it is not clear that monetary expenses constitute speech in the Rawlsian sense. Given Rawls' lack of specific writing on this point, however, I am not fully committed to this interpretation. As we shall see, even if we grant the compliance of the *Buckley* Court's determination on this point with justice as fairness, we will find substantial space for criticism of *Buckley* in other respects. I will operate under this assumption in my foregoing discussion.

While the Court finds both contributions and expenditures to constitute speech, it does not find the FECA's limitation of these forms of speech to be equal in force. A limit on campaign expenditures "necessarily reduces the quantity of expression", as such a ceiling decreases the total number of communications that a campaign may finance and thus the size of the audience to which it may appeal.<sup>9</sup> In contrast, a limit on contributions from any particular individual does not significantly reduce the quantity of that individual's expression. This is because contributions, as 'symbolic speech', indicate only a "general expression of support" and do not "communicate the underlying basis for that support".<sup>10</sup> For example, consider two persons A and B, both of whom wish to express support for candidate C. Person A gives \$500 to candidate C, while person B gives \$499 to candidate C. In the Court's estimation, the contribution of A does not communicate any (non-negligible) greater degree of support for C than that of B. While a curious and perhaps trivial distinction at first glance, the Court's reasoning here will be of

enormous significance concerning the upshot of the *Buckley* decision.

Appellants challenged the constitutionality of the FECA's contribution limits on three grounds: 1) violation of the First Amendment, 2) overbreadth, and 3) violation of the Fifth Amendment. Regarding (2), the Court concludes that the establishment of specific monetary limits does not over-broadly limit protected speech. While most who contribute large sums to candidates do not seek undue influence, such limits are necessary to prevent the *appearance* of corruption as well as its *actuality*.<sup>11</sup> Regarding (3), the Court finds no evidence on the record to suggest that small contribution caps discriminate against minor parties or non-incumbents.<sup>12</sup> Accordingly, both (2) and (3) are dismissed, and I will not further discuss these challenges here. Instead, I will focus on the first challenge to FECA contribution limits: namely, that these limits violate the First Amendment's 'speech' and 'assembly' clauses. As mentioned above, the Court has already determined that contributions constitute political speech. As such, if Congress is to regulate this speech in compliance with the First Amendment, a 'clear and compelling governmental interest' must exist to justify the regulation. The Court agrees with appellees that just such an interest exists: namely, the prevention of the "actuality and appearance of corruption resulting from large individual contributions".<sup>13</sup> The Court states that the solicitation of influence from candidates by means of monetary donations does harm to "the integrity of our system of representative democracy".<sup>14</sup> Moreover, the prevention of the *appearance* of such corruption is just as important: citizens cannot have faith in a system of representation that does not represent their own interests, even if this is not actually (or always) the case. As such, the various forms of contribution limits that the FECA sets forth meet the strict scrutiny test, and no facial violation of the First Amendment is present.

Regarding the FECA's expenditure limits, the Court considers First Amendment challenges to

three spending ceilings found in the statute, which concern 1) independent expenditures, 2) expenditures from a candidate's own funds, and 3) total campaign expenditures.<sup>15</sup> The Court finds all three relevant provisions of the FECA (§ 608 (e)(1), § 608 (a), and § 608 (c)) to be constitutionally invalid. Because this determination is made (largely) for the same reasons for each provision, I will discuss all three provisions together. As stated before, the Court recognizes that all spending ceilings necessarily involve a limitation on the quantity of expression and, thus, a serious limitation of First Amendment freedoms. The Court must thus consider whether any of the aims of the FECA constitute a sufficiently-compelling governmental interest that will satisfy strict scrutiny. First, however, the Court discusses whether § 608 (e)(1)'s limitation on independent expenditures is "unconstitutionally vague".<sup>16</sup> The provision sets limits on expenditures made "relative to a clearly identified candidate", though as the Court notes, the statute contains no definition of what may be meant by 'relative'.<sup>17</sup> In the Court's view, the only way to prevent this provision from being unconstitutionally vague is to interpret 'relative' as follows: a political communication is made 'relative' to a candidate if and only if it contains "explicit words of advocacy" regarding that candidate.<sup>18</sup> These are the so-called 'magic words' later discussed in the *McConnell* decision and are typically thought to include such terms as 'elect', 'defeat', 'vote', 'support', etc. Now, the Court's re-interpretation of § 608 (e)(1) saves the provision from the vagueness challenge but, as I will soon discuss, does not rescue it from the facial challenge of constitutionality. However, the 'magic words' conclusion does establish an important precedent of distinction between 'express' and 'issue' advocacy.

Having thus considered an initial problem with the independent expenditures provisions, I will now discuss appellees' various proposed governmental interests for the licensure of limitations on expenditure speech. As before, the primary aim of the statute was the prevention

of apparent or actual corruption. However, the Court finds this interest to be insufficiently compelling for all three types of expenditure limits in the FECA: 1) independent expenditures, 2) expenditures from a candidate's own funds, and 3) total campaign expenditures. Regarding (1), the Court states that independent expenditures *not* made in connection with or coordination by the candidates may either help or hinder these candidates.<sup>19</sup> An interest group which, for example, seeks to support a candidate X may actually harm X's chances at election by running a negative advertisement. Thus, there is no possibility of producing a *significant* appearance of corruption in this regard. Concerning (2), the interest of preventing corruption seems to make little sense.<sup>20</sup> A candidate cannot presumably corrupt *herself* by use of her own money. Regarding (3), the limit on total campaign expenditures, the Court finds that the interest of preventing undue interest solicitation is sufficiently-served by the contribution limit and disclosure provisions.<sup>21</sup> The reasoning here is thus: if the danger of corruption occurs because of large contributions from single donors, and if such large contributions are prohibited by the contribution cap provisions, then campaign expenditure limits are unnecessary to alleviate this danger. Given the high constitutional 'cost' of expenditure limits, (3) does not pass strict scrutiny. Appellees also assert that the "ancillary governmental interest in *equalizing* the relative" [emphasis mine] political influence of citizens justifies the limits on speech present in (1), (2), and (3).<sup>22</sup> Now, the justification of equalization will be of great consequence to my Rawlsian critique of Court reasoning for all four cases I will discuss. The *Buckley* Court, however, summarily rejects this claim as a compelling governmental interest in all three cases. The Court finds that any measures aimed toward ensuring a roughly-equal chance at political influence are "wholly foreign to the First Amendment".<sup>23</sup> It is not the role of the Court, according to this opinion, to guarantee 'fairness' in the public forum of political speech. It is

instead the Court's task to promote "the widest possible dissemination of information".<sup>24</sup>

Accordingly, the Court finds unconstitutional provisions § 608 (e)(1), § 608 (a), and § 608 (c) of the FECA, as no compelling governmental interests exist to license the limitations on speech.

Now, I will assume first and foremost that the standard of strict scrutiny is a valid method for guaranteeing the compliance of law with the basic political liberties.<sup>25</sup> Accordingly, the question at hand for us is thus: is the *Buckley* Court correct in recognizing such a compelling interest for the FECA's contribution caps but not for its expenditure limits? To begin, it is necessary to determine whether the appearance or actuality of corruption would, in the Rawlsian context, constitute a compelling interest. It should be clear that this is the case. To prevent *actual* corruption is to ensure the fair value of a citizen's right to political participation. If the wealthy may exert undue influence over the decisions of office-holders, then these elites enjoy a greater 'value' for their claims to political participation than the less-advantaged. Moreover, *prima facie*, a system rife with corruption is patently unfair, thus contradicting a central aim of Rawls' project. To prevent the *appearance* of corruption is to satisfy the publicity requirement of a contractarian theory of justice. Citizens will be unable to know that others respect their own aims and ambitions if they believe that certain individuals have exploited the political system so as to gain an unfair advantage. This will prevent full public acceptance of the basic structure that constitutes this system and, thus, the principles of justice. In both cases, a society plagued by apparent or actual corruption will be unstable, thus failing the crucial stability requirement of a system of justice. That corruption trends toward instability should be obvious from the history of campaign finance presented in Chapter III: undue influence by wealthy elites has caused, in this country, both public outcry and serious efforts at reform.

Accordingly, if we accept strict scrutiny as the Rawlsian test for the constitutionality of

limitations on speech, then the Court's judgment regarding contributions caps is just.<sup>26</sup> The same cannot be said for the invalidation of expenditure limits in *Buckley*. However, while the appearance or actuality of corruption may provide reasons for accepting these limits, it is, in my view, best to critique the Court's judgment in this regard apart from this interest. Other requirements for the basic structure present in Rawls' theory will better serve the role of satisfying strict scrutiny. To restate: we are concerned here with limits on 1) independent expenditures, 2) expenditures from a candidate's own funds, and 3) total campaign expenditures. How then would each of these provisions be justified via a compelling interest in the Rawlsian scheme? Regarding (1), the fair value of the liberty of political speech must be guaranteed. Consider two people, A and B, who wish to run independent advertisements in support of a particular candidate. Person A has \$1,000 to spend on this effort, while Person B has \$500,000. Person A can afford only a single, low-budget advertisement that will run late at night; Person B can afford a high-budget advertisement that will play on multiple channels at peak hours of viewership. Clearly, if both are allowed to do as was just described, the value of B's political speech will be significantly higher than that of A, in the relevant Rawlsian sense. Thus, to place limits on such expenditures will guarantee the fair value of this type of speech, and this ambition will constitute a compelling governmental interest.<sup>27</sup>

Concerning (2), the same reasoning applies. For the above example of persons A and B, simply make A and B candidates for federal office who wish to run advertisements in support of their own campaigns using their own funds. Let us assume that A and B have raised equal amounts of money in external fundraising. In such a case, a limit on personal expenditures is necessary to ensure fair value. For (3), the ceiling on total campaign spending, a different mode of critique is needed. Now, a non-Rawlsian criticism of the Court's rejection of (3) may hold that

rapidly-rising campaign costs are detrimental to general economic interests. For Rawls however, if we recognize the status of campaign expenditures as a political liberty, this line of objection will not work. This results from the lexical priority of the First Principle over the Difference Principle; i.e. we cannot “acknowledge a lesser liberty for the sake of greater material means”, even for society at large.<sup>28</sup> It is not clear either that the notion of fair value necessitates (3), as limits on contributions and a candidate’s personal spending may satisfy fair value without requiring a further reduction in liberty. However, (3) may be necessary for another reason: to ensure the equality of political liberty across the totality of the citizenry. As the Court rightly notes, practically any form of political communication in the modern era requires monetary expense. Accordingly, a candidate with a relatively small ‘war chest’ will be able to access fewer media markets and means of self-promotion than a wealthier candidate. Now, the rights to vote and to participate fully in the political process are guaranteed equally to all citizens by the First Principle.<sup>29</sup> In my view, an essential component of both rights is the ability to make informed decisions in selecting among candidates for office. An individual who lives outside contested ‘swing’ states may only have access to media communications from wealthy candidates, thus impairing her ability to make an informed choice among *all* candidates. This limits her exercise of her political liberties relative to an individual who does live in a contested region. Accordingly, to guarantee the equality of basic liberties, it may be required by justice as fairness to also cap total campaign spending. This may be especially true for primary elections, where even solidly-Republican or Democrat states will experience competition among candidates.<sup>30</sup>

A Rawlsian basic structure would thus feature, in my view, all three forms of expenditure limits discussed above. Now, it is clear that the reinstatement of FECA provisions § 608 (e)(1), § 608 (a), and § 608 (c) would not fully realize justice as fairness in federal election campaigns. As



I will soon discuss, more drastic reforms are necessary to achieve this goal. However, given my above remarks, it should be apparent that expenditure limits will generally be required of a Rawlsian scheme of distributive justice. These remarks have highlighted the more crucial points of contention between Rawls' work and the Court's jurisprudence on this matter. My discussion of the remainder of the *Buckley* decision, as well as the three other cases at hand, will thus be considerably briefer. My aim henceforth will primarily be to pick out of the Court's reasoning areas of congruence and divergence from the above.

## **2. Opinion of the Court- Disclosure Requirements and Public Financing**

The disclosure requirements of the FECA were described generally in the last chapter of this paper. Unlike the statute's contribution and expenditure provisions, the FECA's disclosure provisions were not challenged in *Buckley* as being *per se* unconstitutional. Instead, appellants alleged overbreadth, claiming that more narrowly-tailored reporting requirements would satisfy the intended aim of the statute without so strictly restricting First Amendment freedoms.<sup>31</sup> The Court agrees that "compelled disclosure... can seriously infringe upon privacy of association and belief".<sup>32</sup> Accordingly, the relevant provisions of the FECA raise First Amendment concerns that must be justified by a nexus between the requirement of reporting a legitimate governmental interest. The standard of scrutiny applied to such a determination, following *NAACP v. Alabama* (1958), is that of 'exacting scrutiny'.<sup>33</sup> While a lesser standard than strict scrutiny, exacting scrutiny nevertheless requires that the limitations on liberty adopted be substantially connected to the achievement of a legitimate governmental interest. This generally requires the narrow tailoring of statutory measures; hence the constitutional challenge of overbreadth.

In policy areas deemed to be of great national importance, precedent dictates that disclosure and reporting requirements may meet this standard of exacting scrutiny.<sup>34</sup> Thus, the Court

considers two primary questions in evaluating the constitutionality of the FECA disclosure provisions: does a governmental interest of sufficient national importance exist, and are these provisions narrowly-tailored to achieve this interest? Appellees offered three separate governmental interest to justify the statutory requirements, all of which the Court deems to be of the “magnitude” required by exacting scrutiny.<sup>35</sup> These interests are: 1) providing information to the electorate so that citizens may evaluate the financial situations of candidates; 2) deterring actual corruption and preventing the appearance of corruption; and 3) providing enforcement agencies with the necessary information to “detect violations of the contribution limits”.<sup>36</sup> To answer the second question above, the Court considers whether the FECA provisions are narrowly tailored to achieve these ends. Appellants argued that the disclosure requirements were overbroad, as they applied also to minor parties and independent candidates, for whom interests (1), (2), and (3) were not major concerns.<sup>37</sup> While appellants called for a blanket exemption for these parties, the Court finds such an exemption unnecessary. Further, the Court determines that the dangers associated with unreported contributions are compelling for minor parties and independents as well as for major parties.<sup>38</sup> Accordingly, provisions designed to guarantee disclosure and enforcement are narrowly aimed to prevent this danger. Finally, the Court considers a First Amendment challenge to § 434 (e), which requires individuals who contribute or spend over \$100 in political campaigns in a year to report such spending to the FEC.<sup>39</sup> The Court here applies the strict scrutiny standard, rather than exacting scrutiny, as this provision directly concerns the First Amendment guarantees of free association and privacy of belief *for individuals*.<sup>40</sup> Nevertheless, the Court finds § 434 (e) constitutionally firm, as the provision survives scrutiny in concerns over overbreadth, vagueness, and the arbitrariness of monetary thresholds (i.e. the \$100 threshold). Weighing these three concerns, the Court finds the three

governmental interests detailed above to be overriding. Accordingly, all disclosure and reporting requirements of the FECA are upheld by the Court.

In contrast with the last section of this paper, the Court's reasoning here largely conforms with a Rawlsian scheme of justice. I will briefly address the compliance of each governmental interest raised discussed above with justice as fairness. As before, interest (2), the prevention of apparent or actual corruption, is crucial for satisfaction of the requirements of fair value and publicity. Interest (1) is justified on the same grounds as was the FECA's cap on total campaign contributions. I take it to be an integral part of the rights of political participation and voting that citizens must have adequate information to make informed decisions. Because the financial backing of a candidate is necessary for such an evaluation, these rights cannot be adequately guaranteed with public access to disclosure reports, as the FECA guaranteed. Finally, the enforcement interest described by (3) is a necessary correlate of the (1) and (2). It was already stated that the prevention of actual corruption is necessary, in the Rawlsian scheme, to guarantee the fairness of election mechanisms built into a society's basic structure. Given the crucial importance of fairness to justice, the actual ability of relevant institutions to enforce measures to this end is required by justice as fairness.

I will now turn to appellants' challenge to the FECA's system of public financing for presidential elections: specifically, § 6069 of the FECA, which amended Subtitle H of the Internal Revenue Code of 1954.<sup>41</sup> Appellants claimed violations of the First and Fifth Amendments by § 6069; however, the Court finds no merit in these claims and upholds the public financing system. First, it was alleged that, by financing only some candidates (namely, those who elect to choose public financing), the statute promotes some speech over others.<sup>42</sup> The Court rejects this analysis because the First Amendment prevents only the *abridgment* of free

speech, not its *promotion*. Congress is freely entitled to promote political speech, e.g. Congress may finance the construction of a building to be used for hosting political debates if it so chooses. Second, appellants claimed that, because Subtitle H imposes eligibility requirements for public funding (namely, requirements based on fundraising in past elections), the statute violates the Fifth Amendment and Fourteenth Amendment's equal protection guarantees.<sup>43</sup> The Court disagrees that any greater constraint is imposed on ineligible candidates than those who accept public funding. This is a result of the fact that publicly-funded candidates must accept expenditure limits, whereas those limits have been invalidated by the Court for privately-funded candidates.<sup>44</sup> Thus, on the balance, the Court finds that the public financing system actually imposes greater limitations on the campaign efforts of those who accept public funding. Accordingly, § 6069 does not discriminate against minor parties and independents in violation of the Fifth Amendment. The entirety of the public financing system is upheld.

The reasoning here does not directly bear on the project of distributive justice. However, the system of public financing § 6069 puts in place *is* a central concern of the application of Rawls' thought to actual society. As I indicated earlier, Rawls believes that the public financing of elections may be the one of the most effective practical means by which to guarantee the fair value of political liberty.<sup>45</sup> The reason for this claim are clear: the public funding of a candidate, to the exclusion of private financing, eliminates fair value concerns over influence solicited by monetary contributions. The need for contribution disclosure is thus also erased by this system for those who choose it. In addition, the *Buckley* decision leaves in place expenditure limits on publicly-funded campaigns, as such funding (and thus the limits) are accepted voluntarily. Accordingly, all of the concerns relevant to justice addressed by the FECA are solved, resolutely, by public financing. Of course, justice as fairness cannot be fully realized in this regard so long

as some (or in the current case, most) candidates do not choose public financing. As I will argue in Chapter V, the output of this consideration will require, in a Rawlsian scheme, mandatory public financing for all federal elections. I will discuss the plausibility of this claim at that time.

In conclusion, I have identified the various divergences and conformities of the *Buckley* decision with justice as fairness. I have ignored here the Court's invalidation of the then-existing procedure for FEC member appointment, as the constitutional issue raised by that provision (namely, the scope of congressional authority in appointing officers who hold executive power) is not directly relevant to my project. I have focused exclusively on those parts of the case which pertain to the topic at hand. As will be seen, the themes and legal principles discussed above will carry throughout the next three cases. I will now explore to what degree the Court has maintained or rejected these various principles.

#### **B: *Austin v. Michigan State Chamber of Commerce* (1990)**

In a six-to-three decision delivered on March 27, 1990, the Court upheld a Michigan statute that directly mirrored the language of the FECA. The case would profoundly shape the Court's jurisprudence on campaign finance until *Citizens United v. FEC* twenty years later. The majority opinion, which I will now explore, was authored by Justice Thurgood Marshall.

At issue was § 54 (1) of the Michigan Campaign Finance Act of 1976, which prohibited "corporations from making contributions and independent expenditures in connection with state election campaigns".<sup>46</sup> § 54 (1) essentially followed in the tradition of the Tillman Act and, most proximately, the FECA, although the prohibition was limited only to state election campaigns. The Michigan State Chamber of Commerce challenged the constitutionality of *only* the expenditures portion of the provision under the First and Fourteenth Amendments. The constitutionality of relevant federal law banning direct corporate expenditures was not

challenged in *Buckley*, and so the Court's decision here bears on that issue. Following *Buckley*, the Court applies the strict scrutiny standard in this case, and thus must determine 1) whether the statute infringes on First and Fourteenth Amendment protections, and if so, 2) whether the statute is narrowly-tailored to achieve a compelling governmental interest.<sup>47</sup>

The Court first considers the challenge on First Amendment grounds. Following *First National Bank of Boston v. Bellotti* (1978), the Court determines that independent expenditures made by a corporation's general treasury funds do constitute speech. Because § 54 (1) prohibits such speech, the provision is constitutionally firm if and only if it is narrowly tailored to serve a compelling interest. Now, under Michigan law (and federal law), corporations were allowed to indirectly support election campaigns by establishing a "special segregated fund".<sup>48</sup> General treasury funds could be used only to finance the administration of the segregated fund, not to fill its coffers directly. Thus, both federal and Michigan law allowed corporations to advocate for or against candidates indirectly. Following *Massachusetts Citizens for Life, Inc. v. Federal Election Commission* (1986), the Court finds that both 1) the ban on direct corporate independent expenditures, and 2) the financial requirements for establishing a segregated fund, constitute burdens on the corporation's First Amendment freedoms.<sup>49</sup> As such, if the statute is to be upheld, it must meet the standard of strict scrutiny.

To make that determination, the Court considers that State's claim that the danger of apparent or actual corruption constitutes a compelling interest. The Court finds that, while this familiar justification may be sufficient in some cases, the interest achieved by the statute is of a different variety. Instead, the *Austin* Court determines that § 54 (1) seeks to prevent the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form".<sup>50</sup> Essentially, the Court finds that the very nature of state-chartered corpor-

ations, along with the benefits and privileges that arise therefrom, poses a danger to the fairness of election campaigns. Corporations possess the “special advantages... [of] limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets”, while individuals and non-corporate groups lack these benefits.<sup>51</sup> Accordingly, corporations hold an unfair advantage over individual citizens in shaping the outcome of elections.

In the Court’s view, this imbalance runs contrary to basic democratic ideals and will tend to do damage to the ‘representative’ quality of our system of governance. In addition, the statute at hand seeks to address this wrong not by silencing the ‘voices’ corporations, but rather by constraining them to the use of segregated funds. Because the corporations cannot directly contribute to these funds, individuals and non-corporate groups will have to do so. Thus, the statute merely guarantees that whatever ‘speech’ results from the dispersal of these funds will “reflect actual public support for the political ideas espoused” thereby.<sup>52</sup> This aim is, in essence, the interest which the statute seeks to realize. The Court recognizes this governmental interest as being sufficiently compelling. Moreover, the Court finds that § 54 (1), because it prohibits direct corporate expenditures but allows corporations to still voice their views, is “precisely targeted” to achieve its aim.<sup>53</sup> Thus, the statute is narrowly-tailored to serve a compelling governmental interest. The Court also dismisses appellants’ Fourteenth Amendment challenge, which held that the statute’s lack of inclusion of labor union and other organizations violated the equal protection clause. For reasons described above, the Court concludes that the statute’s narrow focus on the dangers of the corporate form was appropriate.<sup>54</sup>

The Court’s determination of the aforementioned compelling interest in this case bears directly on Rawls’ project. Specifically, the Court seems to invoke a notion of fairness that, to some degree, roughly approximates the concept of fair value of political liberty. Contrary to

*Buckley*, the *Austin* Court finds it to be a compelling matter of governmental interest to guarantee the fairness of electoral systems. Where an entity possesses the potential to unfairly assert influence over the outcome of an election, it is constitutionally firm for the relevant legislature to address the imbalance. In this way, the legislature ensures the ‘fair value’ of the power of each individual to exert influence over the political process. This in turn produces a system whereby the basic liberty of political participation is guaranteed its fair value for all natural persons. Now, it is important here not to overstate the compliance of the Court’s reasoning with justice as fairness. Certainly the Court does not reason that the society’s accepted principles of justice require a general guarantee of fair value for all political liberties. However, in my view, the Court’s invocation of fairness as a compelling interest *in itself* seems to coincide with the spirit of Rawls’ view.

However, another aspect of the Court’s reasoning runs contrary to justice as fairness. Reiterating a worry first voiced in *Buckley*, the Court rejects Justice Scalia’s claim that the Michigan statute amounts to an attempt to “equalize the relative influence of speakers on elections”.<sup>55</sup> The implication here, as it was in *Buckley*, is that ‘equalizing’ measures are not sufficient to justify constraints on First Amendment freedoms. The trend of the unilateral rejection of such measures will continue throughout the Court’s jurisprudence. Now, this trend seems to be largely at odds with the First Principle and, specifically, the guarantee of fair value. In a sense, justice as fairness *does* require the equalization of the value attached to the various political liberties. However, these two claims may perhaps be reconciled. The *Austin* Court rejects any attempt to equalize the “influence” of individuals; here, I interpret this term to mean the *actual influence that individuals assert over the outcome of elections*. Because Rawls’ project is not that of producing an *outcome*-based theory, we might say that Rawls also rejects the need



for such an aim. Rather, justice as fairness requires a basic structure that equalizes the *potential* influence of speakers on elections. In other words, citizens must have roughly-equal chances at being able to shape the outcomes of elections. Whether or not the *Austin* Court would accept such a reformulation is largely a speculative question. Ultimately, I will conclude that the notion of ‘fair value’ is at least largely consistent with the Court’s reasoning in *Austin*.

The majority opinion in *Austin* marks a significant departure from *Buckley* in the Court’s reasoning on issues of campaign finance. While the underlying foundation remains the same—that is, the recognition that strict scrutiny will be required as a threshold condition for campaign finance reformative measures—the *Austin* decision broadens the parameters of acceptable limitations on First Amendment protections in this regard. This trend will continue in the next case discussed.

### **C: *McConnell v. Federal Election Commission* (2003)**

As described above, the *McConnell* case consisted of a number of combined challenges to the constitutionality of the BCRA of 2002. Because almost all of the major provisions of the statute were challenged by appellants, the Court’s opinion is long and complicated, with the authorship of the opinion divided among four separate justices. As such, I will not attempt here a section-by-section critique of the opinion of Court, as has been done for the other three cases under examination. Instead, I will explore the broad contours of the Court’s reasoning regarding the most important provisions of the BCRA.

The most important provisions of the BCRA are found within Titles I and II of that statute. These measures include various provisions intended to: 1) discontinue the sweeping use of ‘soft money’ in federal election campaigns, and 2) regulate the financing and distribution of ‘electioneering communications’.<sup>56</sup> New FECA § 323 (as amended by the BCRA) generally

prohibits the solicitation and distribution of soft money in federal election efforts, and the major provisions of this portion of the BCRA are upheld by the Court. In doing so, the majority rejects appellants' facial First Amendment challenge to the constitutionality of § 323. The Court here applies the "less rigorous standard of review... [of] 'closely drawn' scrutiny", as differentiated from strict and exacting scrutiny.<sup>57</sup> Closely drawn scrutiny is applicable to § 323 because this provision of the BCRA largely deals with the solicitation of soft money contributions, rather than expenditures. (The sweeping prohibitions on soft money solicitation enacted by § 323 generally negate the possibility of soft money expenditures in the relevant circumstances). As first described by the Court in *Buckley* and discussed above, contribution limits involve a relatively-minor infringement on speech because the amount set for contributable money does not directly affect one's ability to vocalize support for a candidate. Once more, the governmental issue offered to justify this minor limitation in § 323 is the prevention of actual or apparent corruption.<sup>58</sup> The Court finds this interest to be sufficient to satisfy the standard of closely drawn scrutiny. The Court also rejects appellants' claim that Title I exceeds congressional authority to regulate state elections<sup>59</sup> and dismisses the argument that Title I violates the Fourteenth Amendment's equal protection clause.<sup>60</sup> The latter claim asserted that the BCRA discriminates against political parties in favor of non-party groups (i.e. special interest groups); however, the Court found that, in many cases, the BCRA actually favors organized parties. Accordingly, the major soft money provisions of the BCRA are upheld by the Court.

The BCRA also amends FECA § 304, which sets forth disclosure and reporting requirements for media communications. Intending to close the 'issue advocacy loophole', § 304 broadens the scope of existing law to regulate all "electioneering communication".<sup>61</sup> The term here is defined as any media communication which 1) "clearly identifies a candidate", 2) is aired within sixty or

thirty days of a general or primary election, respectively, and 3) is “targeted to the relevant electorate”.<sup>62</sup> Appellants alleged that the term conflates ‘issue’ and ‘express’ advocacy, where the latter is defined (according to *Buckley*) by the use of ‘magic’ words’, and asserted that the First Amendment right to the former category is inviolable.<sup>63</sup> The *McConnell* Court rejects this distinction, holding that the *Buckley* decision on this matter was merely one of statutory interpretation. The Court finds that the use of ‘magic words’ does not define express advocacy and that replacement term ‘electioneering communication’ suffers from no concern over vagueness or overbreadth.<sup>64</sup> Accordingly, the Court upholds the constitutionality of amended § 304’s regulation of such communications. For the same reasons given by the *Buckley* Court in upholding the FECA’s disclosure requirements (namely, the presence of the three compelling governmental interests discussed above), it also upholds the BCRA’s disclosure provisions regarding electioneering communications.

The Court also upholds BCRA § 203, which prohibits the use of corporate or labor union general treasury funds in the financing of electioneering communications within sixty days of general elections and thirty days of primary elections.<sup>65</sup> As in the *Austin* case, segregated funds may still be used to this end. Once more, the Court recognizes that this provisions burdens corporate speech, but recognizes the existence of compelling governmental interests to license the limitation: the prevention of apparent or actual corruption, as well as the dangers of the corporate form.<sup>66</sup> This provision of the BCRA will be of particular importance to the next (and final) section of this chapter, in which I will discuss the *Citizens United* decision. In that case, the Court will overrule its decision here regarding § 203. It is important to note here that the Court does recognize the existence of a danger of apparent or actual corruption that is sufficiently compelling to limit corporate speech in the form of electioneering communications, which

constitute independent campaign expenditures. The Court further finds on the record that, prior to the BCRA's adoption, the number of corporate-financed electioneering communications had rapidly increased.<sup>67</sup> For the *McConnell* Court, this trend presented a clear danger sufficient to satisfy the conditions of the strict scrutiny standard.

I have outlined here the Court's reasoning in upheld the most important provisions of the BCRA. I have necessarily excluded discussion of many points of contention within *McConnell*, especially those found within the Court's consideration of Titles III-V. However, the constitutional challenges to the two major aims of the statute- that is, the regulation of soft money and electioneering communications- have been addressed. I will now turn to the Rawlsian critique of the Court's decision on these major points. The comparison here largely follows from what has been said before: for FECA § 323 and BCRA § 203, the Court recognizes a compelling governmental interest constituted by the danger of apparent or actual corruption. For FECA § 304, the burdens on speech produced by disclosure requirements are justified by appeal to the same interests as maintained to that effect in *Buckley*: 1) the public availability of information of candidates' finances; 2) the danger of apparent or actual corruption; and 3) the ability of enforcement agencies to detect violations of the statute. In my discussion of the *Buckley* and *Austin* cases, I elaborated on the compliance of each of these justifications with the first principle. The congruence also holds true here. Regarding the two provisions of the BCRA that *McConnell* does invalidate, these measures are generally-speaking so minor as to not merit extensive consideration.<sup>68</sup> Thus, we may that the Court's reasoning in this case is largely consistent with both past precedent and with justice as fairness. This claim should not be interpreted to mean that the regulatory regime established by the BCRA in 2002 and the *McConnell* decision in 2003 modeled justice as fairness, even approximately. While the BCRA

certainly made significant strides toward ensuring a *fairer* value of political liberty for U.S. citizens, it fell far short of altering the basic structure of American society so as to realize Rawls' favored conception of justice. The reformative measures that *would* be required to do so will be discussed further in Chapter V.

I will conclude this section with a few further remarks on the reasoning exhibited by the majority in *McConnell*. It should be apparent from my above discussion that the Court does not speak of fairness, or of ensuring the fair potential for political influence, as a justification for constraints on monetary speech. That particular feature of the *Austin* decision is conspicuously absent in this case. As will become apparent following my exploration of *Citizens United*, the *Austin* decision is somewhat aberrant in that respect. It is, in my view, the point at which the Court's jurisprudence on campaign finance most closely approaches the relevant portions of Rawls' theory of justice. The reasons for its absence in the other three cases are largely unclear, although I will venture a speculative claim to that effect. On my reading, the notion of the fair potential for influence strays too near the concept of an 'equalizing' measure, which the Court has routinely rejected as a compelling governmental interest. What conclusion may we draw from this claim? While the Court's reasoning in campaign finance cases at times complies with justice as fairness, the spirit or motivation behind the former is essentially non-Rawlsian.

#### **D: *Citizens United v. Federal Election Commission* (2010)**

I turn now to the most recent case decided by the Court in the area of campaign finance, *Citizens United v. Federal Election Commission* (2010). The case resulted in a split decision and a majority opinion authored by Anthony Kennedy. The ultimate effect of the decision was the invalidation of the major provisions of BCRA § 203, a result which overturned *Austin* and one portion of *McConnell* (namely, Part VII, which dealt with § 203). Having already described the

material facts of the case, I will now proceed with my critique of the majority opinion.

At issue are three portions of the BCRA: § 203, which modified § 441b of the FECA to prohibit corporate/union funding of electioneering communications, and BCRA § 201 and 311, which set forth reporting and disclosure requirements for such communications.<sup>69</sup> Appellant corporation Citizens United challenged the facial constitutionality of § 203 and raised an as-applied challenge also, alleging that *Hillary* (the communication it sought to distribute) was not properly governed by § 203. The latter challenge largely involves problems of statutory interpretation that are not directly relevant to the project at hand. As such, I will ignore the Court's consideration of the as-applied challenge, found in Parts I-II of the majority opinion. It will be sufficient to say that the Court determines that *Hillary* "qualifies as the functional equivalent of express advocacy" funded directly by a corporation's general treasury, which is prohibited for distribution by both FECA § 441b and BCRA § 203.<sup>70</sup> The Court also finds that Citizens United qualifies as an economic corporation (albeit a non-profit) and thus does not qualify as an ideological corporation exempted from § 441b (as appellants in *Massachusetts Citizens for Life, Inc. v. FEC* (1986) were so considered).<sup>71</sup> The Court declines to "carve out an exemption to § 441b... for nonprofit corporate speech funded overwhelmingly by individuals", such as *Hillary*.<sup>72</sup> A final non-facial issue concerns appellants' alleged waiver of their earlier facial challenge to the constitutionality of BCRA § 203 and FECA § 441b on First Amendment grounds. While it is apparent that Citizens United, to some degree, abandoned the facial challenge in initial oral argument, the Court invokes precedent<sup>73</sup> to consider the constitutionality of these two provisions regardless. As such, appellants' as-applied challenges are dismissed and the Court turns to consideration of the facial challenge.

Following *Buckley*, the Court interprets BCRA § 203 (and thus, the amended § 441b) as a

limitation on the amount that an entity can spend on communication and, thus, a constraint on the amount of speech it may produce.<sup>74</sup> § 203 thus imposes a sort of expenditure ceiling on independent campaign spending by corporations and labor unions, although in most cases, the ceiling is set at zero dollars. In *Buckley*, ceilings of this sort were found unconstitutional when imposed on political campaigns themselves; *Austin* found them to be constitutionally firm when applied to corporations and unions. The Court will now reconsider the *Austin* ruling to determine whether the reasoning in *Buckley* should be extended to independent expenditures as well. Accordingly, the strict scrutiny standard will once more be applied, and if the provision is not found to be narrowly-tailored to achieve a sufficiently compelling governmental interest, it will be invalidated. Following *Bellotti*, the Court notes that the First Amendment generally prohibits discrimination against classes of *speakers* as well as the speech itself.<sup>75</sup> The Court finds § 203 to fulfill this description. In *Austin*, as described above, the Court found a compelling interest (namely, the dangers of the corporate form) which licensed a speaker-based discrimination. The reversal of *Austin* in this case is primarily due to a rejection of that rationale.

The governmental interest featured in *Austin*, that which I have referred to as prevention of the ‘dangers of the corporate form’, is here termed the “antidistortion interest”.<sup>76</sup> This refers to the *Austin* Court’s finding that the corporate form itself poses the danger of distorting the influence of public opinion on election outcomes. The *Citizens United* Court rejects this interest as sufficient for satisfying strict scrutiny. The Court notes that this rationale could be applied to limit the speech of corporations in areas other than campaign finance, such as the publication of a book.<sup>77</sup> Because the antidistortion interest does not invoke, for example, the appearance or actuality of corruption, it is not specific to matters involving election campaigns. The Court thus recognizes a substantial danger to the First Amendment’s protection of corporate freedom if the

*Austin* rationale were to be maintained. The antidistortion interest could, presumably, also be extended to license limitations on the speech of media corporations, thus substantially interfering with the ability of the press to disseminate information.<sup>78</sup> Although the BCRA exempts media corporations from § 203, the acceptance of *Austin* would nevertheless allow Congress (in theory) to undo the exemption and seize control of the press.<sup>79</sup> However, perhaps most important of all in the Court's reasoning is that which was already discussed: the fact that the antidistortion interest licenses First Amendment restrictions based on the speaker, not the speech. While certain forms of speech are certainly not protected by the constitution (e.g. obscenities), the Court finds speaker-based restrictions to be "aberrant" and "unprecedented" in its jurisprudence.<sup>80</sup> Accordingly, the Court rejects the antidistortion interest as a compelling governmental interest. In doing so, the Court invalidates both BCRA § 203 and FECA § 441b, as the general ban on independent corporate and labor union expenditures cannot be maintained. The *Buckley* reasoning on expenditure ceilings in other circumstances is thus applied here, resulting in the overruling of *Austin* and Part VII of *McConnell*.

The Court further considers, and upholds, the constitutionality of BCRA § 201 and 311, the statute's disclosure and reporting requirements. It is not necessary to discuss here the relevant portions of the Court's opinion. These provisions are upheld largely by the same rationale employed in *Buckley* and *McConnell*: that preventing the appearance or actuality of corruption, along with the importance of publicly-accessible financial information and enforcement mechanisms, satisfies the standard of strict scrutiny.<sup>81</sup> That being said, I will now turn to my Rawlsian critique of the Court's decision regarding § 203. As the majority notes, the Court is here confronted with "confronted with conflicting lines of precedent": that of *Austin* and that of *Buckley*.<sup>82</sup> As I have previously noted, the line of precedent exemplified in *Austin* most closely



approaches the reasoning underlying justice as fairness. As such, the Rawlsian mode of criticism regarding this case should be initially obvious. Whereas the so-called antidistortion rationale roughly approximates Rawls' notion of fair value, it cannot be dismissed as contrary to political liberty. Instead, such an interest *must* be achieved so as to guarantee the full force of the First Principle. Ultimately, we have arrived a stark divergence point between Rawlsian and Court reasoning: the jurisprudence of the latter has, following *Citizens United*, reject a centrally-important requirement of the theory of the former. Thus, we may say that, in the relevant Rawlsian sense, the Court's decision is unjust.

Of course, this blanket claim is over-simplistic and requires further elaboration. Now, the concerns that the majority raises over the antidistortion rationale are certainly valid. If the rationale *were* to license such restrictions on liberty, it would be plainly unjust. However, I believe that the Court here misreads the *Austin* decision in an important way. The compelling interest identified in *Austin* is not merely that of preventing the distortion of opinion by corporations. Rather, the *Austin* Court held that the corporate form, by virtue of the greater benefits it confers on its possessors, *unfairly* empowers corporations with a greater potential for influence than that which is granted to individual citizens. The notion of fairness is, I believe, crucial to an understanding of the *Austin* opinion. It is also that which ties the antidistortion rationale most closely to Rawls' favored conception, justice as fairness. Given this understanding, we can see that *Austin* does not after all license the grave injustices that the majority notes here. The publication of a book by a corporation, or the dissemination of information by a media corporation, cannot be said to represent an unfair imbalance of potential influence. Why is this the case?

The distinction results from the fact that the antidistortion interest, properly construed, models

the notion of fair value. According to the First Principle, a fully adequate and universally-compatible scheme of liberty is to be achieved, subject to the constraint of fair value. It would be unjust, given the adoption of this principle, to limit liberty further than what is required by fair value. The above troubling cases are not, on my view, required to guarantee the fair value of political liberty. To put the point more precisely, a basic structure in conformity with justice as fairness may contain institutions designed to limit corporate independent campaign expenditures, but it would not require constraints on the speech of media corporations (generally). Now, certainly an ideal society well-ordered around justice as fairness would go farther, in the area of campaign finance, than to merely restrict corporate independent expenditures and impose general expenditure ceilings. To determine the features of such an ideal basic structure, we will return once more to realm of theory in the next chapter. With my above critique of current United States Supreme Court jurisprudence on campaign finance, we have identified many of the main problems that prevent realization of justice as fairness in modern America. I shall now attempt to more broadly define the parameters of what a Rawlsian program for reforming the U.S. system of campaign finance would entail.

## **Chapter V: Rawlsian Program for Campaign Finance Reform**

In the last two chapters, I detailed many of the problems of justice facing the current U.S. system of federal campaign finance. In this chapter, I will outline in broad strokes a proposal for reform that will, on my understanding of Rawls, realize justice as fairness in this particular context to a much higher degree. I will begin with a review of the relevant secondary literature on the subject matter at hand. After reviewing the proposals set forth by various philosophers, I will determine which (if any) of these accounts seems most plausible. Finally, I will draw from these commentators' work to produce the basic outline of a program for reform.

It is important to note at the outset that both my remarks and those of the philosophers under scrutiny will apply only to the modern American context. I will not consider questions of how justice as fairness should best be realized in the campaign finance systems of other nations. The program of reform that I will offer will not be neatly applicable to problems of justice in other countries, even other advanced, industrialized Western democracies. The task at hand is a fact-sensitive inquiry. The history, culture, economic standing, technological prowess, etc. of a society must be taken into direct consideration when performing such an analysis. It may be speculated that the proposals I will advance here will roughly apply also to relevantly similar nations, i.e. Western European constitutional democracies. This may be the case, but I will not consider such a topic here. Instead, I will focus solely on the question of reforming the U.S. system of federal campaign finance so as to best realize justice as fairness.

## **A: Review of Secondary Literature**

### **1. Joshua Cohen- “Money, Politics, Political Equality”**

In this paper, Cohen sets out, much as I have done, to critique Supreme Court jurisprudence on issues of campaign finance. Cohen’s central thesis holds that the Court has, in *Buckley* and subsequent cases discussed above, provided an “unduly narrow conception of democracy and the role of citizens”.<sup>1</sup> To prove this point, Cohen defines a principle of political equality to govern the fair terms of collective decision-making. He then applies this principle to the question of U.S. federal campaign finance, finding that the Court’s decisions in the relevant cases fail to realize the principle. This principle has three components: “1. *equal rights of participation*...; 2. a strong presumption in favor of *equally weighted votes*; and 3. *equal opportunities for effective political influence*...”<sup>2</sup> As Cohen makes clear, he strongly follows Rawls in formulating such a principle. Indeed, the three components of the principle may be said to articulate a limited case of Rawls’

First Principle: namely, the parts of the First Principle which apply to political liberty.<sup>3</sup> The first component merely restates Rawls' political liberties, as listed above in Ch. II and discussed further in Ch. IV. The second component flows naturally from the listing of the right to vote among the political liberties, along with the guarantee that this right be distributed equally. The third component is of the most interest to us here: as the author makes clear, this is Cohen's equivalent of Rawls' notion of the fair value of the political liberties.<sup>4</sup> In sum, we can read Cohen's principle of political equality as a limited case of the reading of the First Principle that I have offered throughout this paper.

Cohen interprets fair value in the same fashion as I did above: fair value requires "that people who are equally motivated and equally able to play this role [that of the political participant]... ought to have equal chances to exercise such influence".<sup>5</sup> Once more, the equality of influence guaranteed here is not one of *actual* outcome, but rather one of *potential* outcome. Relevantly-similar persons must have roughly-equal chances at influencing the political system to a similar degree. The demands of such a principle will be great; after all, it is not enough to merely meet a threshold condition (i.e. a guaranteed minimum) of opportunity of influence.<sup>6</sup> Moreover, it is not enough to guarantee equal opportunity for influence over just the election of office-holders. Instead, a just society must ensure equal chances for influencing the decisions of these officer-holders after the election as well.

Much as I have done, Cohen identifies the central problem with the current system of campaign finance as being one of fairness. The rights of participation and voting enshrined in the First Principle are, first and foremost, rights to exert influence. However, "when money is as important a political resource as it is in our current system", the power of potential influence is not fairly distributed.<sup>7</sup> This is to say that the fair value of the political liberties is not guaranteed.

Thus, the root problem is the harmful entanglement of money and political influence.

Accordingly, Cohen favors a robust system of campaign finance restrictions that would limit expenditures *as well as* contributions, in opposition to *Buckley*. Cohen considers the *Buckley* Court's reasoning in overturning the FECA's expenditure ceilings on the grounds that such provisions 1) limit the *quantity* of speech produced, and 2) do so absent a compelling interest to that end. As should be apparent, he disagrees with such a conclusion. As I described above, a compelling interest in limiting expenditures exists in the notion of fair value. Moreover, Cohen finds nothing objectionable in the mere limitation of the quantity of speech, so long as consists in a "content- and viewpoint-neutral regulation".<sup>8</sup>

The most powerful argument against a limitation on quantity of speech claims that such a measure would be contrary to "the ideal of democracy itself".<sup>9</sup> The claim is this: expenditure limits are based on a collective determination of *how much* speech should be allowed, when in a democratic system, individual citizens should make such a decision. The legislature should not decide for each citizen how much information on candidates is required to make an informed judgment. Cohen produces two responses to this argument. First, the rationale behind his defense of expenditure limits is not that *this* party should decide the permissible quantity of speech rather than *that* party. Instead, the argument for expenditure ceilings is based on appeal to a "principle of political fairness", i.e. the notion of fair value.<sup>10</sup> As such, it is inaccurate to characterize his proposal as requiring a transition of responsibility from individuals to the collective. Second, while the objection appeals to the notion of democracy, it fails to consider one central aspect of the democratic ideal. The objection (and *Buckley*, in Cohen's view) "casts citizens principally in the role of audience", whereas citizens in a democracy are also "agents, participants, [and] speakers".<sup>11</sup> Expenditure limits do not constrain the role of citizens as spectators; instead, they

guarantee the fair value of their role as active participants in the political process. Citizens do not (or should not) merely sit back and watch the process unfold, but should rather engage fully in the election and decision-making of their representatives. However, in Cohen's estimation, the current system's wholesale dependence on money prevents *most* citizens from taking up this role. It is this imbalance which fair value-aimed expenditure limits are intended to correct.

On the whole, Cohen's analysis of the problems at hand is consistent with the conclusions I have already reached in this paper. However, as he freely admits, he does not "defend a particular proposal for reforming the system".<sup>12</sup> Cohen simply finds fault with the Court's reasoning and argues for the restatement of those FECA provisions that the Court struck down in *Buckley*. As such, Cohen's proposal for campaign finance reform includes, at the very least, 1) strict contribution limits, 2) strict expenditure limits, and 3) disclosure and reporting requirements. In my view, the achievement of (1), (2), and (3) will not render the system sufficiently just. While Cohen defends the notion of a voluntary system of public financing, he does not call for the installation of a *mandatory* public finance system. It is for such a program of reform that I will argue later in this chapter.

## **2. David Estlund- "Political Quality"**

Estlund sets out here to defend what he terms the "epistemic approach" to the structuring of political systems.<sup>13</sup> Such an approach seeks to reconcile the tension between political equality and the "quality of democratic procedures";<sup>14</sup> that is, between political *equality* and political *quality*. In other words, Estlund is concerned with a conflict between equal access to participation in democratic processes and the ability of those processes to produce good results. Estlund focuses on the epistemic value of democratic institutions, or "their tendency to produce decisions that are correct by the appropriate independent moral standards".<sup>15</sup> On this view,

democratic processes, such as elections, are seen as mechanisms by which a body of persons may make decisions of collective importance. According to Estlund, the *quality* of citizens' rights of participation (i.e. the value of the political liberties) must be guaranteed to some degree, or else these processes will fail to reflect collective decision-making. However, he denies that political quality must be guaranteed equally, or roughly equally, as Rawls' notion of fair value would require. In other words, Estlund claims that we should "accept substantive inequalities of political input" in order to ensure a higher quality of democratic institutions as a whole.<sup>16</sup>

It should be clear from these prefatory remarks that, unlike Cohen, Estlund does not strictly follow Rawls in his thinking. Both Estlund and Rawls require of democratic societies the 'formal' equality of political liberties, i.e. that each person has an equal right to freedoms of speech and association, to vote, to participate in politics, etc. However, they diverge on the question of 'substantive' equality: whether the value of these liberties must also be guaranteed equally. This is to say that Estlund denies the need for the 'fair value' provision of the First Principle.<sup>17</sup> Now, it was said earlier that it is not my aim in this paper to defend Rawls' view from criticism, but rather to apply his theory to the particular case of campaign finance. This remains the case. I discuss Estlund's paper here for two main reasons. First, his view remains largely consistent with that of Rawls' (at least in the respects relevant to my project) with the single exception of fair value. Second, Estlund's discussion of a scheme of campaign finance *absent* a fair value guarantee will be instructive by contrast. Given the central importance of fair value to my critique of the current campaign finance system, such a contrast will better highlight the reformative measures that will be necessary if the fair value of the political liberties is to be realized.

Estlund focuses on the question of whether potential influence over the outcomes of

democratic processes should be made roughly equal. As such, he addresses the same core problem that both Cohen and the *Austin* Court discuss. He makes it clear that political egalitarians- those who, like Rawls, would guarantee both formal and substantive political equality- do not require equalization of all inequalities in potential influence. Natural inequalities, such as “social connections, good looks, debating skill,” etc., are not subject to just arrangement under a society’s basic structure and thus will not be considered.<sup>18</sup> As with Cohen, his view is narrowly constrained to consider only “*the insulation of political influence from differential wealth or social rank*”.<sup>19</sup> Estlund rightly takes the First Principle’s guarantee of fair value to principally concern these inequalities, and thus the criticisms of Rawls he offers bear directly on the problem of campaign finance. The shape of his argument is this: some inequalities in political quality will, if tolerated, improve the output of democratic collective-decision procedures.

The force of the argument derives from Rawls’ Difference Principle, under which economic inequalities are permissible so long as they improve the situation of the least-advantaged social group. Where differences in wealth and income will improve the condition of *all* people in a society, there is no reason not to accept such inequalities. After all, the least-advantaged under such a scheme will find themselves in better circumstances than they would if an egalitarian scheme were put in place. Estlund argues that the same will be true of the political liberties: we should allow inequalities in the substantive worth of political liberty if it will improve the value of those liberties for the least-advantaged.<sup>20</sup> Estlund believes that some such inequalities will improve the epistemic quality of democratic institutions; that is, that they will lead to more just outcomes from collective decision procedures. If such an arrangement is acceptable in regard to economic and social standing, why should it not be so for political liberty?



I will not provide a summary here of Estlund's arguments as to why an unequal distribution of substantive liberty would be Pareto-superior to one in which fair value is guaranteed, i.e. a basic structure governed by justice as fairness as described. Once more, it is not my purpose to defend Rawls from such criticisms or to determine the strength of Estlund's objections. I should note that, in my view, Estlund is incorrect in claiming that the positing of fair value in Rawls' work derives solely from the empirical argument that inequalities in political quality will not increase total political liberty. I believe that the First Principle will require rough equality in substantive liberty even if this claim were false. While parties to the original position would be able to accept a reduction in economic equality to ensure greater prosperity for the least-advantaged, they would not be willing to do the same in the case of liberty. This assumes that the parties place liberty in a more favored position than wealth, income, or status; hence the lexical ordering of the Two Principles. Of course, if this is correct, it merely shows that Estlund's criticisms are not internal to Rawls' theory. The view he espouses may be superior to that of Rawls by an external comparison between the two theories. I will now examine the implications for Estlund's view for the issue of campaign finance.

Estlund asks us to consider the equal arrangement of substantive political liberty (i.e. one governed by fair value) with the highest possible degree of epistemic quality for its democratic institutions. By *epistemic quality*, he means the arrangement with the greatest total amount of input into the political process, such as expressive speech. He terms such a distribution "*E-maxx*".<sup>21</sup> The question at hand is this: does an unequal arrangement of substantive political liberty exist that will produce democratic processes of greater epistemic quality than *E-maxx*? If so, his arguments above would entail that such an arrangement should be adopted. Estlund proposes one possible *hypothetical* distribution where this would be the case. He asks us to

consider a society currently at the *E-maxx* level, that is, where potential political input is equally guaranteed.<sup>22</sup> In this society, campaign expenditure and contribution limits are firmly set. A new “Progressive Voucher” system is introduced, whereby campaigns may spend more than previously allowed.<sup>23</sup> The first Progressive Voucher is given freely to all campaigns and may be redeemed for a certain amount  $x$ . Candidates may purchase as many vouchers as they wish, but all vouchers will be worth  $x$  dollars. All vouchers after the first must be purchased at the following rate: voucher 2 =  $(x + 1)$  dollars; voucher 3 =  $(x + 2)$  dollars, etc. The money collected by the government from candidates who purchase multiple vouchers is then used to finance the first voucher, available for free to all candidates. Such a system features an unequal distribution of the worth of the political liberties, i.e. the right to influence election outcomes. Candidates who collect more funds may purchase more vouchers (we assume that contribution limits are set a relatively low amount). However, such a system increases the total amount of input into the political process without producing any gratuitous inequalities in substantive value. Candidates must still collect the money used to buy vouchers from individual contributors, and the low contribution limit ensures that candidates who purchase many vouchers will do so only after collecting funds from many individuals. In Estlund’s view, such a hypothetical arrangement improves the democratic process as a whole, even though fair value is not guaranteed.

Such a system would clearly be incompatible with justice as fairness on the interpretation that I have offered thereof. However, Estlund’s work does provide a clear contrast that will be useful in the next section of this paper. In Estlund’s hypothetical system, departure from *E-maxx* only occurs where aggregate input could be achieved by producing inequalities in the value of the political liberties. Specifically, such inequalities arise when differential wealth is allowed to play a substantial role in determining potential influence on the political process. Estlund does not

consider (and for good reason, I believe) the possibility of allowing social standing or other factors to influence potential input. As such, his paper serves to highlight the central target of my own: the role of inequalities of wealth in reducing the equality of substantive value. Thus, if we are to produce a system of campaign finance compatible with justice as fairness, we must eliminate (to a degree of practical possibility) the influence of differential wealth on elections and political decision-making. The removal of such influence is, in my view, an essential component of the effort to guarantee the fair value of the political liberties. Following my brief remarks to follow, I will consider how the modern American system of campaign finance could be reformed so as to remove the influence of differential wealth. If citizens are to have roughly-equal chances at influencing the democratic process, stricter measures than have been adopted so far must be put in place. As I will stress, this arises principally out of a concern for fairness.

### **3. Other Remarks**

I take these two papers, those of Cohen and Estlund, to be broadly representative of the current literature on the subject at hand. Few authors have written specifically on the question of a Rawlsian approach to campaign finance reform; where they have, it has mostly been in passing during more general commentaries on Rawls. Furthermore, I have found no work that advances a specific proposal, in compliance with Rawls' theory, to address current issues with the American system of campaign finance. Cohen has simply criticized existing Court jurisprudence on the subject from a Rawlsian perspective. Estlund, although advancing a more specific proposal, departs from Rawls in a significant way, and his voucher system cannot be taken to be Rawlsian in character. As such, I take it upon myself to propose relevant reformative measures that are intended, first and foremost, to best realize justice as fairness in the current context.

Eric Freedman has also examined the status of Supreme Court jurisprudence on this issue,

finding, much as I have, a large discontinuity between Rawls' philosophy and the Court's reasoning.<sup>24</sup> Freedman also touches on possible means by which justice as fairness could be better realized in the context of campaign finance. However, he focuses exclusively on campaign contribution limits, setting the issue of expenditure limits to the side.<sup>25</sup> Although Freedman does claim that hard money contribution limits are set too high to realize fair value, the Court has consistently upheld the constitutionality of such limits (regardless of the actual dollar amount). As such, discussion of his argument to this point would add little to our current project. Moreover, the proposal that I will raise in the next section of this paper will render the need for adjustments in contribution limits moot. In addition, Freedman argues for the necessity of regulating soft money contributions as well as hard money donations.<sup>26</sup> Because this paper predated the adoption of the BCRA and its soft money regulations, these points also are now essentially moot. Accordingly, I will go no further in explicating Freedman's paper.

Justin A. Nelson has argued that Rawls and others (e.g. Sunstein, Dworkin) stray from the correct path of critique by arguing that *Buckley* should be overruled.<sup>27</sup> While these authors (and myself) have focused on criticizing the ruling in *Buckley* and subsequent cases, Nelson claims that an economic approach is preferable. He argues that we should conceive of the realm of campaign finance as a "marketplace", in which both a supply side (campaign contributors) and a demand side (politicians who desire contributions to run campaigns) exist.<sup>28</sup> Too much attention has been given in the campaign finance debate, says Nelson, to only the supply side, i.e. to limiting contributions and expenditures. Instead, we should focus our efforts in reducing the 'demand' that causes politicians to seek out financial contributions. I am sympathetic to this analysis of the problem. However, I believe that the proposal I offer below will encompass the concerns of both Nelson and Rawls. In a system of voluntary public funding of elections,

substantial demand may still exist among those politicians who elect not to choose public financing. In a *mandatory* public financing scheme, however, this concern will evaporate.

This concludes my review of the relevant literature on the relation between Rawls' philosophy and the issue of campaign finance reform. As should be clear, relatively little work has been done on this specific subject so far. Even less work has been done regarding a specific (albeit skeletal) proposal for reconciling justice as fairness and the financing of U.S. federal elections. It is to this task that I now turn.

## **B. Proposal for Reform**

In this section, I will first offer an argument as to why a mandatory scheme of public financing should be adopted if justice as fairness is to be best realized in the modern American context. I will next provide a skeletal account of what such a system may look like. I have neither the space nor the expertise for a full policy recommendation in this regard; instead, I will attempt to draw out the broad parameters of a system compatible with justice as fairness.

A few notes on the limits of this proposal: first, I use the word *mandatory* here, as contrasted with *voluntary*. In the current U.S. campaign finance regime, candidates for president (and only for president) may voluntarily submit to a system of public financing for their campaigns. In a mandatory system, by contrast, each candidate for a certain type of office would be required to fund his or her campaign through public funds, to the exclusion of private funds. A mixed system of public and private funding is also possible. This is, to some degree, the system currently in place in the United States for presidential elections. Such a mixed system is *not* what I propose here. Instead, I propose what I call a *mandatory exclusive public financing* (MEPF) system, as contrasted with a *mandatory inclusive* (or *mixed*) system. Moreover, I intend to widen the scope of the existing public funding system to include president, vice-presidential, House, and Senate

elections. In sum, I propose that a mandatory exclusive system of public funding be put in place for all federal elections in the United States.

### 1. Argument for Public Financing

The groundwork for the argument of this section has largely already been laid in the preceding chapters. It is thus only to state the argument in a semi-formal fashion. The conclusion of the argument will be, if sound, that a MEPF system will best realize justice as fairness in this context, as every problem of justice raised so far in this paper may be resolved through the installation of such a system.

I begin first with contribution limits. As we have seen, the Court has left the BCRA and the FECA's contribution limits intact. However, concerns remain (as addressed by Freedman above) that these limits are set too high and that not all forms of monetary donation are covered by existing law. An epistemic problem may also exist here: how are we to know the specific dollar amount that will, if set as a limit, prevent most persons from soliciting influence? Such a determination seems unlikely to ever be correctly made in practice. Moreover, even if we assume that the current limits prevent the *actual* solicitation of influence, it may be that the *appearance* of corruption will still remain. The current outcry over the influence of corporations and monied interests on the outcome of elections certainly seems to indicate as much. A final concern: a system with low contribution limits still requires politicians to solicit funds *en masse* from laypersons. This means that politicians spend a great deal of time raising funds and attending fundraising events, perhaps to the exclusion of their representative duties. A scheme of low contribution limits will presumably require politicians to spend more time fundraising than a scheme of higher limits, in which they may draw larger sums from smaller numbers of people. Thus, the very existence of contribution limits may do some harm to the quality of our

representative democracy. In a MEPF system, however, these concerns do not exist. Put plainly, such a system prohibits the solicitation of funds from private citizens and organizations. As such, the three worries listed above no longer apply.

I will now turn to the question of expenditure limits. Much attention has been given, both in the Rawlsian literature and elsewhere, to the question of whether these limits should be reinstated. In light of the *Buckley* decision, we must ask: 1) should expenditures from a candidate's own money be regulated, and 2) should total campaign expenditures be regulated? It was said before that justice as fairness requires that both types of limits be put in place, so as to ensure the fair value of the political liberties. Now, consider a scenario in which *Buckley* is overturned and the FECA's various expenditure limits are reinstated. This will prevent the worst cases of inequality in the worth of a candidate's speech, e.g. when a wealthy candidate is able to outspend a less-wealth rival. However, some inequality of the value of political liberty will still exist in such a system. Wealthier candidates will still possess an initial advantage, even if it is lessened to some degree. Moreover, these expenditure limits will not address the primary concern noted by Nelson, i.e. the increasing 'demand' of money for politicians. Money will still be essentially entangled in the system of campaign finance, and, as I have already suggested, the effects of this entanglement are harmful in essence. Expenditure ceilings can only curb the rising costs of national campaigns and prevent gross imbalances; they cannot eliminate the wholesale reliance of politicians on the solicitation of funds. Now, certainly it cannot be denied that the reinstatement of expenditure limits would produce a more just system of campaign finance in the Rawlsian perspective. However, it seems clear that such measures will not produce the *most* just arrangement and will not fully realize the fair value of political liberty. In my view, a MEPF system will better accomplish these two ends. In such a system, expenditure ceilings are simply

unnecessary. When only a certain specific amount of money is allowed to each candidate, the candidates obviously cannot spend more than their allotted amounts. As such, the need for spending ceilings evaporates. In such a system, a candidate's personal wealth or social standing cannot influence the amount of money present in her campaign war chest; thus, these factors cannot influence campaign spending. As such, the value of the potential (not actual) influence of all candidates will be made roughly-equal, and the fair value provision will be satisfied.

In regard to reporting and disclosure requirements, a MEPF system will certainly be no more burdensome than the current regulatory regime, as centered around the FEC. Campaigns will no longer be required to compile and file regular reports that list all relevant information on all contributors who have given more than a certain amount. Individual and organizational contributors will no longer be required to report monetary donations over the allotted amount. The FEC will no longer be required to process, store, and publicize all such data. Instead, the agency will merely need to review claims for public funding from potential candidates and ensure the proper disbursement thereof. Campaigns will simply be required to regularly report expenditures, so as to ensure that public funds are not spent illicitly. It seems clear that the institution of MEPF will not drastically increase or decrease the current burdens on government, citizen, or candidate in regard to disclosure. Now, I acknowledge that this claim is largely speculative and that I lack the proper administrative expertise to fully justify such a conclusion. Nevertheless, even if MEPF did significantly increase the burdens placed on the relevant parties, this is not in itself an objection to MEPF in the Rawlsian view of justice. Certainly the concern for ensuring fair value will override any such prudential concerns as to additional paperwork. Moreover, I think it highly likely that a universal system of public financing will lead to a more public dissemination of information of candidates' finances. If this is correct, then citizens will



have access to more information under a MEPF system so as to make informed judgments on candidates. As I stated in Ch. IV, I take informed decision-making to be a crucial component of the political liberties of voting and participation.

Finally, it is necessary to consider the regulation of independent expenditures in such a system. These concerns do not bear directly on the validity of MEPF, as independent, non-coordinated expenditures must be financed solely by private citizens and organizations. I take my discussion of *Citizens United* in Ch. IV to require a general prohibition on electioneering communications and independent expenditures by corporations and labor unions. The reasoning that led to that conclusion stands and is not affected directly by the adoption of MEPF.

Regarding independent expenditures by non-economic entities and natural persons, it was said in Ch. IV that the guarantee of fair value requires the regulation of such spending. This does not imply, however, that such expenditures must be prohibited wholesale. Instead, a general ceiling on aggregate spending by persons during an election cycle, done in non-coordinated support of or opposition to a candidate, must be instituted. This will ensure roughly-equal chances for private citizens and organizations to influence the outcome of democratic procedures. Some may question the distinction made here: why is it the case that fair value requires a prohibition of corporate expenditures, but only regulation of non-corporate private expenditures? The difference lies with the potential for distorted influence that arises out of the corporate form, as the *Austin* Court first noted. Corporations are afforded additional privileges in the context of potential influence by virtue of the corporate form, while private citizens lack these benefits. The concern here is primarily one of fairness, as was stressed before.

In sum, the main problems of campaign finance in the current context may be addressed by contribution limits, expenditure limits, independent expenditure regulations, and disclosure and

reporting requirements. However, a MEPF system addresses all of these same concerns while at the same time better realizing justice as fairness and, specifically, the fair value of the political liberties. Such a system is arguably simpler than the installation of various distinct solutions to the problems raised, and thus more likely to be understood fully by private citizens. It may be said accordingly that a basic structure that includes MEPF will tend toward greater publicity, which in turn will contribute to a greater degree of stability internal to the structure. Moreover, MEPF may be able to address concerns of campaign finance that the other measures leave out, e.g. unregulated soft money donations and the monetary influence of PACs. Because MEPF prohibits non-public contributions to and spending by candidates, the concerns raised by donations of this type will no longer exist. In my view, the elegance of such a system in dealing effectively with so many disparate problems counts in its favor.

It may be objected that a MEPF system too greatly restricts the potential influence of citizens over the outcome of elections. In Rawlsian terms, this objection holds that MEPF results in a less-than-fully adequate scheme of political liberty, specifically in reference to the right of political participation. Under such a system, private citizens can no longer voice support of candidates by means of monetary contributions, thus lessening the liberty of participation available to them. The liberty of political speech allotted to candidates is also reduced *via* the *de facto* expenditure ceilings created under MEPF. There are several ways to respond to such a charge. Most importantly, the First Principle requires the existence of a universal scheme of fully-adequate liberty; however, it also requires that the fair value of all political liberties be guaranteed. It was argued earlier that fair value may not be fully realized in the absence of a MEPF system in the modern American context. Thus, so long as the scheme of political liberty produced is adequate, a full realization of fair value requires such a system, even at the cost of

some reductions in liberty. We now ask: is the scheme of liberty produced adequate? It is important to note that monetary speech is not the only means of potential political influence. Pure speech and expressive conduct, as well as association with politically-oriented groups, may be achieved in the absence of significant financial expenditure. Moreover, if MEPF were to be instituted, it seems likely that non-monetary speech would increase greatly in value. In other words, the degree of potential influence associated with monetary speech would fall, while the degree of potential influence associated with pure speech/expressive conduct would rise. The point here is this: in the current system, money is necessary for a great deal of political speech, as the *Buckley* Court first noted. However, in a society with MEPF in place, this claim would no longer be true. Thus, there is little reason to believe that a MEPF system will result in an unsatisfactory scheme of political liberty, and it is clear that such a system will best realize the guarantee of fair value.

## **2. Shape of the Proposal**

It is not my purpose here to give a full policy recommendation as to the adoption of a MEPF system. Instead, I will attempt to outline the broad contours of such a system, in the form of specific conditions that must be met. The particular details required by its installation are, of course, highly fact-sensitive. If this proposal were ever to be adopted in actuality, a careful review of all relevant political, social, cultural, and economic factors would need to be undertaken. Such a review is clearly beyond the scope of this project.

As such, I will define only the basic parameters of an adequate MEPF system. Any proposal that meets these conditions, whether voucher-based, based on a tax-supported general fund, etc., will best realize justice as fairness in this context. I propose that the reformed system of U.S. federal campaign finance must:

1. Prohibit direct contributions from natural persons to federal election campaigns;
2. Prohibit direct contributions from all private organizations, corporations, unions, etc.;
3. Prohibit coordinated expenditures by natural persons or private organizations;
4. Provide funds to federal election campaigns using only publicly-distributed monies:
  - a. Establish a threshold condition of proven popular support (e.g. through petition signatures or other means) for public funding;
  - b. Establish tiers of funding levels into which candidates are placed based on the amount of proven public support shown;
  - c. Automatically allow public funding for incumbent candidates;
  - d. Automatically place incumbent candidate into the highest funding tier;
  - e. Establish strict prohibitions on the purchasing of petition signatures or other means of support;
  - f. Disallow discrimination in allotment of funds based on political ideology, religious views, or any other content-based identification;
  - g. Prohibit all campaign spending beyond the level of public funding allotted;
5. Require quarterly and post-election reports of all expenditures by candidates;
6. Make such reports publicly-accessible within a reasonable period of time;
7. Place the names of all publicly-funded candidates on the appropriate ballots;
8. Prohibit corporate/union funding of all electioneering communications or express advocacy media;
9. Set expenditure limits on non-coordinated independent expenditures by natural persons, noneconomic corporations, political committees, etc.;
10. Require quarterly report of all such expenditures and make such reports publicly-

available;

11. Allow candidates in lower levels of funding to apply for increased public funding rates, not to exceed the highest level, when in competition with higher-level-funded candidates, especially incumbents;
12. Prohibit the use of public funds for purposes not substantially related to the campaign at hand or issues of public significance.

These conditions broadly define the parameters of a MEPF system that will best realize justice as fairness in the current context. Further conditions may be required upon closer examination, or some of the above provisions may be stated too stringently. These modifications are perfectly acceptable within an inquiry as fact-sensitive as this. However, I believe that the general, non-exhaustive list above gives the rough shape of a reformative program for campaign finance that will best ensure the fair value of political liberty.

In conclusion, I have argued that a MEPF program of some kind is required by Rawls' theory when applied to the modern American context. I have further attempted to provide some indication of what this system may look like. Ultimately, what is most clear is that Rawls' theory of distributive justice requires a far more robust regulatory regime than that which currently exists in the United States. Serious reformative measures will be required if justice as fairness is to be more fully realized in the basic structure of this nation. I have also suggested, in past chapters, that this program of reform conflicts greatly with the current interpretation of the U.S. Constitution as offered by the Supreme Court. This tension between political philosophy and constitutional law will not be easy to reconcile. Indeed, the program for reform discussed above may lie outside the current realm of practical possibility. However, I believe that this discussion has defined a benchmark against which our current system of campaign finance may be

measured. The aim now must be to effect reform that will move the current regime closer to the Rawlsian ideal.

### 3. Feasibility of the Proposal

I will now briefly consider several problems of political feasibility that may arise in implementing such a system. My aim here is not to resolve all such problems, i.e. to ‘pave the way’ for realizing justice as fairness in U.S. campaign finance reform. Instead, I will merely attempt to identify the main obstacles to such a reformative effort.

First and foremost, it should be clear that a MEPF system would most likely be ruled unconstitutional by the Supreme Court, given its current jurisprudence. The reasons for this should be apparent from my discussion of the Court’s reasoning in Ch. IV. As such, it should come as no surprise that a MEPF system will not comply with the Court’s current interpretation of the First Amendment. I do not consider this a substantial concern for my project. After all, one significant claim of this paper is that current constraints on campaign finance reform, as established by the Court, violate important aspects of justice as fairness. An optimally-just financing arrangement will not be possible without the overruling of large parts of *Buckley* and *Citizens United*. As I have suggested, there is no essential incompatibility between relevant parts of the U.S. Constitution and justice as fairness. The First Amendment *as written*, for example, may not go far enough in ensuring an adequate scheme of equal political liberty; however, the language contained therein is also fully represented in Rawls’ work. In other words, it is not necessary to completely abandon the current U.S. Constitution to make significant progress in more justly financing election campaigns. In my view, the greatest tension lies between the Court’s current interpretation of the First Amendment and the demands of the First Principle. If this tension is resolved, we may be confident in the constitutionality of a MEPF approach to

campaign finance reform.

A separate concern is this: how would we administer and regulate such a system? After all, a set of conditions for a program of reform, as given in the last section, is worthless without some guarantee that those conditions will be upheld. In my view, no drastic change in agency is necessary to achieve this end. The FEC is already designed so as to receive financial reports, publicize rules and regulations, and enforce potential violations of election law. The FEC could continue to play this role under a MEPF system. The agency would collect regular financial expenditure reports from campaigns and make this information promptly available for public scrutiny. In addition, the FEC would oversee the disbursement of public funds to candidates, as well as bringing legal action against alleged violators of election law. Such expanded responsibilities would most likely necessitate additional funding for the agency and a larger staff. Now, one potential concern with this arrangement may arise out of the partisanship of the FEC. As I mentioned earlier, following *Buckley*, FEC members are appointed by the President and confirmed by the Senate. In a situation where one party holds both the presidency and a Senate majority, worries over the undue control of the FEC by that party will be apparent. If we accept the Court's ruling in *Buckley* as to the delegation of executive power, such an arrangement may be unavoidable under the current Constitution. At present, it is difficult to see how we might alleviate these concerns. The ultimate aim, of course, is to reasonably guarantee the impartiality of FEC board members. This might be achieved by granting these members lifetime tenure, as conditioned on good behavior, much in the same way that federal judges are appointed. Alternatively, we may require that a certain number of members be non-politician citizens, such as academics or other knowledgeable persons. Whatever the best solution may be, it would be outside the scope of my project to further pursue this line of inquiry.

A final concern is more specific to Rawls' philosophy and arises out of the publicity constraint: that is, will such a MEPF system be accepted and understood by the citizens of the United States? In other words, will my proposal exhibit a sufficient degree of 'uptake' so as to encourage adoption by the citizenry? The answers to these questions are, of course, largely empirical; they rely on knowledge of the psychological states and tendencies of many persons. Nevertheless, I will venture a few speculative claims on this point. It may be true that, if the installation of a MEPF system were put forth today as a constitutional amendment, it would not gain sufficient public support. Many people would be, I think, wary over such a drastic reform of current law. Some may be skeptical as to the validity of a system that effectively removes their ability to privately contribute to their favored candidates. Fortunately, realization of my proposal is not dependent on an all-inclusive, one-time amendment to the Constitution. The system could perhaps be realized in stages, thus allowing individuals to become acquainted with the new system and accepting of its restrictions. Over time, this may generate enough uptake so as to remove any Rawlsian concerns arising out of stability or publicity.

In fact, such a gradual program of reform may be ultimately superior in realizing justice as fairness, due to an important interpretive point on fair value.<sup>29</sup> In my view, the best way to interpret the notion of fair value is not as a stark, wholesale requirement of a basic structure, but rather as a safeguard against clear, identifiable inequalities of value. If we think of this in the context of the original position, we do not expect the parties to design their society's basic structure *around* the notion of fair value. Instead, we expect them to design a system that guarantees a fully-adequate scheme of equal liberty for all citizens. Once the proposal for this system is put forth, the contractors discuss the implications thereof and attempt to predict any undesirable consequences of the system. Perhaps, as Daniels does, they will recognize the



potential for substantial inequalities in the worth of the equal political liberties. Of course, the value of these liberties cannot be fully equalized, as the contractors cannot account for speaking skill, attractiveness, etc. Instead, they look only for *substantial* probable inequalities in value, and then they adjust the scheme of liberty so as to compensate. We may think that, in attempting to realize fair value in campaign finance, our program for reform should follow this same model. We will begin by searching out the most significant and apparent inequalities in value and will then make necessary reforms to the system. We continue to identify and remove these inequalities, moving from the most apparent to the more nuanced, until the system roughly guarantees the fair value of the political liberties. As should be apparent, this process will be both gradual and systematic. We should expect that such a process will tend toward greater public acceptance than a sudden, drastic constitutional change.

In this section, I have considered only a few of many concerns over the feasibility of my proposal for reform. Discussion of other worries is not possible at this time. Nevertheless, I hope to have indicated at least the theoretical feasibility of such a project. Other more tangible, context-sensitive obstacles will have to be considered as they arise.

## **Chapter VI: Conclusion**

When dealing with an issue as large and difficult as that of campaign finance reform, certain complications must, by necessity, be set to the side. This is certainly true of this project. I have not, for example, attempted any empirical study of the actual effects of certain Supreme Court decisions, nor have I attempted to survey the current flow of money from particular parties to campaign coffers. Such work is important for any full understanding of the problem of campaign finance, but that has not been my project in this paper. Instead, I have attempted to identify the strains of thought and reasoning that underlie our current system of campaign finance, as well as

the constraints imposed on that system by actors like the Congress and the Court. I then analyzed those lines of reasoning in the light of Rawls' theory of distributive justice.

What conclusions may we draw from this project? First and foremost, it is without question that the current system fails to even roughly approximate justice as fairness. More broadly, we may say that the current system is incompatible with Rawls' general methodology for thinking about problems of justice. Regardless of which particular conception of justice is selected to guide our society's basic structure, the current system of campaign finance is not aimed at ensuring the instantiation of the values of stability, publicity, the exercise of the two moral powers, etc. Accordingly, the system cannot be publicly accepted and understood by rational persons in their capacity as citizens. This in itself is a concern of great importance, especially given the close proximity of issues of campaign finance to the realization of the political liberties. The situation appears even graver if justice as fairness is adopted as the public criterion of justice for this society. In that case, it is undeniable that the current system fails to guarantee the fair value of the political liberties, e.g. the right to vote, the liberty of political speech, the right to political participation.

I have also identified the Supreme Court as the primary agent responsible for inhibiting the progress of the system in the direction of justice as fairness. The reformative efforts of the Congress, such as the FECA, its Amendments, and the BCRA, all made important strides toward improving the current system. Moreover, as I described in Ch. IV, these actions tended toward better realizing justice as fairness in the context of justice as fairness. However, many of the most significant aspects of these measures have been now found unconstitutional by the Court. These include campaign expenditure limits, candidate contribution limits, and the prohibition on corporate/labor union funding of independent expenditures. I have also said that the main reason

for this trend is not a fundamental incompatibility between justice as fairness and the U.S. Constitution, as written, but rather discordance between the Court's unduly-narrow interpretation of the First Amendment and Rawls' approach to justice. This tension must be reconciled if any truly significant efforts are to be made to reform the current system.

I have also described, in broad strokes, the program for reform that would best realize justice as fairness in the modern American context. Such a program would culminate in a mandatory exclusive public financing (MEPF) system, which is actually a category of different possible approaches to the issue of campaign finance reform. There are most likely multiple ways in which to instantiate such a system, e.g. a voucher-based program, expansion of the current public financing system, etc. The particular contours of the program will be, of course, highly fact-sensitive. Nevertheless, I have argued that any system that roughly fulfills the MEPF conditions set forth in Ch. V will approximately realize justice as fairness. The actual path to reform is sure to be beset by many obstacles, not the least of which will be the Supreme Court. However, I have also given some reason to believe that even a true MEPF system does not lie outside the realm of feasibility. Its full realization may not be practically possible *at this moment*, but gradual progress in that direction may accomplish the same end.

In sum, I have attempted a Rawlsian critique of the reasoning behind the current U.S. system of campaign finance at the federal level. This is certainly not the only mode of critique one might employ. The views of other political and moral philosophers could also be applied to the problem in the same manner, with varying degrees of probable success. However, I have suggested that Rawls' theory of distributive justice offers an especially-promising method for critically analyzing the current system. While Rawls does offer formal principles that I have applied to the case at hand, his theory also lends itself to a higher-level mode of critique. Rawls provides a

general methodology for thinking about problems of justice, and it is through this framework that I have attempted to examine the problem of campaign finance. Accordingly, the conclusions of this paper are not essentially dependent on adoption of Rawls' favored conception of justice. Instead, use of Rawls' methodology has allowed for the identification of the substantial inadequacies of our current system. This framework for thinking about justice has also suggested means by which to eliminate those deficiencies. It is now left to the nation's citizens and their representatives to do just that.

## Notes

### Chapter II

<sup>1</sup> Thomas Pogge, *John Rawls: His Life and Theory of Justice* (New York: Oxford, 2007) 28

<sup>2</sup> Leif Wenar, "John Rawls", *Stanford Encyclopedia of Philosophy* (2008)

<sup>3</sup> Pogge 31

<sup>4</sup> Pogge 31

<sup>5</sup> Pogge 30

<sup>6</sup> John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard, 1971) viii

<sup>7</sup> Rawls, *A Theory of Justice* viii

<sup>8</sup> I will not give a comprehensive overview of classical social contract theory, as its basic tenets should be well-known to readers of this paper.

<sup>9</sup> Rawls, *A Theory of Justice* 7

<sup>10</sup> Rawls, *A Theory of Justice* 7

<sup>11</sup> Pogge 28

<sup>12</sup> Pogge 29

<sup>13</sup> Rawls, *A Theory of Justice* 3

<sup>14</sup> Pogge 29

<sup>15</sup> Rawls, *A Theory of Justice* 3

<sup>16</sup> Pogge 42

<sup>17</sup> Pogge 42

<sup>18</sup> Pogge 42

<sup>19</sup> Wenar, "John Rawls"

<sup>20</sup> The word 'tend' here is important, as Rawls believes distributive justice to not be involved in the *actual* allocation of goods to individuals. Instead, this type of justice is concerned with the arrangement of social institutions: a decision that is necessarily prior to the actual division of goods.

- <sup>21</sup> John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard, 2001) 57
- <sup>22</sup> Rawls, *Justice as Fairness* 58
- <sup>23</sup> Rawls, *Justice as Fairness* 58
- <sup>24</sup> Rawls, *Justice as Fairness* 58-59
- <sup>25</sup> The usage of these terms is somewhat idiosyncratic to Rawls. While the notion of rationality in particular is highly related to that found in rational choice theory, the Rawlsian definitions of these terms should not be conflated with their usages by other writers.
- <sup>26</sup> Rawls, *Justice as Fairness* 19
- <sup>27</sup> Rawls, *Justice as Fairness* 19
- <sup>28</sup> Rawls, *Justice as Fairness* 18-19
- <sup>29</sup> Rawls, *Justice as Fairness* 18
- <sup>30</sup> Pogge 34
- <sup>31</sup> Pogge 34
- <sup>32</sup> Pogge 35
- <sup>33</sup> Rawls, *Justice as Fairness* 8
- <sup>34</sup> Rawls, *Justice as Fairness* 8
- <sup>35</sup> Rawls, *Justice as Fairness* 9
- <sup>36</sup> Rawls, *Justice as Fairness* 9
- <sup>37</sup> Rawls, *Justice as Fairness* 5
- <sup>38</sup> Pogge 37
- <sup>39</sup> Pogge 37
- <sup>40</sup> Pogge 37
- <sup>41</sup> There are certainly other desiderata by which a conception of justice may be judged, including reciprocity. For the purposes of providing merely a *brief* overview of Rawls' work, I will leave these considerations to the side.
- <sup>42</sup> Pogge 39
- <sup>43</sup> Pogge 39-40
- <sup>44</sup> Pogge 40
- <sup>45</sup> Pogge 60
- <sup>46</sup> Rawls, *A Theory of Justice* 85.
- <sup>47</sup> Rawls, *A Theory of Justice* 85
- <sup>48</sup> Rawls, *A Theory of Justice* 85
- <sup>49</sup> Rawls, *A Theory of Justice* 85
- <sup>50</sup> Rawls, *A Theory of Justice* 86
- <sup>51</sup> Rawls, *A Theory of Justice* 86
- <sup>52</sup> Rawls, *A Theory of Justice* 86
- <sup>53</sup> Rawls, *A Theory of Justice* 11
- <sup>54</sup> Rawls, *A Theory of Justice* 11
- <sup>55</sup> Rawls, *A Theory of Justice* 17
- <sup>56</sup> Rawls, *A Theory of Justice* 17

- <sup>57</sup> Rawls, *A Theory of Justice* 17-18
- <sup>58</sup> Pogge 61
- <sup>59</sup> Pogge 61
- <sup>60</sup> Rawls, *A Theory of Justice* 18
- <sup>61</sup> Rawls, *A Theory of Justice* 19
- <sup>62</sup> Rawls, *A Theory of Justice* 18
- <sup>63</sup> Rawls, *A Theory of Justice* 18
- <sup>64</sup> Rawls, *A Theory of Justice* 18-19
- <sup>65</sup> Rawls, *A Theory of Justice* 19
- <sup>66</sup> Rawls, *A Theory of Justice* 19
- <sup>67</sup> Rawls, *A Theory of Justice* 19
- <sup>68</sup> Rawls, *Justice as Fairness* 86
- <sup>69</sup> Rawls, *Justice as Fairness* 87
- <sup>70</sup> Rawls, *Justice as Fairness* 87
- <sup>71</sup> Rawls, *Justice as Fairness* 87. The distinction here between *A Theory of Justice* and *Justice as Fairness: A Restatement* will not be of significance for the purposes of this paper, as the subjects of scrutiny here are the United States constitutional democracy and its policies.
- <sup>72</sup> Rawls, *Justice as Fairness* 87
- <sup>73</sup> Rawls, *A Theory of Justice* 123-24
- <sup>74</sup> Rawls, *A Theory of Justice* 122
- <sup>75</sup> Rawls, *A Theory of Justice* 60
- <sup>76</sup> Wenar, "John Rawls"
- <sup>77</sup> Wenar, "John Rawls"
- <sup>78</sup> Wenar, "John Rawls"
- <sup>79</sup> John Rawls, *Political Liberalism* (New York: Columbia, 2005) 5
- <sup>80</sup> Pogge 82
- <sup>81</sup> Pogge 82-83
- <sup>82</sup> Pogge 82
- <sup>83</sup> Wenar, "John Rawls". Rawls' ambiguity on this matter in *A Theory of Justice* suggests his belief that justice as fairness is compatible with multiple forms of government; by the writing of *Justice as Fairness: A Restatement*, Rawls has confined justice as fairness to likely only apply to the formation of a basic structure for constitutional democracies.
- <sup>84</sup> Pogge, 82
- <sup>85</sup> Pogge 83
- <sup>86</sup> Pogge 83
- <sup>87</sup> Pogge 85
- <sup>88</sup> Pogge 87
- <sup>89</sup> Pogge 87
- <sup>90</sup> Pogge 87
- <sup>91</sup> Pogge 87

- <sup>92</sup> Pogge 93
- <sup>93</sup> Pogge 93
- <sup>94</sup> Ed. Norman Daniels, *Reading Rawls*. (New York: Basic, 1975) 253
- <sup>95</sup> Daniels 256
- <sup>96</sup> Daniels 256
- <sup>97</sup> Daniels 256
- <sup>98</sup> Daniels 258
- <sup>99</sup> Rawls, *A Theory of Justice* 204
- <sup>100</sup> Daniels 259
- <sup>101</sup> Daniels 279
- <sup>102</sup> Daniels 279
- <sup>103</sup> Rawls, *Justice as Fairness* 149
- <sup>104</sup> Pogge 94
- <sup>105</sup> Rawls, *A Theory of Justice* 226
- <sup>106</sup> Pogge 94
- <sup>107</sup> Rawls, *Justice as Fairness*, 149
- <sup>108</sup> Rawls, *A Theory of Justice* 196
- <sup>109</sup> Rawls, *A Theory of Justice* 196
- <sup>110</sup> Rawls, *A Theory of Justice* 197
- <sup>111</sup> Rawls, *A Theory of Justice* 197
- <sup>112</sup> Rawls, *A Theory of Justice* 197
- <sup>113</sup> Rawls, *A Theory of Justice* 198
- <sup>114</sup> Rawls, *A Theory of Justice* 198
- <sup>115</sup> Rawls, *A Theory of Justice* 198
- <sup>116</sup> Rawls, *A Theory of Justice* 199
- <sup>117</sup> Rawls, *A Theory of Justice* 199
- <sup>118</sup> Rawls, *A Theory of Justice* 199
- <sup>119</sup> Rawls, *A Theory of Justice* 199
- <sup>120</sup> Rawls, *A Theory of Justice* 199
- <sup>121</sup> Rawls, *A Theory of Justice* 199
- <sup>122</sup> Rawls, *A Theory of Justice* 200
- <sup>123</sup> Rawls, *A Theory of Justice* 201
- <sup>124</sup> Rawls, *A Theory of Justice* 201
- <sup>125</sup> Rawls, *A Theory of Justice* 201
- <sup>126</sup> Rawls, *A Theory of Justice* 201
- <sup>127</sup> Rawls, *A Theory of Justice* 199
- <sup>128</sup> Rawls discusses the notion of ‘duty’ at length in Chapter VI of *A Theory of Justice*. For the purposes of this paper, it is not necessary to delve into this topic. However, it should be noted that Rawls offers a lengthy discussion of the proper duty of citizens regarding compliance with both just and unjust laws.

- <sup>129</sup> Rawls, *Political Liberalism* 234  
<sup>130</sup> Rawls, *Political Liberalism* 231  
<sup>131</sup> Wenar, “John Rawls”  
<sup>132</sup> Wenar, “John Rawls”  
<sup>133</sup> Rawls, *Political Liberalism* 231  
<sup>134</sup> Rawls, *Political Liberalism* 233  
<sup>135</sup> Rawls, *Political Liberalism* 233  
<sup>136</sup> Rawls, *Political Liberalism* 234

### Chapter III

- <sup>1</sup> Anthony Corrado, Daniel R. Ortiz, Thomas E. Mann, and Trevor Potter. *The New Campaign Finance Sourcebook* (Washington, D.C.: Brookings, 2005) 1  
<sup>2</sup> Anthony Corrado, “Money and Politics: A History of Federal Campaign Finance Law.” *The New Campaign Finance Sourcebook* (Washington, D.C.: Brookings, 2005) 7. Given this phrasing, along with my explication of justice as fairness in the preceding chapter, it should be immediately clear that the problem of campaign finance may be viewed and studied within a Rawlsian framework.  
<sup>3</sup> Corrado 8  
<sup>4</sup> Corrado 8  
<sup>5</sup> Corrado 8  
<sup>6</sup> Corrado 8  
<sup>7</sup> Corrado 8  
<sup>8</sup> Corrado 9  
<sup>9</sup> Corrado 9  
<sup>10</sup> Corrado 9  
<sup>11</sup> Corrado 9  
<sup>12</sup> Corrado 10  
<sup>13</sup> Corrado 10  
<sup>14</sup> Corrado 10  
<sup>15</sup> Corrado 11  
<sup>16</sup> Corrado 11  
<sup>17</sup> Corrado 12  
<sup>18</sup> Corrado 13  
<sup>19</sup> Corrado 14  
<sup>20</sup> Corrado 14  
<sup>21</sup> *Newberry et al. v. United States*, 256 U.S. 232 (1921). *LexisNexis Academic*, Mar. 11, 2012  
<sup>22</sup> Corrado 14  
<sup>23</sup> *Newberry v. United States*  
<sup>24</sup> *United States v. Classic et al.*, 313 U.S. 299 (1941). *LexisNexis Academic*, Mar. 11, 2012  
<sup>25</sup> Corrado 15



<sup>26</sup> Corrado 15

<sup>27</sup> Corrado 15

<sup>28</sup> Corrado 15

<sup>29</sup> Corrado 15

<sup>30</sup> Corrado 15

<sup>31</sup> Corrado 16

<sup>32</sup> Corrado 16

<sup>33</sup> Corrado 16

<sup>34</sup> Corrado 17

<sup>35</sup> Corrado 17

<sup>36</sup> Corrado 18

<sup>37</sup> Corrado 19

<sup>38</sup> Corrado 19-20

<sup>39</sup> Corrado 20

<sup>40</sup> Corrado 21

<sup>41</sup> Corrado 21

<sup>42</sup> Corrado 21

<sup>43</sup> Corrado 21

<sup>44</sup> Corrado 21

<sup>45</sup> Corrado 21

<sup>46</sup> Corrado 21

<sup>47</sup> Corrado 21

<sup>48</sup> Corrado 22

<sup>49</sup> Corrado 22

<sup>50</sup> Corrado 24

<sup>51</sup> Corrado 23

<sup>52</sup> Corrado 23

<sup>53</sup> Corrado 23

<sup>54</sup> Corrado 23

<sup>55</sup> Corrado 24

<sup>56</sup> Corrado 24

<sup>57</sup> Corrado 25. Candidates were eligible for primary campaign funding if they raised “at least \$5,000 in contributions of \$250 or less in at least twenty states”. Public funding would then match up to \$250 per each individual contribution, with the total cap set at \$5 million.

<sup>58</sup> Corrado 25

<sup>59</sup> Corrado 25

<sup>60</sup> Melvin I. Urofsky. *Money and Free Speech* (Lawrence, KS: University of Kansas, 2005) 53

<sup>61</sup> Urofsky 54

<sup>62</sup> Urofsky 54. The Court of Appeals upheld all provisions of the amended FECA except for that which required financial disclosure reports from advocacy groups.

<sup>63</sup> *Buckley et al. v. Valeo, Secretary of the United States Senate, et al.*, 424 U.S. 1 (1976), LexisNexis Academic, Mar. 21, 2012

<sup>64</sup> *Buckley v. Valeo*

<sup>65</sup> Urofsky 54

<sup>66</sup> Urofsky 55

<sup>67</sup> Urofsky 55

<sup>68</sup> *Buckley v. Valeo*

<sup>69</sup> *Buckley v. Valeo*

<sup>70</sup> *Buckley v. Valeo*

<sup>71</sup> Urofsky 62

<sup>72</sup> Urofsky 62

<sup>73</sup> Urofsky 62

<sup>74</sup> Corrado 28

<sup>75</sup> Corrado 29

<sup>76</sup> Corrado 30

<sup>77</sup> Corrado 29

<sup>78</sup> Corrado 31

<sup>79</sup> Corrado 31

<sup>80</sup> Corrado 33

<sup>81</sup> Corrado 34

<sup>82</sup> Daniel R. Ortiz, "The First Amendment and the Limits of Campaign Finance Reform." *The New Campaign Finance Sourcebook* (Washington, D.C.: Brookings, 2005) 95

<sup>83</sup> Ortiz 95

<sup>84</sup> Ortiz 95

<sup>85</sup> Ortiz 97

<sup>86</sup> Ortiz 97

<sup>87</sup> Ortiz 97

<sup>88</sup> Ortiz 99

<sup>89</sup> Ortiz 99

<sup>90</sup> Ortiz 99

<sup>91</sup> Ortiz 100

<sup>92</sup> Ortiz 100

<sup>93</sup> Corrado 38

<sup>94</sup> Corrado 39

<sup>95</sup> Corrado 39

<sup>96</sup> As Corrado notes (p. 40), the BCRA did provide certain exceptions to these provisions, including 1) the raising of funds by federal officials to be used purely at the state or local level (i.e. a House member running for state Governor), 2) participating in state and local fundraising events merely as a speaker/guest, and 3) raising money for charitable organizations that do not have political purposes.

- <sup>97</sup> Corrado 40
- <sup>98</sup> Corrado 40
- <sup>99</sup> Corrado 42
- <sup>100</sup> Corrado 40
- <sup>101</sup> Corrado 40-41
- <sup>102</sup> Corrado 41
- <sup>103</sup> Corrado 38
- <sup>104</sup> Corrado 38
- <sup>105</sup> Corrado 38
- <sup>106</sup> *McConnell et al. v. Federal Election Commission*, 540 U.S. 93 (2003). *LexisNexis Academic*, Mar. 21, 2012
- <sup>107</sup> Corrado 39
- <sup>108</sup> *McConnell v. FEC*
- <sup>109</sup> *McConnell v. FEC*
- <sup>110</sup> Corrado 38-39
- <sup>111</sup> Trevor Potter and Kirk L. Jowers, “Speech Governed by Federal Election Laws.” *The New Campaign Finance Sourcebook* (Washington, D.C.: Brookings, 2005) 220-21
- <sup>112</sup> Potter and Jowers 221
- <sup>113</sup> Potter and Jowers 221
- <sup>114</sup> Potter and Jowers 222
- <sup>115</sup> *McConnell v. FEC*
- <sup>116</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 08-205 (2010). *LexisNexis Academic*, Mar. 21, 2012
- <sup>117</sup> *Citizens United v. FEC*
- <sup>118</sup> *Citizens United v. FEC*
- <sup>119</sup> *Citizens United v. FEC*
- <sup>120</sup> *Citizens United v. FEC*
- <sup>121</sup> Breanne Gilpatrick. ‘Removing Corporate Campaign Finance Restrictions in *Citizens United v. Federal Election Commission* 130 S. CT. 876 (2010)’ (*Harvard Journal of Law and Public Policy*, Winter 2011, Vol. 34, Issue 1), *LexisNexis Academic*, Mar. 18, 2012
- <sup>122</sup> Gilpatrick
- <sup>123</sup> Gilpatrick
- <sup>124</sup> Gilpatrick
- <sup>125</sup> Gilpatrick
- <sup>126</sup> *Citizens United v. FEC*
- <sup>127</sup> Gilpatrick

## Chapter IV

<sup>1</sup> ‘The United States Constitution’ (ed. Steve Mount, [usconstitution.net](http://usconstitution.net)). Article III, § 2. For the relevant precedent regarding the Court’s jurisdiction over ‘cases and controversies’, see *Aetna*

- Life Insurance Co. v. Haworth* (1937).
- <sup>2</sup> *Buckley v. Valeo*, Opinion of the Court
- <sup>3</sup> U.S. Constitution, Article I, § 4
- <sup>4</sup> Specifically: the First Amendment’s ‘speech’ and ‘assembly’ clauses, and the Fifth Amendment’s ‘due process of law’ clause
- <sup>5</sup> *Buckley v. Valeo*, Opinion of the Court, § (I)(A)
- <sup>6</sup> *Buckley v. Valeo*, Opinion of the Court, § (I)(A)
- <sup>7</sup> See *New York Times Co. v. Sullivan* (1964), *Cox v. Louisiana* (1965), *United States v. O’Brien* (1968), *Bigelow v. Virginia* (1975), etc.
- <sup>8</sup> *Justice as Fairness* 44
- <sup>9</sup> *Buckley v. Valeo*, Opinion of the Court, § (I)(A). The Court assumes here that “virtually every means of communicating ideas” requires the spending of money in the present day.
- <sup>10</sup> *Buckley v. Valeo*, Opinion of the Court, § (I)(A)
- <sup>11</sup> *Buckley v. Valeo*, Opinion of the Court, § (I)(B)(1)(b)
- <sup>12</sup> *Buckley v. Valeo*, Opinion of the Court, § (I)(B)(1)(c)
- <sup>13</sup> *Buckley v. Valeo*, Opinion of the Court, § (I)(B)(1)(a)
- <sup>14</sup> *Buckley v. Valeo*, Opinion of the Court, § (I)(B)(1)(a)
- <sup>15</sup> *Buckley v. Valeo*, Opinion of the Court, § (I)(C)
- <sup>16</sup> *Buckley v. Valeo*, Opinion of the Court, § (I)(C)(1). See *NAACP v. Button* (1963) for the relevant test on vagueness concerning First Amendment issues.
- <sup>17</sup> *Buckley v. Valeo*, Opinion of the Court, § (I)(C)(1)
- <sup>18</sup> *Buckley v. Valeo*, Opinion of the Court, § (I)(C)(1)
- <sup>19</sup> *Buckley v. Valeo*, Opinion of the Court, § (I)(C)(1)
- <sup>20</sup> *Buckley v. Valeo*, Opinion of the Court, § (I)(C)(2). It was noted earlier that the *Buckley* decision overturned the FECA’s limit on a candidate’s contribution of her own resources. The Court treats ‘contribution’ and ‘expenditure’ as synonymous regarding a candidate’s own money; hence this provision is discussed under § (I)(C), the expenditures portion of the opinion.
- <sup>21</sup> *Buckley v. Valeo*, Opinion of the Court, § (I)(C)(3)
- <sup>22</sup> *Buckley v. Valeo*, Opinion of the Court, § (I)(C)(1)
- <sup>23</sup> *Buckley v. Valeo*, Opinion of the Court, § (I)(C)(1)
- <sup>24</sup> *Buckley v. Valeo*, Opinion of the Court, § (I)(C)(1), quoting *Associated Press v. United States* (1945)
- <sup>25</sup> I assume this because, for Rawls, any limitation on political liberty may only be justified on the grounds that doing so will 1) ensure a “fully adequate scheme...compatibly with the same scheme for all”; and/or 2) will guarantee the “fair value” of that liberty. These interests may, broadly-speaking, be stated to be ‘compelling governmental interests’ in the relevant sense. To what degree the Supreme Court may recognize governmental interests *beyond* these two options (regarding the political liberties), law justified via those interests will be unjust.
- <sup>26</sup> A further note regarding strict scrutiny: it may, given footnote 25, appear that the conditions of

publicity and stability are not sufficient to license limitations on political liberties. This is not the case. For a scheme of liberty to be compatible with the same scheme for all, it must trend toward the satisfaction of these conditions (and others). If the scheme of liberty guaranteed by a society's constitution is unstable or insufficiently-public, it will tend to produce reductions in the actual liberty afforded to persons. Moreover, a principle of justice that produces a scheme of liberty that is unstable or insufficiently-public will likely not be selected in the original position.

<sup>27</sup> It may appear to some readers that this line of Rawlsian thought may be cross-applied to 'pure speech', i.e. actual, auditory or written speech, in an implausible way. However, I assume here that the ability of individuals to speak or write on behalf of candidates is always, roughly-speaking, equal. Of course, some persons will be better speakers/writers than others. How the basic structure should compensate for the advantages and disadvantages of natural fortune is beyond the scope of this paper. Likely, however, the basic structure will only be required to provide a 'fair equality of opportunity' in access to public forums of speech.

<sup>28</sup> Rawls, *A Theory of Justice* 542

<sup>29</sup> Pogge 82

<sup>30</sup> Of course, this does not completely eliminate the worry that gave rise to this response. To ensure full equality in informed decision-making, all candidates would have to be guaranteed a level of funding adequate for self-promotion in all regions. The only way to achieve this may be a system of mandatory public financing of campaigns, a topic which I address later in this paper.

<sup>31</sup> *Buckley v. Valeo*, Opinion of the Court, § (II)

<sup>32</sup> *Buckley v. Valeo*, Opinion of the Court, § (II)(A)

<sup>33</sup> *Buckley v. Valeo*, Opinion of the Court, § (II)(A)

<sup>34</sup> See *Communist Party v. Subversive Activities Control Board* (1961)

<sup>35</sup> *Buckley v. Valeo*, Opinion of the Court, § (II)(A)

<sup>36</sup> *Buckley v. Valeo*, Opinion of the Court, § (II)(A)

<sup>37</sup> *Buckley v. Valeo*, Opinion of the Court, § (II)(B)(2)

<sup>38</sup> *Buckley v. Valeo*, Opinion of the Court, § (II)(B)(1)

<sup>39</sup> *Buckley v. Valeo*, Opinion of the Court, § (II)(C)

<sup>40</sup> *Buckley v. Valeo*, Opinion of the Court, § (II)(C)

<sup>41</sup> *Buckley v. Valeo*, Opinion of the Court, § (III)

<sup>42</sup> *Buckley v. Valeo*, Opinion of the Court, § (III)(B). Appellants argued by analogy with the religion clauses of the First Amendment, holding that Congress cannot favor an establishment of only some speech, much as cannot favor the establishment of a religion.

<sup>43</sup> *Buckley v. Valeo*, Opinion of the Court, § (III)(B)

<sup>44</sup> *Buckley v. Valeo*, Opinion of the Court, § (III)(B)

<sup>45</sup> Rawls, *Justice as Fairness*, 149

<sup>46</sup> *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990). *LexisNexis Academic*, Mar. 21, 2012. Opinion of the Court, § (I)

- <sup>47</sup> *Austin v. Michigan State Chamber of Commerce*, Opinion of the Court, § (II)
- <sup>48</sup> *Austin v. Michigan State Chamber of Commerce*, Opinion of the Court, § (II)(A)
- <sup>49</sup> *Austin v. Michigan State Chamber of Commerce*, Opinion of the Court, § (II)(A)
- <sup>50</sup> *Austin v. Michigan State Chamber of Commerce*, Opinion of the Court, § (II)(B)
- <sup>51</sup> *Austin v. Michigan State Chamber of Commerce*, Opinion of the Court, § (II)(B)
- <sup>52</sup> *Austin v. Michigan State Chamber of Commerce*, Opinion of the Court, § (II)(B)
- <sup>53</sup> *Austin v. Michigan State Chamber of Commerce*, Opinion of the Court, § (II)(C)
- <sup>54</sup> *Austin v. Michigan State Chamber of Commerce*, Opinion of the Court, § (IV-V)
- <sup>55</sup> *Austin v. Michigan State Chamber of Commerce*, Scalia, J., dissenting
- <sup>56</sup> *McConnell et al. v. FEC*, 540 U.S. 93 (2003). *LexisNexis Academic*, Mar. 13, 2012. Opinion of the Court
- <sup>57</sup> *McConnell et al. v. FEC*, Opinion of the Court, § (I)(A)
- <sup>58</sup> *McConnell et al. v. FEC*, Opinion of the Court, § (I)(B)(1)
- <sup>59</sup> *McConnell et al. v. FEC*, Opinion of the Court, § (II)
- <sup>60</sup> *McConnell et al. v. FEC*, Opinion of the Court, § (III)
- <sup>61</sup> *McConnell et al. v. FEC*, Opinion of the Court, § (V)(A)
- <sup>62</sup> *McConnell et al. v. FEC*, Opinion of the Court, § (V)(A)
- <sup>63</sup> *McConnell et al. v. FEC*, Opinion of the Court, § (V)(A)
- <sup>64</sup> *McConnell et al. v. FEC*, Opinion of the Court, § (V)(A)
- <sup>65</sup> *McConnell et al. v. FEC*, Opinion of the Court, § (VII). § 441b of the FECA bans all direct corporate/union funding of ‘express advocacy’ advertisements. § 203 of the BCRA amends this provision to include ‘electioneering communications’ as well as express advocacy in general, although the terms overlap in reference. Electioneering communications are those broadcast 60 days prior to a general election or 30 days prior to a primary. As such, § 203 does not replace § 441b, but rather includes an additional form of communication prohibited to corporate funding: namely, *non-express* advocacy that occurs within this time period, as well as express advocacy in general.
- <sup>66</sup> *McConnell et al. v. FEC*, Opinion of the Court, § (VII)
- <sup>67</sup> *McConnell et al. v. FEC*, Opinion of the Court, § (VII)
- <sup>68</sup> See § E of Chapter III for elaboration on these provisions. In both cases, the *McConnell* Court finds the governmental interest advanced by appellees to be insufficient to override the First Amendment infringement exhibited therefrom.
- <sup>69</sup> *Citizens United v. FEC*, Syllabus
- <sup>70</sup> *Citizens United v. FEC*, Opinion of the Court, § (II)(B)
- <sup>71</sup> *Citizens United v. FEC*, Opinion of the Court, § (II)(D)
- <sup>72</sup> *Citizens United v. FEC*, Opinion of the Court, § (II)(D)
- <sup>73</sup> See *Thornhill v. Alabama* (1940)
- <sup>74</sup> *Citizens United v. FEC*, Opinion of the Court, § (III). I will henceforth refer to BCRA § 203 and FECA § 441b collectively as ‘§ 203’ for the purposes of brevity. This is appropriate because BCRA § 203 encompasses and expands FECA § 441b.

- <sup>75</sup> *Citizens United v. FEC*, Opinion of the Court, § (III)
- <sup>76</sup> *Citizens United v. FEC*, Opinion of the Court, § (III)(A)(3)
- <sup>77</sup> *Citizens United v. FEC*, Opinion of the Court, § (III)(B)(1)
- <sup>78</sup> *Citizens United v. FEC*, Opinion of the Court, § (III)(B)(1)
- <sup>79</sup> *Citizens United v. FEC*, Opinion of the Court, § (III)(B)(1)
- <sup>80</sup> *Citizens United v. FEC*, Opinion of the Court, § (III)(B)(1)
- <sup>81</sup> *Citizens United v. FEC*, Opinion of the Court, § (IV)(C)
- <sup>82</sup> *Citizens United v. FEC*, Opinion of the Court, § (III)(B)

## Chapter V

<sup>1</sup> Joshua Cohen, “Money, Politics, Political Equality.” *Fact and Value: Essays on Ethics and Metaphysics for Judith Jarvis Thomson*, eds. Alex Byrne, Robert Stalnaker, and Ralph Wedgwood (Cambridge, MA: MIT, 2001) 47

<sup>2</sup> Cohen 49

<sup>3</sup> Cohen 49

<sup>4</sup> Cohen 49

<sup>5</sup> Cohen 50

<sup>6</sup> Cohen 52

<sup>7</sup> Cohen 59

<sup>8</sup> Cohen 69. Any statutory provision which discriminates, implicitly or expressly, against a certain viewpoint or certain content of speech would be patently unconstitutional on First Amendment grounds. It is my contention that no regulation or statute thus far considered in this paper meets this description.

<sup>9</sup> Cohen 69

<sup>10</sup> Cohen 71

<sup>11</sup> Cohen 72

<sup>12</sup> Cohen 48

<sup>13</sup> David Estlund, “Political Quality.” *Democracy*, eds. Ellen Franken Paul, Fred D. Miller, Jr., and Jeffrey Paul (Cambridge: Cambridge University, 2000) 128.

<sup>14</sup> Estlund 127

<sup>15</sup> Estlund 127

<sup>16</sup> Estlund 127

<sup>17</sup> I assume, as a matter of interpretation, that Rawls and Estlund agree on the rest of the language of the First Principle. Estlund acknowledges (p. 130) that his view entails a formal equality of the political liberties, though he does not provide a tentative list of these liberties as Rawls does. Given that Rawls’ description of the political liberties is, in my view, fairly uncontroversial, I will assume that Estlund will accept the equal guarantee of those rights. I will also assume agreement on the First Principle’s requirement that the scheme of liberties allotted to persons be fully adequate and compatible with the same scheme for all. The only question of interest here is that of the need for a fair value provision.

- <sup>18</sup> Estlund 132
- <sup>19</sup> Estlund 133
- <sup>20</sup> Estlund 135
- <sup>21</sup> Estlund 152
- <sup>22</sup> Estlund 153-55
- <sup>23</sup> Estlund 153
- <sup>24</sup> Eric Freedman, "Campaign Finance and the First Amendment: A Rawlsian Analysis." *Iowa Law Review* (vol. 85, no. 3, Mar. 2000) 1065
- <sup>25</sup> Freedman 1071
- <sup>26</sup> Freedman 1072
- <sup>27</sup> Justin A. Nelson, "The Supply and Demand of Campaign Finance Reform." *Columbia Law Review* (vol. 100, no. 2, Mar. 2000) 545
- <sup>28</sup> Nelson 525, 527
- <sup>29</sup> I am indebted to Dr. Jon Garthoff for suggesting this interpretation.

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