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REEXAMINING THE GENDER IMPLICATIONS OF CAMPAIGN FINANCE REFORM: HOW HIGHER CEILINGS ON INDIVIDUAL DONATIONS DISPROPORTIONATELY IMPACT FEMALE CANDIDATES

By Ashley Baker

The Bipartisan Campaign Reform Act ("BCRA"), signed by the President and enacted into law on March 27, 2002, capped a seven-year effort by its Congressional sponsors to change federal campaign law and marked the most significant amendment to the Federal Election Campaign Act ("FECA") in more than a quarter-century. BCRA’s two pillars are its prohibition on the raising and spending of “soft money” by federal officeholders and candidates and its redefinition of what constitutes a campaign advertisement. Proponents of BCRA lauded its potential to address the corruptive effects of money in politics while opponents of BCRA decried its impact on the First Amendment rights of candidates and their contributors.

Reform legislation focused solely on corruption ignores the reality that exploding campaign costs and obstacles to effective fundraising by female candidates create severe barriers to political participation. While corruption is a valid concern, the effects of campaign finance legislation are no less insidious. One need only glance at the composition of the 109th U.S. Senate to find them: one African American, two Pacific Islanders, three Latinos, 14 women and 80 White American men. Consequently, assuming a priori that the government may impose reasonable restrictions on the fundraising ability of candidates, this Article seeks to develop an equal protection analysis of campaign finance reform by considering the effects of BCRA on minority, particularly female, candidates for the Senate.

The first part of this article develops the theoretical underpinnings of the argument that campaign finance law impairs the equal protection rights of female candidates. I briefly consider the historical application of equal protection law in the arena of elections and political campaigns and then situate campaign finance within that jurisprudence. Second, this essay offers empirical evidence demonstrating both the gendered component to candidate fundraising in U.S. Senate elections and the extent to which campaign finance laws, exemplified by § 307 of BCRA which increased individual contribution limits from $1,000 to $2,000, affect the relative ability of men and women to fundraise and campaign successfully. Third, I combine this data with the theoretical arguments of the first section to articulate my central argument - campaign finance regulations, as exemplified by § 307, operate in conjunction with gender disparities in a fundraising capacity to impair the relative ability of women to run for office. Finally, this article considers the legislative application of this argument.

DO SECTION 307 VIOLATE EQUAL PROTECTION?

The Supreme Court has affirmed both the right to equal participation of all voters and the right to a results-oriented determination of whether this right has been infringed. In recent decades, campaign finance has emerged as the new battleground in the struggle for equality in the political arena. Most discussions of campaign finance discrimination have focused on the individual level of the citizen voter or contributor. However, the campaign finance system is also suspect from the candidates’ perspective to the extent that it impairs a candidate’s ability to run, successfully, for office. The Court has consistently afforded protection of the absolute right of candidates to pursue elective office. Support for this right generally derives from the First Amendment and judicial recognition that running for office is a political activity vital to political advocacy and expression. However, courts have also recognized that restrictions on political participation implicate a candidate’s rights under the Fourteenth Amendment.

In particular, the Court has consistently recognized and expressed hostility to economic discrimination against political candidates. In Bullock v. Carter, the Supreme Court invalidated, on equal protection grounds, a primary election filing fee that required candidates to pay upwards of $6,000 to gain access to the ballot. The Court held that economic discrimination is an unconstitutional barrier to political participation because it “substantially limits” the voter’s choice of candidates. Similarly, in Lubin v. Panish, the Court held that California could not deprive an indigent citizen the right to run for office because of his inability to pay a filing fee. Therefore, both Bullock and Lubin illustrate the theoretical underpinnings of an argument that declares financial barriers unconstitutional in the political system which effectively can exclude candidates from running for office.

Although under-funded candidates are not legally excluded from participation, the centrality of money to modern campaigns...
excludes them in practice. In the wake of Buckley, the costs of running for office at all political levels have exponentially increased. Total receipts in Congressional campaigns rose from $194.8 million in 1978 to $1.185 billion in 2004.\textsuperscript{10} Candidates seeking office, particularly in statewide campaigns, require vast sums of money to purchase television and radio advertising, support door-to-door canvassing efforts, and otherwise connect with the voting public. Campaign fundraising is highly correlated with electoral success, and it is in general, universally accepted that candidate expenditures affect electoral outcomes.\textsuperscript{11} Candidates who win, raise and spend more money than candidates who lose. In 2000, for example, the average Senate candidate spent $2.345 million while the average winning Senate candidate spent $7.589 million.\textsuperscript{12} Although the relationship between spending and electoral success is not perfectly linear, the correlation is striking.

To the extent that insufficient fundraising constructively impairs the ability of candidates from a protected group to compete for elected office, campaign finance laws may present an equal protection dimension. Yet, at first glance, the immense centrality of money to electoral victory seems unaffected by BCRA. In 2000 Senate candidates spent a total of $437 million\textsuperscript{13} and in 2004 they spent $488 million.\textsuperscript{14} However, to identify the equal protection impact of campaign finance reform, one must look beyond campaign finance totals to a gendered analysis.

Female candidates for the U.S. Senate crystallize both the different fundraising capacities of candidates and the electoral consequences of this fundraising dynamic. Even though women have been historically underrepresented as both Senators and candidates, their numbers in recent years are sufficient for statistical analysis. To the extent that the following data reveals the disproportionate impact of BCRA on women, existing campaign finance law also impairs the constitutional, political rights of female candidates.

Campaign fundraising posed a significant obstacle to female candidates after the 1970s, when women first began running for Congress in significant numbers.\textsuperscript{15} However, subsequent election cycles show a trend of steady improvement in the ability of female candidates to fundraise successfully. A turning point in the electoral experience of female candidates culminated in the 1992 election with a breakthrough in their ability to receive financial campaign contributions. In 1992, women contested 11 races for Senate seats and emerged victorious in five, tripling their representation in the Senate. During these campaigns, women raised record sums of money, even topping their male opponents in the second quarter.\textsuperscript{16} Female candidates raised more money than men with similar backgrounds and 60% of their contributions came from small, direct-mail donations from women.\textsuperscript{17} Many of the patterns of campaigning and fundraising developed then, in 1992, carried into the next decade.

Carole Jean Uhlaner and Kay Lehman Schlozman’s 1986 study, Candidate Gender and Congressional Campaign Receipts, is one of the few systematic efforts to analyze competing theories of why women are perceived to be at a disadvantage in fundraising when compared to their male counterparts.\textsuperscript{18} Uhlaner and Schlozman examined whether gender had an independent effect on campaign finance. In conducting their analysis, they factored in gender with other variables, such as incumbency status, contested election, party, opponents’ receipts, prior experience, and vote-share in the previous election.\textsuperscript{19} They concluded the relationship between gender and campaign finance was not statistically significant; rather, the most relevant predictor of a candidate’s receipts was their status as challengers.\textsuperscript{20} Since this 1986 study, data and literature by other authors have supported Uhlaner and Schlozman’s theory.\textsuperscript{21} Factors other than gender are offered such as support from political action committees (“PACs”), to account for the disparity in fundraising.\textsuperscript{22}

However, as discussed later, this analysis shows that these authors have incorrectly concluded that gender has no significant effect on campaign finance. When fundraising is disaggregated to consider the sources and amounts given to women, a clear difference emerges in the capacity of women to raise money from PACs and to collect large individual contributions. Similarly, when women are further differentiated into successful and unsuccessful candidates, women who win have demonstrably more money than either other female candidates or their victorious male counterparts.

Before I turn to my findings, a brief word is needed on my methodology and the limits it presents for this study. The study concerns the elections of 1998, 2000, 2002, and 2004. Data was collected from the Federal Election Commission and The Center for Responsive Politics\textsuperscript{23} and analyzes receipts collected by all major party candidates during this six-year finance period. Each candidate’s spending has been broken down into individual contributions and non-party contributions. These categories have been calculated as a percent of the candidate’s total receipts in an effort to control for spending disparities between different states. Therefore, the variable considered throughout this paper is the percent of total money received from the source in question. Each percentage is then further considered with respect to gender within the various categories of party, result, and candidate status. To control for lopsided races and the propensity of...
women to run as sacrificial candidates in such races, the analysis
discounts all candidates who failed to garner 35% of the final
vote.

Analysis of the four election cycles raises several baseline
claims about the fundraising conducted by female candidates for
the U.S. Senate. As a whole, these propositions remain true
whether such fundraising was conducted under FECA or BCRA.

**INDIVIDUAL CONTRIBUTIONS: COMPROMISE A GREATER PERCENTAGE OF TOTAL CAMPAIGN RECEIPTS FOR WOMEN THAN FOR MEN**

Individual contributions overwhelmingly comprise the most
important source of financing for all candidates. In elections
conducted under FECA (1998, 2000, and 2002), women collected
71.34% of their contributions from individual donors and 16.51%
from PACs. In 2004, under BCRA limits, women collected
73.13% from individual donations and 20.38% from PACs. In contrast, men collected 61.32% of their contributions in 1998, 2000, and 2002 from individual donors; 68.72% of their total funds came from individual donors in 2004.

This proposition holds true in all categories of analysis -
party, candidate status, and race outcome - and is particularly significant in open-seat and challenger races
where female candidates are historically most likely to be concentrated. Compared to men, the average female
candidate in these four election cycles raised 7.22% more of their financing from individual donors. Incumbent
female candidates raised just 5% more of their finances from individual donors than incumbent males while
women running as challengers and for open seats raised over 12% more of their finances from individual contributors than their male counterparts raised.

**FEMALE CANDIDATES COLLECT THESE INDIVIDUAL CONTRIBUTIONS IN SMALLER DENOMINATIONS THAN MALE CANDIDATES**

Women and men raise individual contributions in different
amounts and from different sources. The vast majority of large
donors to political campaigns are men. Female candidates as a
whole depend particularly upon female donors for financial visibility and win monetary support from men only as their odds of election increase near to certainty. Moreover, the average size of individual donations to most female candidates continues to be smaller than the average donation to male candidates. For example, female non-incumbents received 1/4 of all individual contributions in amounts less than $200 whereas men received about 1/5 of their contributions in these smaller denominations. There are several possible explanations for this discrepancy, ranging from a purported psychological barrier, rooted in historic sex-role patterns, against women asking for large sums

**WOMEN NEED MORE MONEY THAN MEN TO BE SUCCESSFUL CANDIDATES**

Equalization of contribution totals may not even be sufficient to equalize the electoral outcomes or opportunities of male
and female candidates. Analysis of aggregate levels of fundraising demonstrates noticeable differences in the finances necessary for female candidates to run successful campaigns. These differences exist in the amount of money necessary to reach the 35% threshold of campaign viability considered in this essay and the amount of money necessary to win a Senate seat. Considering all four electoral cycles, women reaching this 35% mark, on average, collected about $7.6 million — or $5 million more than male candidates.

Additionally, while women who win raise significantly more money than women who lose, male winners collect only marginally more money than their losing counterparts. The difference between male winners and losers is only about $300,000. In contrast, female winners and losers are separated by $5.1 million, a particularly striking discrepancy considering that candidates failing to collect at least 35% of the final vote have already been excluded from this analysis. Thus, for women, $5 million is the price of the mere 15%-point difference between winning and losing.

**EFFECTS OF BCRA**

By simply increasing the individual contribution limit from
$1,000 to $2,000, §307 of BCRA, in effect, exacerbated the female candidates’ disadvantage in each of the three aforementioned facets of gender-specific fundraising. Simultaneously, BCRA enhanced the fundraising capacities of male candidates who have always had a greater ability to collect the maximum contribution. Therefore, male candidates’ greater ability to collect maximum contributions doubled in magnitude under BCRA.

Since the enactment of §307, both male and female candidate individual contributions (understood as a percentage of their total funding) have increased, but individual contributions to male candidates has increased significantly more. In 2004,
while female candidates experienced less than a percentage-point increase in individual contributions, male candidates received an eight point jump. Male incumbents and candidates who won their races experienced a particularly significant jump in individual contributions, with male incumbents gaining nearly 5% in individual contributions and winning male candidates gaining nearly 8%. Meanwhile, female candidates in corresponding categories either experienced no change or actual decline in their relative individual contributions. Effectively, the bump from $1,000 to $2,000 has boosted the individual contributions of candidates most capable of receiving maximum contributions—such as incumbents, probable winners and male candidates in general.

Ultimately, BCRA favored male candidates by increasing their individual, and overall, contributions and failing to affect a corollary benefit on the fundraising of female candidates. Prior to the enactment of BCRA, female candidates averaged $7.33 million in total receipts to male candidates’ $6.34 million. After BCRA, female and male candidates averaged $7.97 million and $7.93 million, respectively. This phenomenon affected women regardless of candidate status. Incumbent female candidates, who had previously enjoyed a $3.4 million advantage over male candidates, saw their edge drop by $2 million in 2004. Female challengers were affected even more severely as their total receipts declined by more than 1/3, from just over $3 million pre-BCRA to $1.9 million in 2004. In contrast, male challengers increased their receipts from $5.5 million to $6.2 million, thereby raising, on average, over 200% more money than female challengers. On the whole, because women start out severely underrepresented and have a high propensity to run as challengers, the prospect that female challengers cannot raise as effectively as male candidates cast grave implications towards the representation of women in the Senate.

**Incumbent female candidates, who had previously enjoyed a $3.4 million advantage over male candidates, saw their edge drop by $2 million in 2004.**

Unquestionably, BCRA is a facially neutral law. Moreover, this analysis reveals that BCRA established financial parity between candidates of different genders insofar as women had enjoyed, in the aggregate, a fundraising advantage over men prior to BCRA’s enactment. However, with respect to the legal rights affected by BCRA, the relevant consideration is the degree of effective political participation, enjoyed through the act of running for office that candidates of different genders were able to exercise by virtue of money raised. Money engenders successful candidacy; particularly at the Senate level, fundraising is crucial to launching a legitimate and successful campaign. Female candidates, as demonstrated above, require more money than men to reach the thresholds of both campaign viability and electoral success. Thus, the decline in the female candidates’ fundraising advantage should be interpreted as a decline in their ability to participate in the electoral process.

It must be noted that in neither the pre- nor the post-BCRA periods did female candidates achieve comparable success rates to male candidates. Taking the number of female winners as a percent of the total number of successful candidates, women were successful in the past four election cycles 13.6% of the time on average. In 2004, the proportion of successful female candidates did not significantly differ from the three prior cycles; however, this fact is likely due primarily to the high number of incumbent women running and winning in 2004 and should not be taken as evidence that BCRA did not affect the success rates of female candidates. In fact, the absence of success by open-seat and challenger candidates in 2004 is strikingly below the historical success rate for such candidates, which is about 45% and 5% respectively.

Courts have considered equal-protection challenges to campaign finance laws premised on the discriminatory effects of campaign finance regulations on political challengers. While previous claims are not completely analogous to those of female candidates, they are instructive in articulating a theory of harm and in understanding the courts’ receptiveness to the gendered claims raised in this article. The case study presented in this article is strengthened to the extent that women are an identifiable class to whom the Court has consistently afforded protection under the equal protection clause.

In addition to their First Amendment challenges, the Buckley appellants argued that contribution limitations resulted in invidious discrimination between incumbents and challengers because challengers needed large sums of money to overcome the disadvantages of lesser name recognition. The Court rejected this claim largely on grounds that there was insufficient evidence to support it, but, significantly, it did not reject the theory itself. The Court held that, because there was no evidence that incumbents would benefit more, and because the danger of corruption is equal among challengers and incumbents, Congress had justifiably put fundraising constraints on both classes. Still, the Court explained that, even though the law appeared evenhanded on its face, “[t]he appearance of fairness... may not reflect political reality.”

Likewise, the plaintiffs in *McConnell v. Federal Election Commission* made a similar claim that contribution limits discriminated against challengers. The Court dismissed the plaintiff’s claim for lack of standing, specifically, for the plaintiff’s inability to show that the alleged injury was fairly traceable to § 307 of BCRA. However, the Court remained divided on the viability of the theory itself. As Justice Scalia’s biting dissent stated, “[T]o be sure, the legislation is evenhanded....[b]ut as
everyone knows, this is an area in which evenhandedness is not fairness. If all electioneering were evenhandedly prohibited, incumbents would have an enormous advantage.1

Two federal district court cases further develop this theory. In Minnesota Citizens Concerned for Life v. Kelley, a pro-life candidate alleged that a year-based limit on contributions discriminated against challengers because they generally entered a race late in an election cycle whereas incumbents were able to raise money throughout their terms.3 The court concluded here that it had no basis on which to find that the year-based limit discriminated against challengers as a class; thus, the plaintiff had failed to carry his burden.4

Additionally, Driver v. Distefano considered a challenge to a Rhode Island statute limiting political contributions to $1,000, which the plaintiff argued violated the Fourteenth Amendment by impermissibly discriminating against challengers in favor of incumbents.5 In expressing at least a theoretical receptiveness to the argument, the court went so far as to posit a two-part test for its analysis: first, the court must determine whether the statute employs evenhanded language and is therefore evenhanded on its face; then, if it is facially even-handed, the court must determine whether a discriminatory effect exists in practice.6 Ultimately, the court’s decision rests on a rejection of the second part of this test in which the court did not believe that the statute in fact discriminated against challengers. The court noted that the available evidence contradicted the plaintiff’s claim that challengers could catch up with incumbents by raising more money from contributions in excess of $1,000 than incumbents could.7 Therefore, as in Mississippi, Buckley, and McConnell, the court here accepted the legal theory but found that the plaintiff presented insufficient evidence to carry his burden of proving discriminatory effect.

Empirical support for the proposition that BCRA limits disadvantaged female candidates corrects the shortcomings of these prior attempts to strike down contribution limits on equal protection grounds. Additionally, this claim corrects a further weakness in prior formulations—the availability of political participation is inequitable in regards to poorly funded candidates in general, and to female candidates in particular. Although it remains doubtful that the Court will recognize a fundamental right to wage equally effective campaigns for elective office,8 the Court is inherently more receptive to claims of discrimination levied by women by virtue of their nature as a suspect class.

### A Proposal for Equal Campaign Finance Reform

Given the Court’s baseline recognition of a candidate’s fundamental right to participate in the political process, the empirical showing that immutable characteristics, consistently recognized as mandating particular scrutiny under the Equal Protection Clause, correlate with disproportionate fundraising disadvantages highlight the extent to which current campaign finance laws violate that right.9

The remedies for this particular campaign finance dilemma are different from many of the legislative proposals advocated by campaign finance reformers because many of those remedies focus on corruption and free-speech debates. Recognizing that a finance scheme that facially awards female candidates more money than male candidates would be politically and constitutionally untenable, I propose that the best remedy would be a cap on political contributions at the amount that all candidates are equally capable of collecting. Neither the current level nor the pre-BCRA limit is acceptable in terms of ensuring equal political participation. While further research is needed to determine this limit in precise dollars, drastically reducing the maximum contribution would simultaneously equalize the fundraising capacity of all candidates and cause aggregate campaign receipts to correlate much more closely with the extent of each candidate’s base support.

This statistical showing of the discriminatory effects of current campaign finance structures exposes the need to expand the campaign finance debate to include assurances that regulations, like other laws governing electoral participation, operate consistently with the equal protection requirements of the Fifth and Fourteenth Amendments and recognize the rights of candidates to enjoy equal opportunity to participate in the political process.
...