

# HOW CAMPAIGN FINANCE LAW FACILITATES THE UNDERREPRESENTATION OF WOMEN IN POLITICS

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In 1985, political activist Ellen R. Malcolm founded the organization EMILY's List from the basement of her home, seeking to fill a gap she saw in progressive women's ability to raise money to run for public office.<sup>1</sup> Malcolm embraced "the convention of political fundraising that receiving major donations early in a race is helpful in attracting other, later donors."<sup>2</sup> It was true in the 1980s and even more so in the present day: political campaigns succeed or fail based on those early donations.<sup>3</sup> Today, women are still underrepresented across all levels of government.<sup>4</sup> Despite comprising half of the country's population, women make up only 26% of the United States Congress.<sup>5</sup> Studies show that female candidates have to spend more time and money on fundraising than their male counterparts, likely contributing to the comparatively low numbers of women running for office and winning elections.<sup>6</sup> These barriers are even more staggering for women of color, for whom support infrastructure in terms of campaign trainings, recruitment, and financial support are not as strong.<sup>7</sup>

This article argues that gender inequities in electoral politics are compounded by the modern campaign finance landscape, in which there are very few restrictions, allowing for massive unregulated amounts of money to flow into the coffers of primarily male political candidates. It begins with a brief overview of campaign finance jurisprudence, then examines the gendered implications of the law, and, ultimately, offers short-term and long-term solutions for democratic reform.

## *The Campaign Finance Legal Landscape*

The Federal Election Campaign Act of 1971 (FECA), along with its amendments in 1974, marked Congress' first attempt at substantially regulating political campaign fundraising and spending.<sup>8</sup> This legislation was born out of the political

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<sup>1</sup> *Our History*, EMILY'S LIST, <https://www.emilyslist.org/pages/entry/our-history> (last visited Apr. 7, 2021).

<sup>2</sup> *Id.*

<sup>3</sup> *See id.*

<sup>4</sup> *By the Numbers*, REPRESENT WOMEN, [https://www.representwomen.org/current-women-representation#us\\_overview](https://www.representwomen.org/current-women-representation#us_overview) (last visited Apr. 7, 2021).

<sup>5</sup> *Women in the U.S. Congress 2020*, CTR. FOR AM. WOMEN AND POLITICS (2020), <https://cawp.rutgers.edu/women-us-congress-2020> (last visited Apr. 7, 2021).

<sup>6</sup> *See* Shannon Jenkins, *A Woman's Work Is Never Done: Fund-Raising Perceptions and Effort Among Female State Legislative Candidates*, 60 POL. RES. Q. 230, 230 (2007).

<sup>7</sup> Sarah Bryner & Grace Haley, *Race, Gender, and Money in Politics: Campaign Finance and Federal Candidates in the 2018 Midterms* 6 (Peter G. Peterson Found., Working Paper, Mar. 15, 2019), <https://www.pgpf.org/sites/default/files/US-2050-Race-Gender-and-Money-in-Politics-Campaign-Finance-and-Federal-Candidates-in-the-2018-Midterms.pdf>.

<sup>8</sup> Richard Hasen, *The Nine Lives of Buckley v. Valeo*, in *FIRST AMENDMENT STORIES*, 4-5 (Richard W. Garnett, Andrew Koppelman, eds., Found. Press, 2010).

context of the Watergate era, during which Congress had an appetite for combatting electoral corruption.<sup>9</sup> FECA established contribution and expenditure limitations, disclosure requirements, a public funding program for presidential elections, and the Federal Election Commission (FEC), a new federal agency tasked with enforcing its provisions.<sup>10</sup> However, FECA has faced stark opposition ever since its inception, with many arguing that its limitations infringed upon the right to freedom of speech.<sup>11</sup>

The Supreme Court's chipping away at FECA and its progeny began almost immediately with its decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). In this case, the Court overturned FECA's expenditure limitations, holding that restrictions on political spending violated the First Amendment.<sup>12</sup> Since then, the Court has also overturned limitations on political party spending, contribution limits to political action committees (PACs), cumulative contribution limits, contribution and expenditure limits in connection with ballot initiatives, and in *Citizens United v. FEC*, corporate expenditure limits.<sup>13</sup> As a result of this deterioration of campaign finance legislation, the existing body of law is filled with holes. This decline has increased significantly since Justice Sandra Day O'Connor was replaced by the staunchly conservative Justice Samuel Alito, moving the Court in a decisively deregulatory direction.<sup>14</sup>

As of now, the only major regulations that remain are disclosure requirements, individual contribution limits, and the Bipartisan Campaign Reform Act of 2002's (BCRA) soft-money ban prohibiting unregulated contributions to political parties.<sup>15</sup> Additionally, the FEC's constant state of gridlock and vacancies has left it a toothless body with little ability to meaningfully regulate.<sup>16</sup> As the Court continues to strike down various limitations and requirements as a violation of the First Amendment, it is questionable whether even a very functional FEC could do much to limit the amount of money in politics. As is, the Court has already created a "hydraulic pressure" system where "tightening the controls in the regulated domain may not reduce the amount or influence of money in the system overall," but rather

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<sup>9</sup> *Id.*

<sup>10</sup> 52 U.S.C. §§ 30106–30116.

<sup>11</sup> See Hasen, *supra* note 8.

<sup>12</sup> *Buckley v. Valeo*, 424 U.S. 1, 51 (1976). The Court held that expenditures were functionally political speech. *Id.* at 19. It then reasoned that independent and candidate-funded spending, in contrast to individual contributions to campaigns which could act as bribes, could not lead to *quid pro quo* corruption. *Id.* at 46-47. Therefore, the expenditure limitations failed to overcome strict scrutiny, as they were not sufficiently narrowly tailored to the state interest of preventing corruption. *Id.* at 51.

<sup>13</sup> See generally *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); *McCutcheon v. FEC* 572 U.S. 185 (2014); *First Nat'l Bank v. Bellotti* 435 U.S. 765 (1978); *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>14</sup> Richard Hasen, *Justice Souter: Campaign Finance Law's Emerging Egalitarian*, 1 ALB. GOV'T L. REV. 169, 170 (2008).

<sup>15</sup> See 52 U.S.C. §§ 30101–30146.

<sup>16</sup> See Daniel I. Weiner, *Fixing the FEC: An Agenda for Reform*, THE BRENNAN CTR. (Apr. 30, 2019), <https://www.brennancenter.org/our-work/policy-solutions/fixing-fec-agenda-reform>.

redirect the flow of money towards less regulated areas left open by the judiciary's decisions.<sup>17</sup>

### *The Gendered Impact of Campaign Finance Law*

With this unhindered flow of money into politics, women face an uphill battle in competing to fundraise. In 2018, FEC filings showed that in the most competitive races of the cycle, women running for Congress raised an average of \$500,000 less than men.<sup>18</sup> In recent cycles, women have found success in fundraising through small dollar donations,<sup>19</sup> but men still dominate PACs, where the large sums of money reside.<sup>20</sup> Ever since the D.C. Circuit's 2010 decision in *SpeechNow v. FEC* allowing PACs that only make independent expenditures to accept unlimited contributions,<sup>21</sup> super PACs—PACs with no spending caps—have taken over the campaign financing scene.<sup>22</sup> As stated by the Center for American Women and Politics at Rutgers University, “amongst both general donors and mega donors to super PACs, women continue to be underrepresented and outnumbered by men.”<sup>23</sup> Therefore, unrestricted super PAC funding, in addition to concerns with regards to its anti-democratic distorting impacts, disadvantages female candidates facing an already unequal playing field.

Women also tend to donate far less money to political campaigns than men.<sup>24</sup> This presents another barrier for female candidates, who tend to rely more on women's donations than their male opponents.<sup>25</sup> Demonstrating this trend, data from the 2020 Democratic presidential primary shows that donations from women made up a larger portion of female candidates' overall funding.<sup>26</sup> Therefore, when women running for office naturally attract a donor base that looks like themselves, they end up with a smaller war chest. These factors serve to worsen the fundraising gender gap.

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<sup>17</sup> SAMUEL ISSACHROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURES OF THE POLITICAL PROCESS* 431 (5th ed. 2016).

<sup>18</sup> Peter Overby, *There's A \$500,000 Gender Gap When It Comes To Campaign Fundraising*, NPR (Sep. 26, 2018), <https://www.npr.org/2018/09/26/651185105/theres-a-500-000-gender-gap-when-it-comes-to-campaign-fundraising>.

<sup>19</sup> Kate Zernike, *Female Candidates Break Barriers Except When It Comes to Money*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/us/politics/women-campaign-fundraising.html>.

<sup>20</sup> Jonathan Igne-Bianchi, *Super PACs and Female Candidates*, SPARE CHANGE NEWS (Mar. 26, 2013), <http://sparechangenews.net/2013/03/super-pacs-and-female-candidates/>.

<sup>21</sup> *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (2010).

<sup>22</sup> ISSACHROFF, *supra* note 17, at 387–88.

<sup>23</sup> Eliza Newlin Carney, *Super PAC Boom Marginalizes Women, Report Says*, ROLLCALL (Jan. 14, 2014), <https://www.rollcall.com/2014/01/14/super-pac-boom-marginalizes-women-report-says/>.

<sup>24</sup> Katy Waldman, *Study: Men Shell Out a Lot More for Politicians Than Women Do*, SLATE (Jan 15, 2014), <https://slate.com/human-interest/2014/01/women-contribute-far-less-to-political-campaigns-than-men-do-according-to-a-new-report.html>.

<sup>25</sup> Danielle Kurtzleben, *Here Are the Presidential Candidates Women Have Been Donating To*, NPR (Nov. 26, 2019), <https://www.npr.org/2019/11/26/764179752/heres-which-presidential-candidates-women-have-been-donating-to>.

<sup>26</sup> *Id.*

Additionally, studies have shown that anxieties surrounding raising large amounts of money also play a major role in dissuading women from running for office.<sup>27</sup> Further compounding the problem, as women are more likely to run as Democrats,<sup>28</sup> they face added pressures from their base to avoid super PAC money on principle. For example, after Persist PAC, a super PAC formed by Elizabeth Warren supporters, began buying advertisements in support of her 2020 presidential run, *The Guardian* published an article titled “No, Elizabeth Warren – taking Super PAC Money Is Not Girl Power,” criticizing Warren for “using gender as an excuse to abandon one’s principles and take big money.”<sup>29</sup> This, in combination with the historical barriers for women in politics, leaves progressive women running for office in an unwinnable Catch-22.

Unsurprisingly, challenges in effective campaign fundraising are even more prevalent for women of color. Women of color often struggle to be taken seriously as viable candidates, making it more difficult for them to raise large sums of money.<sup>30</sup> Candidate for Michigan House of Representatives Rebecca Thompson described “learning how to raise campaign funds” as something she “as a Black woman had trouble doing or even talking about in front of strangers.”<sup>31</sup> Working to ameliorate this problem, EMILY’s List “trained 2,400 women, 400 of them women of color, [setting] a record for the 33-year-old organization” in the 2018 cycle.<sup>32</sup> While such efforts are important in closing the gender and racial gaps, the larger structural problem calls for comprehensive legislative solutions.

### *Solutions Moving Forward*

There is a pressing need for both small-scale and large-scale legislative reform to close the fundraising gender gap and create a more democratic system for financing political campaigns. In terms of small-scale tangible legislation, the Brennan Center suggests that a donation-matching public financing system could help women and racial minorities overcome fundraising disparities.<sup>33</sup> Such a program, as set out in the For the People Act (H.R. 1), would allow candidates to receive matched public

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<sup>27</sup> POLITICAL PARITY, *SHIFTING GEARS: HOW WOMEN NAVIGATE THE ROAD TO HIGHER OFFICE* 24 (2014), <https://www.politicalparity.org/wp-content/uploads/2017/10/Shifting-Gears-Report.pdf>.

<sup>28</sup> Lisa Hagen, *A Record Number of Women Are Running for House in 2020*, U.S. NEWS (Sep. 16, 2020), <https://www.usnews.com/news/elections/articles/2020-09-16/a-record-number-of-women-are-running-for-house-in-2020> (“Of the 298 female nominees for Congress, 204 are Democrats, while 94 are Republican”).

<sup>29</sup> Arwa Mahdawi, *No, Elizabeth Warren – Taking Super Pac Money Is Not Girl Power*, GUARDIAN (Feb. 29, 2020), <https://www.theguardian.com/commentisfree/2020/feb/29/elizabeth-warren-super-pac-week-in-patriarchy>.

<sup>30</sup> Linda Kramer Jennings, *Women of Color Face Significant Barriers When Running for Office, But They’re Finding Support*, YES! MAGAZINE (Jul. 31, 2018), <https://www.yesmagazine.org/democracy/2018/07/31/women-of-color-face-significant-barriers-when-running-for-office-but-theyre-finding-support/>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Chisun Lee & Gregory Clark, *Small Donor Public Financing Could Advance Race and Gender Equity in Congress*, THE BRENNAN CTR. (Oct. 15, 2020), <https://www.brennancenter.org/our-work/research-reports/small-donor-public-financing-could-advance-race-and-gender-equity/>.

funding for every small dollar donation (up to \$200) they receive.<sup>34</sup> Eligibility for the matching program is conditioned on voluntary compliance with lower contribution limits and other requirements, incentivizing candidates to follow guidelines that allow for a fairer campaign finance landscape.<sup>35</sup>

If H.R. 1 is signed into law, it would certainly begin to level the playing field for female candidates. Still, due to the voluntary component of the public funding program, many candidates would opt-out and continue to receive huge donations from wealthy individuals, corporations, and PACs, making this legislation an incomplete solution. However, a nonvoluntary program imposing expenditure restrictions on outside funds would almost certainly be deemed unconstitutional, as it penalizes and burdens candidates' and donors' free speech rights in ways that have already been prohibited by the Court.<sup>36</sup> Additionally, the Court has rejected "leveling the playing field" as a compelling state interest that could justify such legislation, deeming such a rationale as "wholly foreign" to the First Amendment.<sup>37</sup>

Thus, while H.R. 1 is a good first step, the reality is that due to the Court's restrictive campaign finance jurisprudence, comprehensive solutions cannot be implemented without a constitutional amendment paving the way. In 2013, Senator Tom Udall (D-NM) introduced such a constitutional amendment, aiming to "restore authority to the American people, through Congress and the states, to regulate and limit the raising and spending of money for federal political campaigns."<sup>38</sup> Udall's campaign finance reform amendment garnered 54 votes but failed to overcome a Republican filibuster and ultimately did not make it to the ratification stage.<sup>39</sup> But there is an underlying political will for change. A 2018 Pew Research Center report showed that 77% of Americans believe "there should be limits on the amount of money individuals and groups can spend on campaigns."<sup>40</sup> If public opinion on this issue can translate into votes in the legislatures and large-scale change via a constitutional amendment, there may be hope for meaningful campaign finance reform in the future. Until then, the endless flow of money into politics, and with it the fundraising gender gap, remains.

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<sup>34</sup> For the People Act of 2021, H.R. 1, 117th Cong. (2021).

<sup>35</sup> Lee & Clark, *supra* note 33.

<sup>36</sup> See *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 721 (2011)

<sup>37</sup> *Id.* at 723.

<sup>38</sup> Tom Udall, *Udall Introduces Constitutional Amendment on Campaign Finance Reform* (June 18, 2013) <https://www.tomudall.senate.gov/news/press-releases/udall-introduces-constitutional-amendment-on-campaign-finance-reform>.

<sup>39</sup> Gary Gerew, *Udall Campaign Finance Amendment Fails in Senate*, THE BUS. J. (Sep. 12, 2014) <https://www.bizjournals.com/albuquerque/blog/morning-edition/2014/09/udall-campaign-finance-amendment-fails-in-senate.html>.

<sup>40</sup> Bradley Jones, *Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence*, PEW RES. CTR. (May 8, 2018), <https://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/>.