UNDOING REFORM:

PERSONAL PAC V. STATE BOARD OF ELECTIONS

By: James Merriner

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Introduction

Political reformers have long described Illinois campaigns as woefully under-regulated, with frequent references to the "Wild West." In fact, electioneering in Illinois is heavily regulated. The State Board of Election's handbook on "Rules and Regulations" (revised August 2012) runs to 109 pages of small, eight-point type.

Whether these regulations do any good is another question.

The forty-year reformist struggle to impose limits on campaign funding has been waged broadly to (1) reduce the corruption of money in politics and the appearance thereof, (2) abate frantic money-raising, enhance electoral competition, and raise the tone of electioneering, and (3) thereby improve public trust in government.

Judged by results, not intentions, this regulatory regime has failed. To the extent that objective data can test the results, none of the qualities listed above has been bettered. Indeed, for a constellation of reasons, all probably have worsened. Campaign financial reform has met the iron law of unintended consequences.

On top of that, the regulatory regime steps up to the line of First Amendment protections and sometimes transgresses it. Recent judicial rulings have affirmed this point.

This paper will argue that political obstacles prevent Illinois reformers from enacting the campaign financial limits they seek. Even if they could enact the limits they seek, they would not provide the public benefits promised. Even if they could provide the benefits promised, they would abridge First Amendment freedoms.

1. Does Illinois' history of public corruption justify campaign-finance limits?

That Illinois has a sordid history of corruption is beyond dispute. Reformers believed that a propitious moment for reform had arrived after successive recent governors, George Ryan, a Republican, and Rod Blagojevich, a Democrat, were imprisoned.

A journalistic study by the author ranked Illinois as the ninth most corrupt state as of 2005 (Merriner, 2007). More recently, a University of Illinois at Chicago study listed Illinois as the third most corrupt state, and the Northern District of Illinois (including Chicago) as the most corrupt federal judicial district, as of 2010 (Simpson et al., 2012, 8, 7).

Reformers have identified the pathologies of Illinois' "pay-to-play" corruption as (1) a "corruption tax" intangibly placed on taxpayers, (2) erosion of public support for the political system, (2) loss of citizen participation in the political process, (3) loss of legitimacy of public officials, (4) diminished quality of state-provided services, and (5) tolerance of corruption (see, e.g., Redfield, 2006; "Tainted Democracy," 1997).

Therefore, it would seem, Illinois needs campaign finance limits to reduce public corruption. But a "State Integrity Investigation" by an ethics watchdog group finds Illinois with a "74 percent corruption risk," eleventh in the nation, and a grade of just C for its regulatory regime ("Illinois Corruption Risk," 2012).

That lackluster ranking came after the state's first-ever caps on campaign contributions, enacted in 2009. And that law illustrated how serious campaign financial limits cannot pass the General Assembly.

In any case, federal courts have held that a history of corruption alone does not justify electioneering constraints that impinge on the First Amendment. As a court recently noted, "[P]reventing actual or apparent quid pro quo corruption is the *only* interest the Supreme Court has recognized as sufficient to justify campaign- finance restrictions" (emphasis in original, *Wisconsin Right to Life,* 153).

Defendants in recent Illinois litigation urged a federal judge to "take judicial notice of the political climate underpinning the Illinois election code" (*Personal PAC,* Document 28, 6). Defendants did not ask the judge to consider the First Amendment. The judge pointedly "decline[d] the invitation to study Illinois' political history" and in March 2012 ruled against the defendants on First Amendment grounds (*Personal PAC,* Document 39, 7).

In another case, Illinois joined twenty-one other states in arguing before the Supreme Court that Montana's campaign finance limits were justified by that state's history of corruption.

Bradley A. Smith, a former chairman of the Federal Election Commission and a prominent opponent of campaign-finance regulation, wrote, "It would be as if a state argued that its crime rates were so bad that the right of *habeas corpus* shouldn't apply there, or that it should be allowed to conduct unreasonable searches without a warrant, or that its courts were so backlogged that it should be allowed to dispense with the right to trial by jury" (Smith, 2012, 1).

In June 2012, the Supreme Court ruled against Montana (*American Tradition Partnership).* Regulation of political speech is permitted only to prevent corruption or its appearance, not by a record of corruption, the Court held.

So the courts have eliminated the history-of-corruption rationale for campaign contribution limits. But reformers seemingly cannot let it go.

As recently as August 2012—two months after the *Montana* ruling—the State of Illinois argued in a case in federal court here that former Governor Blagojevich's crimes justified the state's campaign finance law of 2009. The state even appended a copy of the three-year-old Blagojevich indictment as a legal exhibit. The pleading added: "Against this backdrop, the Illinois legislature sought to reform its electoral process and restore faith in government" (*Illinois Liberty PAC,*Document 19, 2).

2. Can the 2009 Contributions and Expenditures Act Survive?

Former Governor James R. Thompson once said to me, "Is not my ability to raise money to advance my ideas a test of those ideas?" (Thompson, personal communication, September 27, 2006). Thompson's query would seem to assume a perfect marketplace of ideas. But the marketplace of ideas can be distorted by big money and many other factors.

In that light, some reformers argue that campaign-finance limits promote the value of equality in the marketplace of ideas. Such egalitarianism is a principle inherent in the First Amendment and the Amendment therefore permits campaign- finance restrictions.

But as noted, the judiciary has disagreed, stating that the goal of reducing the reality or appearance of corruption is the solitary enabler of these restrictions. Thus, the relevant question about the state Disclosure and Regulation of Campaign Contribution and Expenditures Act is: Does it aid the anticorruption enterprise?

Enacted in December 2009 and effective January 1, 2011, the law was by far the most far-reaching Illinois elections reform since the first state Campaign Disclosure Act of 1974. At a favorable moment following the spectacular scandals of governors Ryan and Blagojevich, reformers had at last attained their goal of limiting campaign contributions.

Yet a cautionary note had been sounded by two advocates of campaign finance reform in Illinois in 1998. They wrote, “The case for limits on campaign contributions is not as obviously compelling as many reformers seem to think. . . . [Academic research] does not demonstrate that campaign contributions have major effects on policy decisions. There are also grounds for doubting that limits on campaign contributions really work” (Redfield and Quirk, 16).

Two other academic advocates of reform noted a pitfall: “In order to be effective, contribution limits must be set low enough to encourage a broad-based fundraising strategy, yet high enough to allow candidates to run an effective campaign without spending all of their time fundraising” (Novak and Shah, 2007, 7). In other words, laws written by incumbent office holders (seeking their own reelection) can attain an exquisite equipoise of competing values. The trust of reformers in the wisdom of legislators is an ongoing marvel.

During floor debate urging passage of the 2009 law, one representative assured his colleagues that they need not worry about it: “Ladies and Gentlemen, we have campaign laws in place today. Who among us has been arrested because of them? Who among us has violated them to the point where we’re worried about each other? The answer is none of us, none of us” (*Illinois Liberty PAC,* Document 19-4, 5).

That representative's remarks carried perhaps more meaning than he intended. A 2007 academic study flatly stated: "The [Illinois] State Board of Elections has failed to enforce the law" (Novak and Shah, 3).

In any case, here in tabular form are the limits on contributions to candidates under the 2009 law (adapted from "State Limits," 2011):

Limit per Candidate:	**Individuals**	**Corporations**	**Unions**	**PACs and Candidates'**	**State Parties**
Primary:	$5,000	$10,000	$10,000	$50,000	Statewide: $200,000 Senate:
General	$5,000	$10,000	$10,000	$50,000	***Unlimited***

This regulatory scheme obviously empowers state parties and their leaders at the expense of other political speakers—especially individual voters. The clear effect of this scheme is to concentrate additional power in the hands of the Democratic and Republican leaders of the House and Senate (the "four Leaders"). It is difficult to discern how a statute that consolidates political power in four people might aid the anticorruption enterprise.

Many analysts contend that the modern, inordinate clout of the four Leaders derives from the restructuring of the General Assembly under the so-called Cutback Amendment of 1980, a reformist triumph (Merriner, 2008, 30-32). The 2009 act expanded and cemented the Leaders' 1980 clout.

Some reformers accepted the flawed 2009 bill (sponsored by the majority Leaders) in the name of a half-a-loaf compromise that would facilitate later, tougher reforms. Maybe so, but even the weak limits of the current law soon were diluted by a federal judge and then all but gutted by the legislature itself.

3. Undoing Reform: *Personal PAC v. State Board of Elections*

Modern campaign finance reform now has a forty-year record. The Federal Election Campaign Act of 1971 was rewritten in the Watergate climate of 1974. That law was muddled by the Supreme Court in 1976. In *Buckley v. Valeo,* the Court essentially ruled that limits on campaign *spending* violated the First Amendment, while limits on campaign *contributions* did not. Spending equals speech, but contributions are conduct, not speech. This curious reasoning has generated a mishmash of state and federal statutes and regulations, persistently litigated ever since.

In 2010, the Supreme Court ruled in *Citizens United v. Federal Election Commission* that Congress cannot restrict independent political expenditures by corporations and unions. The underlying case concerned a documentary movie about a politician, Hillary Clinton. Under the First Amendment, the government could not outright prohibit screening of the movie. However, under federal law, its sponsors could not advertise or buy broadcast time for the movie unless it met certain tests of timing and funding. The Court said such tests for independent political speech violated the First Amendment.

The Court reinforced *Citizens United* in 2012 with the *Montana* ruling referenced above. Whether political funding that is truly "independent" of candidates and parties can be defined or enforced is a perennial argument.

Personal PAC, an Illinois prochoice lobby, sued the State Board of Elections in federal court in Chicago on February 14, 2012. Citing *Citizens United,* Personal PA said Illinois abridged free-speech rights by applying contribution limits to independent interest groups. Further, Illinois outlawed independent PACs from forming one or more additional PACs (and thus spending more money).

Not for the last time, the state raised a tired and invalid defense: "[T]he challenged statutory scheme is closely drawn to counter the history of corruption prevalent in Illinois politics . . . The history of political corruption [in Illinois] takes this case outside *Citizens United*" (*Personal PAC,* Document 28, 5, 7).

On March 13, 2012, Judge Marvin E. Aspen ruled for Personal PAC and against the state. "While [the state's] motivations are sound and worthy, it is not our job to consider the efficacy of a piece of legislation or the motives of its enactors in determining its constitutionality," Aspen wrote (Document 39,13).

The state did not appeal and agreed to pay Personal PAC $70,000 in costs (Document 48, 3).Illinois legislators took note of Aspen's decision as well as of the so-called SuperPACs that were spawned by *Citizens United* and related rulings. Fearful of running against "independent" SuperPACs that might back their opponents, on May 31, 2012, lawmakers passed Senate Bill 3722 to amend the 2009 reform law.

The amendment waives limits on all contributions to candidates when spending by an independent PAC or individual reaches $100,000 in local races or $250,000 in a statewide election. There is a big exception: Contribution ceilings are not lifted based on what a political party might spend in a given race. Thus, an underfunded candidate might be able to defend himself somewhat against SuperPACs and millionaires—but not against party leaders who oppose him. The bill took effect with the governor's signature on July 6, 2012.

After *Citizens United, Montana, Personal PAC,* and Senate Bill 3722, the Contribution and Expenditures Act of 2009 is functionally meaningless (although, to be sure, its tightened financial disclosure requirements remain in effect). In the current political and legal climate, it is doubtful that serious and enforceable campaign-finance limits in Illinois could be imposed.

4. Further Undoing Reform? *Illinois Liberty PAC v. State Board of Elections*

On July 24, 2012, Illinois Liberty PAC, a right-wing lobby, sued the State Board of Elections on behalf of what the PAC calls "nonparty political speakers." Illinois Liberty PAC argues that by exempting political parties and their leaders from limits placed on others, the state denies nonparty speakers a Fourteenth Amendment right to equal protection of the laws as well as First Amendment rights.

The federal lawsuit alleges, "Because [Senate Bill 3722] treats contribution limits as expendable, it stands as a tacit admission either that contribution limits are obsolete in the wake of *Citizens United* and thus serve no anticorruption interest[,] or that the

limits never served an anticorruption interest in the first place" (*Illinois Liberty PAC,* Document 7, 13).

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In response, the state asserted that the "contribution limits in the Act do not run afoul of the First and Fourteenth Amendments, as they are closely drawn to serve an anticorruption interest." Without such limits, "the people of Illinois will suffer irreparable harm each day that the limitations are not enforced, leaving the system open in the upcoming elections to a free-for-all, unregulated and susceptible to corruption" (*Illinois Liberty PAC,* Document19, 4).

On August 27, the PAC amended its complaint to add as a plaintiff an individual contributor (Document 28-1). The case is pending before Judge Gary Feinerman. It has the potential of expanding the constitutional crimps on campaign- finance laws. Whatever the merits of Illinois Liberty PAC's case, only the most optimistic reformer could regard the 2009 law as "closely drawn." A skeptic might suggest that after four decades of earnest efforts to clean up politics by regulating its funding, campaigns remain largely "unregulated and susceptible to corruption"—the 109 pages of the state elections handbook notwithstanding.

Legislative complexity, lax enforcement, constitutional infirmities, and incessant litigation attend campaign-finance reforms. In spite of these defects, have the reforms provided public benefits?

5. Tests of Reform: Electoral Competition and Public Trust

One of the claims advanced by reformers is that limiting the dollars spent by wealthy persons and groups would serve to democratize campaigns and thus enhance electoral competition. Election returns from the past forty years do not support this claim. Not even the highly exceptional elections of 2010, when many incumbents were thrown out of office, offer much support.

In 2010 Republicans gained 63 U.S. House seats, the largest midterm shift in congressional control since 1938. Republicans also won six additional U.S. Senate seats, plus a total of 680 state legislative seats nationwide. In Illinois, Republicans netted six additional state House seats and two state Senate seats.

These changes made headlines, but another fact about the 2010 elections went nearly unremarked. Most incumbents were reelected easily.

In the U.S. House, the incumbency retention rate was 85 percent. In the Illinois House, incumbents ran in 107 of 118 districts and won at a rate of 91 percent. Only in 85 of the total of 139 Illinois House and Senate seats up for election then did the two parties even bother to contest them.

Nationally, 5,247 state legislative incumbents sought reelection and 87 percent were returned to office. In 18 states, as in Illinois, state legislative incumbents won

between 90 and 98 percent of the time—in California, the largest state, not a single incumbent was beaten (Casey, 2012, 1).

Such numbers proving the power of incumbency, dating from the first Watergate-era reforms, could be cited until the mind reels. However, it should be noted that the 2010 Illinois elections took place under federal and state restrictions imposed since 1974 but before the 2009 Contribution and Expenditures Act took effect.

Has that act, then, affected the 2012 election cycle?

Consider:

- After the March primaries, only 24 of 59 state Senate districts offered candidates from both parties.
- Likewise, 81 of 118 House districts had only one party's candidate.
- Only 24 Senate districts and 38 House districts are considered competitive.

Of course, incumbents have always enjoyed institutional advantages, in particular the decennial gerrymandering of election districts. Still, it seems clear that contribution limits have protected the status quo by erecting barriers of entry to the political market. Further, regulations impose compliance costs because any candidate, of whatever means, must hire lawyers and accountants. Barriers and costs then inhibit the very public policy changes that reformers seek. Efforts to weaken the status quo have reinforced it.

A related, though intangible, benefit promised by campaign financial reform is an elevation of public trust in government. Again, evidence to back this claim is elusive.

In Illinois, the Campaign Disclosure Act of 1974 was followed by further ethics legislation including the State Gift Ban Act of 1998, the State Officials and Employees Ethics Act of 2002, the Campaign Contribution and Expenditures Act of 2009, and the 2012 Senate

Bill 3722 amendments. Public opinion survey data under this regulatory regime hardly indicate that trust in government is rising or even stable.

The Illinois Policy Survey of Northern Illinois University annually asks respondents to rate their trust in the General Assembly. In 1994, those who held either "poor" or "very poor" judgments, as well as those expressing "good" or "excellent" opinions, were roughly tied at 18 percent each. In 2011, fully half expressed "poor/very poor" opinions compared to just 9 percent for "good/excellent" (Peddle and Burrell, 2010, 15; Burrell and Wyckoff, 2012, 19).

Another poll by the University of Illinois asked in 2006, "How much of the time do you think you can trust the Illinois state government in Springfield to do what's right?" Result: "[A]lmost no one chose 'always,' while about 15 percent of the sample chose 'never' (Gaines and Kuklinski, 2).

More recently, a *Chicago Tribune* poll (Pearson, 2010) reported that "more than 6 in 10 lack confidence in Democratic-run Springfield" (the modifier "Democratic-run" perhaps indicates the newspaper's editorial position).

Nationally, the outlook is no better. In 1974, the climax of the Watergate scandal and the date of the first sweeping campaign reforms, Gallup found that 44 percent of respondents expressed "not very much" trust in the federal government or "none at all" (a volunteered response) "to do what is right." In 2011, after 37 years of reforms, the corresponding number was 57 percent ("Trust in Government," 2012, 1).

A similar CNN/ORC International Poll in 2011 found trust in government at an "all-time low:" "Seventy-seven percent of people questioned say they trust the federal

government only some of the time, and an additional eight percent volunteer that they never trust the government to do what's right" ("CNN Poll,"1).

Manifold factors influence the "trust" issue and it is possible that distrust would be higher without the various reforms put in place. But reformers seeking empirical confirmation for their cause must look elsewhere.

As for another alleged boon of reform, constraint of the "dialing for dollars" frenzy, online disclosures posted by the State Board of Elections offer no assurance that fundraising for the 2012 election cycle (a presidential election year) underperforms those of 2010 (midterms), 2008 (presidential), or 2006 (midterms). Instead, the 2012 campaigns, state and federal, are manipulated by SuperPACs. This is where forty years of reform have taken us.

Conclusion

Reformers have been fixated on the costs of campaigns but not on the costs of reforms. Campaign financial limits carry costs both procedural and substantive. The 2009 Illinois reform law, itself fundamentally flawed, has already been vitiated by the judiciary and the legislature. To the extent that campaign-finance controls remain, they protect incumbents and fail to advance the values of equality, democracy, freedom of speech, probity, or trust in government. The reformist struggle to cleanse government of corruption must find other avenues.

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