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HAS THE U.S. CAMPAIGN FINANCE SYSTEM COLLAPSED?

The Interest Group Response to Campaign Finance Reform

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The Interest Group Response to Campaign Finance Reform

Michael M. Franz

Abstract

Has the most recent campaign finance reform failed relative to interest groups? More broadly, what's next in the realm of interest group electioneering? This paper explores the role of interest groups in two areas: as contributors to candidates and parties and as candidate and issue advocates. Overall, the numbers reported here show that direct interest group influence with candidates and parties likely declined in the wake of reform. On the other hand, recent uncertainty in the regulatory environment should foster the expansion of interest group advocacy efforts (and has already done so in this year's presidential primary elections). On this score, the attempts of reformers to reduce interest group electioneering have likely failed. Instead of concluding that such a development is bad for American elections, however, this paper argues that such discontent is misplaced.

KEYWORDS: campaign finance, 527s, issue advocacy, soft money, PACs

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Political scientist Marc Petracca observed in 1992 that scholars of interest groups often discuss changes in interest group politics as “explosions” (1992: 11-13). He noted this pattern before interest groups in the 1990s expanded their presence in American politics even further with soft money party donations and with issue advocacy television ads. If interest groups “exploded” in the 1960s with their lobbying and advocacy, however, they surely went nuclear in the 1990s. Pressure group electioneering was so powerful a presence in the elections of 1994-2002, that Congress in 2002 was compelled to pass the first major campaign finance reform in a generation, the Bi-Partisan Campaign Reform Act (BCRA). *The New York Times* declared its passage “a victory for all Americans” (Editorial, A36, 3/21/2002).

There were really two main concerns about interest group electioneering that were addressed in BCRA: soft money contributions by interest groups to non-federal party accounts and issue advocacy advertisements by interest groups that featured federal candidates but avoided “magic words.”¹ BCRA eliminated the first concern with a near-complete ban on soft money for parties and attempted to handle the second with the establishment of the “electioneering communication.” This category of election-related message (presumably) mandated that any interest group ad aired within 60-days of a general election or 30-days of a primary, *and* that featured or pictured a candidate for federal office, be paid with hard money dollars out of a regulated PAC account.²

As with all things campaign finance, however, this latter restriction was merely prologue to yet another chapter in the “explosion” narrative. By 2004, 527s were nearly a household name, and by 2007 (in a controversial decision in *FEC v. Wisconsin Right to Life*), two new Supreme Court justices seemed poised to help dismantle some of the BCRA regime (Hasen 2008). This raises the question posed here: has BCRA failed relative to interest groups? More broadly, what’s next in the realm of interest group electioneering?

I shall begin with a discussion of soft money contributions by interest groups, considering more broadly the role of interest groups as investors in parties and candidates. I shall then examine the nature and extent of issue advocacy

¹ Magic Words were first established in a footnote in the Supreme Court’s 1976 decision in *Buckley v. Valeo*. The court listed eight phrases that it believed clearly established an election message. These magic words are: “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” or “reject.” By the 1990s, the presence of these words had developed into the legal bright line between regulated election ads and non-regulated issue ads.

² PACs are committees most often formed by corporations and unions to collect contributions from employees or members to be spent on federal electoral activity. It is beyond the scope of this paper to outline all of the rules relative to interest groups and elections, but for much more information on the legal dos and don’ts I recommend *The New Campaign Finance Sourcebook* (Corrado et al 2005). In particular, Chapters 1 and 2 offer the best history available of the evolution of campaign finance laws.

campaigns. In this second discussion, I wish to consider the possibility that concerns over interest groups as issue advocates may be misplaced. Even after the Court's decision in *Wisconsin Right to Life*, one might argue that the most important problem relative to interest groups is not their public communications but the nature of their Washington lobbying, which is far more hidden from the American voter than the very public act of direct voter appeals on television.

Interest Groups as Investors

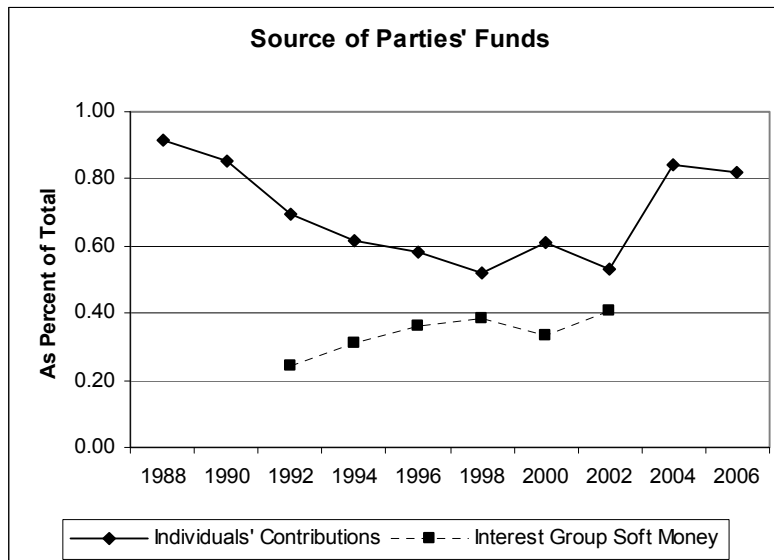
Interest group contributions to parties and candidates are assumed to be part of a rational strategy in the pursuit of favorable governmental policy. This raises serious questions for reformers who presume that candidates and parties are happy to oblige special interest demands in exchange for much-needed campaign dollars. While the evidence for such a nefarious relationship is mixed (Ansolabehere, de Figueiredo, and Snyder 2003), its potential is compelling and concerning. After seven years of tireless advocacy by Russ Feingold and John McCain, BCRA did eventually pass in 2002 (see Green 2002, pp.73-83, for a concise history of the legislative struggle), and it contained specific provisions to blunt the role of interest groups as investors in public policy outcomes.

In addition to banning soft money for parties, BCRA also dealt a silent blow to PACs by doubling the upper limit on contributions from individuals to candidates (to \$2,000, indexed for inflation), but retaining the same contribution limit of PACs to candidates (at \$5,000). The law also increased the limit individuals could contribute in hard money to party accounts (from \$20,000 to \$25,000, also indexing the new limit to inflation), but left untouched the PAC limit on party contributions at \$15,000. *Stated bluntly, in a post-BCRA world, interest groups play a significantly reduced role as contributors to parties and candidates.* On this score, BCRA could be deemed a success.

Consider first the position of interest groups as contributors to parties. As it stands, after the elimination of soft money for parties, interest groups play almost no role in funding the Democrats' or Republicans' hard money accounts. In Figure 1, I show the percentage of party money contributed by individuals from 1988 through 2006, a time span covering ten elections. In 1988, individuals contributed over \$105 million in itemized hard money contributions (that is, contributions greater than \$200 per donor) to all federal party accounts, representing 90 percent of itemized hard money receipts. When including non-itemized contributions, individuals contributed over \$241 million to parties that year. Compare this to PAC contribution totals to parties in 1988: just over \$13 million for all PACs. In 2006, after the ban on soft money, individuals contributed over \$418 million in itemized contributions to parties (82 percent of all itemized dollars), but PACs only accounted for just over \$50 million.

During the 1990s, however, the story is largely different. It is apparent that the era of soft money significantly changed the funding structure of the Democratic and Republican parties. In brief, soft money was a creation intended to allow parties to build a party brand and to help non-federal state candidates (Corrado 2005, p.32). Parties argued, justifiably and successfully, that for spending on get-out-the-vote efforts or on generic “pro-Democratic” or “pro-Republican” appeals, it was unfair to force the funding of these activities with regulated hard money. Soft money developed, though, into a convenient method of avoiding the rules on hard money. Parties in the 1990s used soft money aggressively to air unregulated (non-magic-word) television advertisements on behalf of federal candidates. (I expand on this below.)

Figure 1



*Figures for 1988 and 1990 do not include soft money in the denominator since soft money totals were not reported to the FEC prior to 1992.
 Figures for 1992-2002 include hard and soft money in the denominator.
 **All figures only consider itemized contributions (>\$200 per donor) in the FEC detailed contributor files.

Using the FEC reports of soft money donations (the Commission first required parties to report itemized contributions of soft money in 1992), I split donors into individuals and interest groups. Interest groups in this scheme include any corporation, union, PAC, trade association, or membership group contributing to

the parties' non-federal accounts.³ The graph demonstrates that between 1992 and 2002, parties steadily increased their reliance on *soft money* donations by interest groups. Note, in particular 1998 and 2002, when interest group soft money accounted for nearly 40 percent of all party receipts (hard and soft money combined).

These numbers are staggering. Interest groups donated over \$255 million in soft money to parties in 2000 and over \$276 million in 2002. This exceeds significantly the \$176 million in individual contributions of soft money in 2000 and \$171 million from individuals in 2002. In this sense, campaign finance reformers were correct to assert that the soft money era was unique. It represented an unparalleled linkage between interest groups and parties. For example, McCarty and Rothenberg (2000) note: "the use of so-called 'soft money' contributions [enhanced] the role of the party as an intermediary between groups and candidates: Interest groups [had] an incentive to channel large amounts of money to party organizations so it could be funneled into accounts where it could be spent directly on favored candidates" (292). Former Congressman Timothy Wirth affirmed the point in a 1997 affidavit for a campaign finance case, saying:

When I solicited contributions for the state party, in effect I solicited funds for my election campaign. I understood that solicitees who made contributions to the party almost always did so because they expected that the contributions would support my campaign one way or another. . . . In this fund-raising, I often solicited contributions to the DSCC [Democratic Senatorial Campaign Committee] from individuals or Political Action Committees (PACs) who had already "maxed out" (contributed to my campaign committee the maximum amount allowed by federal law).⁴

³ There is an important conceptualization point worth making here. The FEC stores all soft money donations to parties (for 1992 through 2002) in its Detailed File for contributions from individuals. To sort out whether the soft money donor is an individual or interest group requires an examination of the specific donor name; there is no unique contributor code as in the PAC contribution files. There are over 50,000 soft contributions in 2002, for example, meaning that the donor classifications require some detailed recoding. Alternatively, the Center for Responsive Politics (CRP) at www.opensecrets.org reports soft money totals for interest groups in a much easier to digest format. Unfortunately, in its summary reports, the CRP includes soft money contributions from certain individuals (CEOs and spouses and children of CEOs) in the total for different groups. This approach artificially increases soft money totals for these groups. In my scheme, a more conservative one, I only show soft money contributions directly from interest groups, excluding these affiliated individual totals.

⁴ Document accessed from a Web archival search on relevant campaign finance cases. The affidavit was submitted for *Federal Election Commission v. Colorado Republican Federal*

At the same time, fund-raisers and party officials also acknowledged that soft money was used to purchase access to party leaders and federal policymakers. According to former Senator Dale Bumpers, in his 2003 affidavit for *McConnell v. FEC*:

I believe that, in many instances, there is an expectation of reciprocation where donations to the party are made. . . . I do not think the tobacco industry gives the Republican Party a million and a half or two million dollars because they expect them to take a very objective view on tobacco issues. I think the tobacco industry got what they expected when, after they had given scads of money to both the Republican National Committee and the National Republican Senatorial Committee, a majority of Republicans killed the tobacco bill.⁵

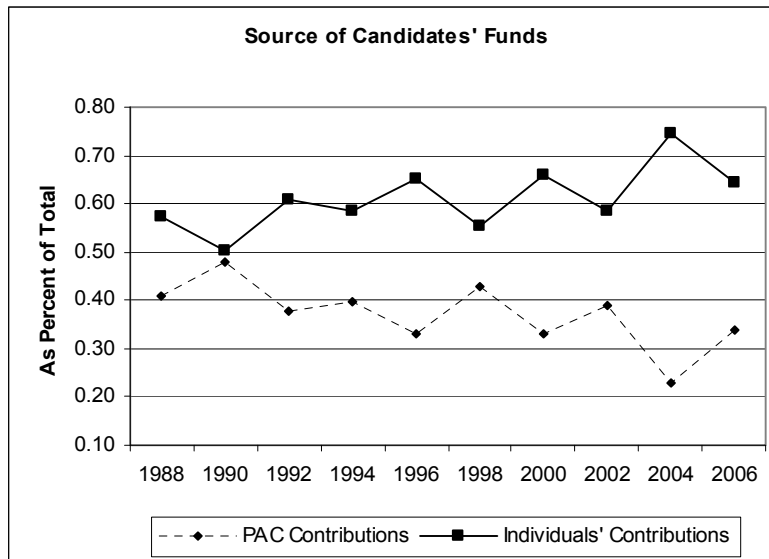
In general, then, the presence of soft money allowed interest groups to contribute to parties with the goal of helping candidates in close races and to signal their loyalty to a party agenda. There can be no doubt that in the era of soft money, interest groups drew ever closer to parties, far closer than in any other period in the previous 100 years. The good news, however, is that with the passage of BCRA, individuals regained the primary status of party funders. In both 2004 and 2006, individuals accounted for over 80 percent of all party receipts.

Consider next the role of PACs as contributors to candidates. PACs have had a significant role in this regard since the passage of campaign finance reform in 1974. PACs increased significantly in the years after the 1974 reforms, and their presence as contributors has consistently engendered cynicism on the part of those worried about the power of special interests. Figure 2 shows the percentage of candidate contributions coming from individuals and PACs between 1988 and 2006. (Party and candidate contributions are included in the denominator here, but they represent only about 2 percent of all candidate receipts). PACs play a more prominent role in this realm (as opposed to as party financers), but their status is still subordinate to contributions from individuals. More importantly, PACs account for a smaller share of candidate receipts after the passage of BCRA.

Campaign Committee. The electronic version is no longer online, but a hard copy is available from the author on request.

⁵ Accessed from Key Documents section of www.democracy21.net

Figure 2



*Contributions from individuals only include itemized contributions (>\$200 per donor) in each cycle's FEC detailed file.

**Contributions to candidates from parties and other candidates are included in the denominator, though candidate transfers between committees and loans to candidate committees are not.

In 2004, for example, individuals contributed over \$1 billion in itemized contributions to federal candidates, and PACs contributed just over \$320 million. The huge individual presence in 2004 represented a near 70 percent increase in itemized donations from 2000, but the PAC commitment was only about 25 percent greater than four years prior. All told, individuals gave 75 cents of every dollar to federal candidates that year, the largest share of candidate budgets in over 20 years.⁶ In 2006, PACs had their lowest share of candidate budgets in any of the five previous midterm elections. PACs only accounted for 34 percent of congressional candidate budgets that year, and the \$724 million itemized contributions from individuals accounted for 64 percent of candidate war chests.

The chief message to draw from Figure 2 is that in 2004 and 2006 individuals were ever more important in candidate fund-raising. Even without these post-BCRA years, however, there is an apparent trend between 1988 and 2002 away from PAC donations and towards individual contributions (Jacobson 2006 also

⁶ One should note, in addition, that PACs have historically given very little to presidential candidates (because of the general election public funding system), which explains why the disparity between PACs and individuals in Figure 2 is always greater in presidential election years.

notes this, p.191). This is particularly true in presidential election years where PACs account for a lower share of candidate budgets in each subsequent election. The trend is only exacerbated after BCRA's passage. For all those worried about PAC power, then, the evidence is clear: the problem is greatly alleviated with the doubling of the individual limits. This will likely become more apparent as these limits index to inflation and PAC limits do not.

Of course, there are those who would object to the implicit notion expressed here that contributions from individuals are "purer" than those from interest groups. The type of contributor who can give the individual maximum is still wealthier than most voters, and many of these individuals are powerful business and union leaders who might leverage significant influence with their hard money donation.⁷ Furthermore, individuals who bundle contributions might have particularly large influence with candidate and party beneficiaries. Whether individuals with higher donor limits can leverage increased power over candidates is a controversial question, however. Ansolabehere and colleagues (2003), for example, observe that contributions from individuals tend to be small. They posit that individuals contribute not as a form of investment, which is more likely the motivation of interest groups, but as an act of democratic participation.

Ultimately, this point is unlikely to convince reformers, and as long as contributions are a legal form of political expression—a right which is surely here to stay—there will always be concerns about whether donors have more influence than non-donors. Furthermore, the current Supreme Court in *Randall v. Sorrell* (which in 2006 overturned Vermont's very low contribution limits at the state level) made clear that contributions are likely to remain high enough to warrant concern over the relationship between contributor and candidate. We can likely agree, though, that interest group investment strategies are certainly not advantaged post-BCRA, and this should satisfy many reform advocates.⁸

Before moving on to a discussion of interest group electioneering, I think the point can be extended even further. Consider the role of 527s. For many, 527s have become "shadow parties," where donors of soft money pre-BCRA shift to pro-party 527s post-BCRA (Skinner, 2005). On this, the evidence is mixed. Weissman and Hassan (2006), for example, show that many corporations did not move their soft money for parties to pro-party 527s (but see the Clark Muntean article in this issue). Despite this, because 527s played such a prominent role in

⁷ For example, we most certainly must be worried about the Jack Abramoffs of the world, but as I'll discuss below, their influence is primarily in the lobbying realm, on K Street in Washington. In my view, this is probably the place to be chiefly worried about the influence of individuals and interest groups, as opposed to the highly regulated role of candidate and party contributor.

⁸ I am not making a zero-sum argument here. Just because individuals under BCRA can contribute more money to candidates with higher limits does not preclude PACs from compensating by finding the means to invest more aggressively in candidates (as bundlers, for example). The initial evidence of two post-BCRA elections, however, appears to indicate that this has not happened.

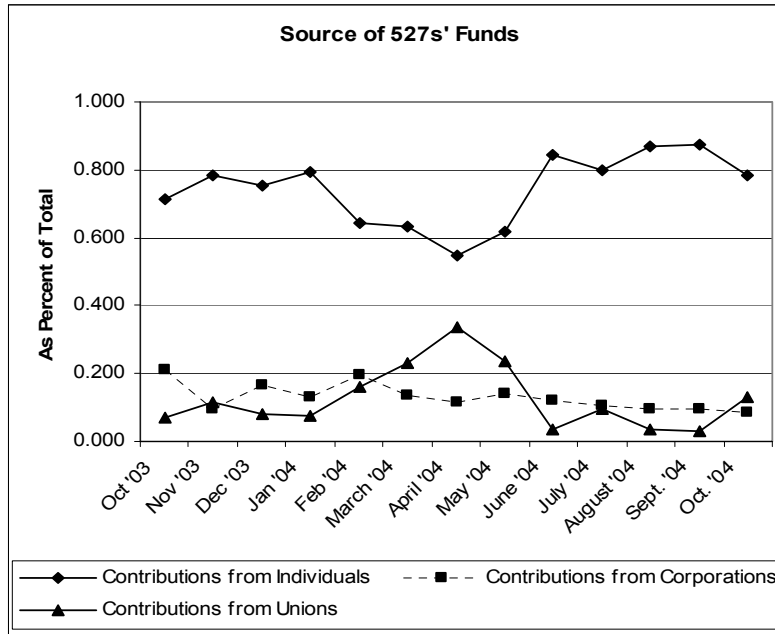
2004, it's worth considering the donor bases of these active groups. What role did unions and corporations play in funding 527s in 2004? Do they sidestep the upper limits on donations of hard money with a prominent presence in the coffers of these new groups?

In Figure 3, I show the contribution percentages of individuals, unions, and corporations to issue advocacy and federally oriented 527s in 2004.⁹ I show these totals for each month in the year running up to the November election (October 2003 through October 2004). The graph demonstrates that in every month, individuals account for the largest percentage of donated money. This is particularly true for donations in the final few months of the election season, when individuals make up between 80 and 90 percent of these 527s' budgets.

The reason for this lies in the underlying exemption available for 527s to air ads close to Election Day. In short, provided these groups received the bulk of contributions from individuals, and provided that they side-stepped "magic words" in their public communications, 527s were largely allowed to remain active until the very end of the election. The Figure shows how small a presence unions and corporations played in funding these groups, though. Even in this realm, general treasury money from unions and corporations was quite small in comparison to money donated out of their own bank accounts by individuals. Of course, unlike donations to candidate and party accounts, contributions to 527s are unlimited and often in the millions, even from individuals. This is justifiably a concern for many reformers, and one current fight is to force many of these 527s to register as PACs.

⁹ These numbers are from reports to the IRS by 527s. 527s must report receipts and expenditures to the IRS if they do not report to the FEC or conform to state-level reporting requirements. When initially reporting to the IRS, 527s must state the explicit purpose of the group. I examined each stated purpose and coded each group into one of four categories: issue advocacy, state and local, federal, and unclear. Issue advocacy groups, in my coding scheme, are those groups whose stated purpose is to educate voters or to get-out-the-vote. State and local groups are those whose stated purpose is to contribute to or aid candidates for non-federal office. Federal 527s are groups whose stated purpose includes either a specific reference to helping federal candidates or a generic reference to aiding candidates. Finally, unclear groups are 527s whose stated purpose is too vague to be classified.

Figure 3



*Any 527 coded as federal-oriented or issue advocacy is included here. State-level groups and non-federal candidate groups are excluded.

All told, my point with this brief analysis is straightforward: individuals are the primary benefactors of federal campaign activity. This is especially true post-BCRA, and has largely been true for the last 30 years. In a sense, then, BCRA was successful in minimizing the role of interest groups relative to party accounts, representing the most important victory for campaign finance reform advocates, and has moderately undercut the role of PACs relative to candidates. Even in the realm of 527s, individuals hold the most clout. This should ultimately temper the passions of many who assume that corporations and unions “buy” elections or “bribe” candidates.

Interest Groups as Advocates

The situation is noticeably different in the realm of interest group electioneering, where reformers are most concerned. Indeed, in the world after *Wisconsin Right to Life*, the wall erected by BCRA between election advocacy and issue advocacy seems to have crumbled. With this, we might have real reason to worry that the gains made by reformers with the passage of BCRA are now under full-scale

attack, and that interest groups are ready to burst through with ever more unregulated and thinly disguised pro-candidate electioneering.

In this sense, if “buying” votes or access is undermined by contribution limits, it is certainly possible that interest groups could alternatively work to elect candidates presupposed to help their policy agendas. At first glance, we might have little reason to worry. The number of groups who spend aggressively and independently of candidates is not significantly large. For example, in 1998, 84 PACs reported independent expenditure campaigns either for or against a federal candidate for office. Twenty-two of these groups aired television ads in the top 75 media markets that year. Compare this to the over 2,800 PACs reporting contributions to federal candidates. In 2000, 159 groups reported independent expenditures to the FEC, and the Wisconsin Advertising Project captured ads from 103 distinct groups making television appeals. By contrast, 2,900 PACs made candidate contributions in 2000.

The larger issue, however, is the intensity of these appeals to voters. In Table 1, I show the level of expenditures in campaigns by parties and interest groups for all available data back to 1988. Party independent expenditures—which are public communications funded with hard money—were illegal prior to a 1996 Supreme Court case (*Colorado Republican Federal Campaign Committee v. FEC*), and in the elections of 1996-2002 were essentially irrelevant, as parties spent their huge war chests of soft money on unregulated candidate issue advocacy. In 2000 and 2002, for example, parties spent well over \$100 million in each year on about 200,000 soft money ads. With the elimination of soft money, though, parties invested significant hard money resources (again, overwhelmingly funded by regulated contributions from individuals) on independent expenditure campaigns. As the Table makes very clear, parties did not slow their expenditure efforts in 2004 and 2006; they actually expanded them with the use of hard money.¹⁰

¹⁰ Note that coordinated expenditures by parties—hard money communications that are coordinated with candidate campaigns—have remained fairly consistent for the last 20 years. Coordinated expenditures are subject to certain limits, making them less attractive as an option for parties. In addition, the rules for coordinated expenditures have not changed during this time period. This is unlike party independent expenditures, which were legal only after 1995 and which now represent the chief way for parties to advocate for candidates without limit. Corrado (2006), however, discusses the Republicans’ innovative use in 2004 of a hybrid form of party expenditure that was neither independent nor coordinated.

Table 1—Party and Interest Group Electioneering Totals

	Party Independent Expenditures	Party Ads with no “Magic Words”	Party Coordinated Expenditures	PAC Candidate Contributions	PAC Independent Expenditures	Issue Advocacy/ Electioneering Communications
1988			\$39,389,147	\$157,188,684	\$21,465,566	
1990			\$18,080,615	\$157,574,457	\$5,647,859	
1992			\$59,558,271	\$186,308,525	\$11,035,701	
1994			\$39,920,211	\$186,609,024	\$5,200,081	
1996	\$11,120,467		\$51,186,413	\$213,883,248	\$10,183,805	
1998	\$1,545,874	\$25,580,622 (44,377)	\$18,004,896	\$248,967,935	\$9,507,928	\$9,220,196 (18,499)
2000	\$2,882,646	\$160,124,457 (226,430)	\$43,636,346	\$307,725,837	\$28,802,075	\$90,993,892 (131,212)
2002	\$3,009,529	\$114,693,929 (194,687)	\$17,466,991	\$300,658,557	\$20,355,772	\$ 24,637,129 (40,579)
2004	\$260,889,338		\$50,691,402	\$320,273,768	\$68,708,428	\$134,161,852
2006	\$225,987,351		\$21,833,527	\$380,389,934	\$38,555,666	\$21,870,736

*Data in first, third, fourth, and fifth columns are from the FEC. Independent expenditures for parties were not legal before 1996.

**For data in the second and last column, 1998, 2000, and 2002 are from Wisconsin Advertising Project estimates and represent the estimated total amount spent on television ads that featured federal candidates but avoided magic words. Numbers in parentheses are the total number of ads broadcast fitting this description. Figures for 2004 and 2006 in the last column are from FEC totals on the amount spent on interest group “electioneering communications.” Data prior to 1998 is not available.

I illustrate these party numbers as a form of comparison with interest group expenditures shown in the last three columns. First, PAC contributions always exceed any measured effort by interest groups and PACs to spend independently of candidates. For example, PAC independent expenditures are actually quite low between 1988 and 2002, never totaling more than \$29 million. These figures in this time frame are consistently lower than the coordinated efforts by parties. After 2002, however, PACs nearly doubled their independent expenditure campaigns in hard money, but the jump is still relatively modest when compared to the PAC contribution figures.

Of course, issue advocacy by interest groups is very high for the elections of 2000 and 2004. Interest groups spent an estimated \$91 million in 2000 to air over 131,000 political ads that mentioned federal candidates but avoided magic words. After the passage of BCRA, 527s and other groups in 2004 spent over \$134 million on non-magic word ads in the weeks leading up to the primaries and general election. In simple terms, the “crisis” of interest group issue advocacy in 2000 was not solved with the provisions on “electioneering communication” in BCRA. By 2004, the money simply moved *from* groups funded by unions and corporations *to* groups funded primarily by large and unregulated donations from individuals (as discussed in the previous section—see again Figure 3).

Is this an “explosion” to worry about? Perhaps. Keep in mind that prior to 1998 issue advocacy by interest groups was minimal. The AFL-CIO did spend significantly on issue ads in 1996 (Rozell and Wilcox 1999, p.139), but in the time before the mid-1990s, interest groups spent independently of campaigns with mostly hard money. And as Table 1 demonstrates, the level of such efforts (in the form of independent expenditures) was fairly modest.¹¹ Even after the advent of issue advocacy, interest groups spent relatively small sums on these unregulated efforts in 1998 (about \$9 million on TV ads), 2002 (about \$25 million on TV), and 2006 (about \$22 million on 30-day and 60-day broadcast messages). As such, in only two elections since the major campaign finance reform of 1974 have interest groups spent for candidates at truly astronomical levels.

In this, I am excluding from these figures the totals devoted to the ground war (see Magleby and Monson 2004, Magleby and Patterson 2006), and there is some evidence that many groups have shifted tactics from TV to old-fashioned mail, phone calls, and door-to-door mobilization.¹² In this realm, interest groups are

¹¹ Consider specifically two major electoral controversies involving interest groups in the 1980s: John Dolan’s National Conservative PAC (Sabato 1984) and the National Security PAC with its Willie Horton ads. These were largely hard money fights on a modest scale.

¹² I am usually suspicious of those announcing the apparent death of television advertising (see *New York Times*, A1, 9/5/02 and *New York Times*, A1, 4/6/04). It is true that Internet electioneering is cheaper and door-to-door efforts are comparatively more effective (Gerber and Green 2000), but television affords an interest group the chance to reach thousands of voters

afforded greater opportunities to distort a candidate's record or spread character attacks. Such tactics are also less likely to foster media scrutiny. This is harder to do in a television ad because the media and opposing candidates are ordinarily watching closely. It is true, then, that any figures for TV advertising by interest groups understate the overall level of group mobilization in campaigns. Even admitting that, though, 2002 and 2006 saw far less interest group advocacy than 2000 and 2004.

2008, however, will undoubtedly be the third election to warrant concern about interest group candidate advocacy. I expect record levels of interest group issue advocacy this year. The reasons for this are twofold.¹³ First, the presidential election is likely to be very close, and is undeniably consequential. With two wars being waged in the Middle East, and after years of rancor and partisan bickering, the stakes of this election are greater than ever. And Democratic congressional gains in 2006 will be vigorously defended this year. Even if, as early polling suggests, the Democrats are unlikely to lose control of the House and Senate, Republicans and pro-GOP groups will have incentive to fight against further losses, especially in the Senate, where 60 Democratic votes is a possibility.

The second driving force for more interest group spending is the regulatory environment.¹⁴ With the *Wisconsin Right to Life* (WRTL) decision from the summer of 2007 (see the Briffault article in this issue), where the Supreme Court argued that ads mentioning candidates should not be uniformly treated as election-related, the chance for issue ads supporting candidates from unions and corporations is high. Whereas the rules for 2004 permitted 527s to air unregulated ads for candidates close to Election Day, *WRTL* (and recent FEC rulemaking) permits such messages from almost any interest group, provided the message is "reasonably" interpreted as issue-related and not solely election-related. Furthermore, the Court was clear that the context of the message (how close it airs to Election Day, for example) cannot be used as a determinative factor in its classification. That judgment is confined solely to the content of the ad.

instantly. In addition, because there are always more TV ads with every successive election, I assume that TV advertising is here to stay.

¹³ I should say *largely* twofold. Boatright (2007), for example, expects 527s to spend aggressively in 2008, but not for the same reasons as in 2004. Namely, the functional motivations for many pro-Democratic 527s in 2004 (in Boatright's assessment) are not present currently. As such, he expects the spending to be funded by issue-based groups and 527s connected with larger union or membership groups. This implies that election spending by interest groups is motivated for a variety of reasons in addition to the two mentioned above.

¹⁴ I do not expand on this here, but one component of the regulatory environment is the currently hand-cuffed Federal Election Commission. As of this writing, the FEC is only staffed with two commissioners. Because any regulatory action requires the approval of at least four commissioners, the FEC is essentially unable currently to monitor and enforce campaign finance violations. This will, without question, compel candidates, parties, and interest groups to push the limits on permissible electioneering.

This should, in practical terms, reset the game to the pre-BCRA rules. Thinly disguised lobbying ads on TV and radio will support or oppose federal candidates for office, and many will be funded with union and corporate money. This will surely increase the role of interest groups as candidate advocates. Rick Hasen, campaign finance expert, has made this astute observation: “Note the breadth of this standard [as set out in WRTL]. What issue is unlikely to become the subject of legislative scrutiny by some Member of Congress in the near future?....Simply put, for most ads there *will* be a reasonable interpretation of even an ad likely to affect the outcome of an election that it is something other than an appeal to vote for or against a candidate” (2008, pp.29-30—emphasis in original).

The early evidence from the 2008 presidential primaries appears to bear this prediction out. Consider these recent headlines:

- “Stealthy Groups Shake Up Races,” *Wall Street Journal*, 2/4/2008
- “Outside Groups Aid Obama, Critic of Their Influence,” *New York Times*, 1/30/2008
- “After Ruling, Outside Groups Spend Heavily to Sway Races,” *New York Times*, 1/1/2008
- “Nonprofits Become a Force in Primaries,” *Washington Post*, 12/5/2007
- “A New Channel for Soft Money Appears in Race,” *New York Times*, 11/12/2007

And as of February 11, 2008, interest groups had spent almost \$7.5 million on electioneering communications (as reported to the FEC) featuring candidates in presidential and congressional primary races. The relevant interest groups (12 of them) are shown in Table 2.¹⁵

While these developments alone are potential cause for distress, there are still other unanswered questions that may allow for yet more varied investments by interest groups in elections. One issue involves FEC mandates of disclosure for electioneering communications. Under current rules, any ad mentioning or picturing a federal candidate that airs within 60-days of a general election or 30-days of a primary and costs more than \$10,000 must report to the FEC any contributions to the group, even if the ad itself is unregulated. In one pending court case, *Citizens United v. FEC*, the plaintiffs are arguing that these disclosure requirements should not extend to unregulated issue ads. The argument is simple:

¹⁵ This represents the largest presidential primary mobilization by interest groups in the modern era. Keep in mind, though, presidential candidates through the end of January 2008 had spent over \$100 million in television advertising alone (as reported by Wisconsin Advertising Project in its February 1, 2008 press release).

if the ad itself is judged to be issue advocacy, why should the sponsors report contributions to the Federal *Election* Commission?

If the Supreme Court hears the case and agrees with Citizens United, much of these electioneering communications will be funded with money that is impossible to track.¹⁶ This is especially important for electioneering communications sponsored by non-profit 501c groups. 527s are required to report receipts and expenditures to the IRS, regardless of the timing and form of electioneering, but 501c donor lists are not disclosed, except to the FEC when they sponsor electioneering communications. As it stands, if a concerned voter or journalist is interested in tracking the source of funds used to air TV and radio attacks by interest groups close to Election Day, the FEC makes this endeavor fairly easy. If Citizens United is successful, though, the source of such funds will remain secret, and more money will consequently flow to 501c groups and certainly away from 527s. Keep in mind: disclosure does not exist currently for 501c phone banking and mailings, or for their TV and radio ads outside the 60-day and 30-day windows.

All told, broader deregulation of interest group campaign finance laws looms large on the horizon, and many expect interest groups to expand their electoral presence in this current election cycle. Whereas BCRA was a success relative to interest groups as investors, the evidence is convincing that it has failed miserably relative to efforts at group advocacy. I remain unconvinced, however, that such developments spell doom for American politics. I expand on this skepticism in the final section.

Table 2—Electioneering Communications in 2008 Primaries

Group Name	State	Public		
		Distributi	Receipts	Expenditures
		on		
Alliance for a New America	VA	26-Dec-07	\$10,000	\$8,817
Alliance for a New America	VA	26-Dec-07	\$1,661,121	\$1,659,598
Alliance for a New America	VA	15-Dec-07	\$50,000	\$170,801
Alliance for a New America	VA	15-Dec-07	\$841,121	\$590,000
			\$2,562,242	\$2,429,216
AFSCME AFL-CIO	DC	29-Jan-08	\$0	\$102,200
AFSCME AFL-CIO	DC	15-Jan-08	\$0	\$65,425
AFSCME AFL-CIO	DC	27-Dec-07	\$0	\$75,855
AFSCME AFL-CIO	DC	26-Dec-07	\$0	\$84,406

¹⁶ Disclosure requirements are some of the most accepted forms of campaign finance regulations. One argument of many free speech advocates is that disclosure alone is enough to protect democracy from the influence of money in politics. As such, it seems unlikely that disclosure is truly at risk, although the current Court seems eager to reconsider even accepted logics of *Buckley*.

AFSCME AFL-CIO	DC	20-Dec-07	\$0	\$156,333
			\$0	\$484,219
American Right to Life Action	CO	19-Dec-07	\$11,832	\$11,832
American Right to Life Action	CO	12-Jan-08	\$12,900	\$11,635
			\$24,732	\$23,467
California Nurses Association	CA	10-Jan-08	\$0	\$150,000
Club for Growth.net	DC	9-Jan-08	\$332,000	\$203,400
Club for Growth.net	DC	26-Dec-07	\$304,500	\$189,396
Club for Growth.net	DC	10-Dec-07	\$375,000	\$161,684
Club for Growth.net	DC	17-Dec-07	\$200,000	\$196,882
			\$1,211,500	\$751,362
Elder Citizens for a Better Gov't	MD	5-Feb-08	\$20,000	\$20,000
Freedom's Watch, Inc.	DC	8-Dec-07	\$86,000	\$79,317
National Education Association	DC	24-Jan-08	\$0	\$101,200
The One Campaign	DC	15-Dec-07	\$0	\$2,025,000
PowerPac.org	CA	3-Feb-08	\$0	\$40,600
PowerPac.org	CA	2-Feb-08	\$0	\$120,370
PowerPac.org	CA	31-Jan-08	\$0	\$60,000
PowerPac.org	CA	29-Jan-08	\$0	\$45,300
PowerPac.org	CA	27-Jan-08	\$0	\$25,304
PowerPac.org	CA	28-Jan-08	\$0	\$10,281
PowerPac.org	CA	26-Jan-08	\$0	\$44,700
PowerPac.org	CA	23-Jan-08	\$0	\$154,203
PowerPac.org	CA	21-Jan-08	\$0	\$245,315
			\$0	\$746,073
Republicans Who Care	DC	28-Jan-08	\$200,000	\$180,000
Working for Working Americans	NV	13-Dec-07	\$523,040	\$482,250
			\$4,627,514	\$7,472,104

*Figures are from FEC Electioneering Commission Reports, through February 11, 2008

*Expenditures refer to the totals for the reporting period. Receipts refer to any contribution totaling more than \$1,000 in the previous calendar year. If groups have a substantial budget and receive limited contributions, reported expenditures can exceed reported receipts.

Interest Groups as democrats

In brief, there may be a trade-off for those reformers who want to remove interest group money from electoral politics. It is, after all, intense political competition between the Democrats and Republicans that motivates any expansion of

electioneering by interest groups. Thus the polarized partisan politics after 1994 is undeniably the chief reason for the emergence of soft money and issue advocacy.¹⁷ Attempts to constrain the flow of money in elections may work for a time, but as interest groups react to a consequential political context, they will mobilize to expand their resource base.

Indeed, the speedy explosion of 527s in the 2004 elections stands in contrast to the relatively slow emergence of issue advocacy, which took nearly two decades to “explode” onto the political scene. If the latter development is curious because it took so long, the former is intriguing because it happened so fast. Both changes are explained by the same mechanism, though: interest groups and other political actors will find campaign finance loopholes when there is a political and electoral motivation to find them. I should stress that this is not the simplistic hydraulic theory of campaign finance, which asserts that money is like water and always finds a path. Instead, I would argue that without the electoral impetus, there is little incentive for more money, in new and varied forms, to flow into the process.

On the other hand, here is the trade-off. Party theorists are thrilled to see a competitive political process where parties are polarized and differences matter. And although competitiveness has declined at the individual level in the last 20 years, meaning that fewer citizens vote in elections that are close, competitiveness has increased at the macro or institutional level, meaning that polarized parties fight aggressively in a handful of races for majorities in Congress and for control of the policymaking agenda in Washington. Which do we value more? A competitive partisan context where interest groups continue to spend vast sums on elections, to the dismay of reform advocates? Or an electoral process where groups play a more limited role but where the outcome is pretty much known, to the dismay of many democratic theorists? Indeed, I am not sure that we can escape such a trade-off.

Consider a further question: is interest group money spent on electioneering worse for democracy than money spent on lobbying? Which *should* we prefer? Independent and uncoordinated interest group electioneering that directly touches the voter? Or less visible lobbying by interest groups on K Street, fueled in part through contributions of hard and soft money? The bulk of empirical evidence suggests that PAC money almost never buys votes on the House and Senate floor, but it *does* buy access to policymakers at key moments of policymaking (Hall and Wayman 1990; Smith 1995). Even Brad Smith, a persuasive critic of campaign finance regulation and a former FEC commissioner, admits that when it comes to legislating, the potential for corruption and influence peddling is far greater than in the world of electoral politics (2001, pp. 76-77).

¹⁷ I discuss this in much more detail in Franz (2008).

This concern extends far beyond the limited effect of regulated contributions. When Congress passed the Honest Leadership and Open Government Act in 2007, it contained provisions about lobbying gifts to elected officials, candidates' use of private airplanes, and disclosure for lobbying activity and budget earmarks. The act was motivated by a real concern that the relationship between lobbyist and legislator was too cozy and too invisible.

Of course, interest groups provide valuable information and expertise in the drafting and implementation of public policy—this should not be forgotten. But voters never know the true influence of lobbyists, and sporadic media coverage of lobbyist-funded golf trips and expensive meals do little to assuage the concerns of voters. In this sense, access politics presents real opportunities for consequential influence, and voters have few tools available to hold legislators accountable for any improper relationships.

In this light, the struggle over which groups can fund TV ads might not be so worrisome. After all, when interest groups try to convince voters to support certain candidates, *voters keep the power*. If concerned citizens are worried about soft money ads and who funds them, voters will discount the messages. If these voters dislike certain political products, like obvious electioneering disguised as issue advocacy, we might expect them to vote with their remote controls and turn the channel. And if voters care not about issue ads and soft money, which seems to be the case, since respondents in public opinion polls almost never list campaign finance as a major problem in American politics, then all of the hand-wringing over finance reform may be misplaced energy.

Furthermore, there is considerable evidence that exposure to campaign advertising is a good thing. Recent scholarship has consistently uncovered a link between ads and increased campaign knowledge and interest (Franz et al 2007), in addition to numerous null effects (Krasno and Green 2008). And meta-analytic assessments of negative advertising in particular find only sparse evidence that ads undermine the health of American democracy (with lower participation, for example: Lau et al 2007). The old line that TV ads are bad for America seems exactly that—an old line.

Having said that, in the next few years the fault lines of campaign finance regulation will be on two fronts: first, the boundary between political and non-political organizations, the latter being largely exempt from requirements on reporting and fund-raising, and second, the standards for which candidate-mention ads are excepted from the rules on electioneering communication. If we regulate activity too much, with too expansive a standard, we come close to unreasonable restrictions on free speech. For example, is it reasonable to mandate that Planned Parenthood fund its pro-choice citizen education, or the NRA fund its ads about gun safety, with hard money? How about forcing groups that sponsor public service announcements about drunk driving or churches that air ads about

their congregation to fund this activity with hard dollars? Both are possible if we define anything even remotely political and said close to an election as implicit candidate advocacy.

For example, this past December, the organization One.org aired a television ad in a few media markets where presidential primaries were being waged. The ad urged voters to consider the candidates, look at their issue positions, and make an informed choice. Figure 4 shows four screen shots from the ad, which pictured the campaign stickers of all Democratic and Republican candidates for president. The ad is an issue ad, no doubt. While there might be an implicit pro-Democratic message somewhere in the group's larger agenda, this is invisible in the ad itself. A strict standard would force the ad to be funded with hard money, and the spot would be considered candidate advocacy. This seems too expansive. The organization was simply urging voters to care about the elections. Why force the group to behave *as if* it were working for the victory or defeat of a specific candidate?

Figure 4—Screen Captures from One.org Ad



On the other hand, with a vigorous defense of speech rights close to Election Day comes the possibility for a complete dismantling of distinctions between election and issue advocacy. The Supreme Court has maintained for more than a generation that regulations on election advocacy are acceptable if they help limit the “appearance of corruption.” In that sense, very few people want the complete elimination of campaign finance restrictions. But once you defend at least some

regulations on election-related speech, it becomes next to impossible to define a standard that does not potentially touch genuine issue-related speech (as with the One.org spot). The candidate-mention test was designed to be that standard, but it appears open to considerable criticism. How do we manage that problem then? How do we protect issue speech if no one can agree on a definition? The conundrum approaches becoming an existential concern.

The bottom line, however, is that when interest groups work to convince voters to make certain decisions, we should treat such advocacy with an open mind. If disclosure of electioneering communications is overturned, however, voters will lose some of the tools needed to hold interest groups accountable. Given the near impossible task of delineating election from issue advocacy, I would suggest a compromise:

- First, I recommend embracing lenient standards on issue advocacy. On this score, it must be said plainly: the fight is lost! Issue advocacy is here to stay. In addition, the current FEC rules differentiating issue from express advocacy are functionally a mess, and express advocacy is easily circumvented. It is time for reformers to give up the ghost and move on.
- On the other hand, I recommend far stronger and more expansive rules on disclosure. Any public communication (by a 527 or 501c) featuring or picturing a candidate at any time in the year should be disclosed to the FEC and donor lists should be made public.

Whereas my first recommendation grants interest groups plenty of opportunity to support candidates but avoid regulation, this second recommendation gives voters the chance to track the source of the electioneering. Some may object with the claim that free speech must sometimes be allowed anonymity (Smith 2001, pp.220-225), but I only anticipate such a problem in the most rare circumstances.¹⁸ Ultimately, elected officials must compromise on these issues, lest we risk the landscape of campaign finance laws being set by litigation. Such a patchwork of judicial activism is unlikely to satisfy anyone. In addition, it may be time to shift our reformist energies to other matters (see, for example, the Malbin article in this issue) and leave it to voters to accept or discount non-candidate messages.¹⁹

¹⁸ This recommendation is also the complete opposite of Ackerman and Ayres's (2002) proposal to institute secret donation booths that shield even the candidate from tracing contributions. I grant that such an idea is interesting, but it has almost no chance of becoming a reality.

¹⁹ I anticipate one specific reaction to this: it is hard enough to get citizens to vote; giving them even more responsibility in elections (to look up the donor rolls of interest groups, for example) seems unrealistic. Perhaps, but this is not an interest group problem. If voters are too busy or too

Conclusion

I have hoped to suggest here that electioneering by interest groups has entered a new phase with the coming election. The *WRTL* case has guaranteed this. At the same, however, I caution against embracing the pessimism of the most vocal advocates of reform. As a proportion of all funds, investments by interest groups in candidates and parties are lower now than in the previous 20 years, and advocacy by interest groups is largely bankrolled by a relatively small number of groups. Even if this were greatly expanded, though, voters remain the gatekeepers of any success by interest groups in this realm. This is unlike the far more hidden politics of lobbying, where interest groups can hold considerable power over the drafting and implementation of legislation. We would be better served to focus more energy on lobbying by interest groups. Demanding more disclosure in this regard and extending regulations on impermissible lobbying practices would do far more to limit influence by interest groups than any attempt to limit or prevent clever TV ads.

The future of campaign finance regulations is unknown. The Supreme Court today is far removed from the *Buckley* or *McConnell* courts. Even if John McCain were elected president, he may not abate the deregulatory trend. During the primaries this year, he opted not to accept matching funds from the FEC, and he is currently considering opting out of the general election system. Furthermore, we can hardly be assured that President McCain would appoint a pro-BCRA justice. As Bob Bauer has noted on his blog (<http://www.moresoftmoneyhardlaw.com>), would we actually expect McCain to prioritize campaign finance reform over other controversial issues when selecting justices? A recent *Wall Street Journal* editorial even raised a question about loans McCain secured to fund his presidential campaign, suggesting he used his influence as a sitting Senator (see *Wall Street Journal*, A16, 2/14/2008). If the dean of campaign finance reform cannot be counted on to expand or solidify the spirit of BCRA, would any president?

Ultimately, my response is less perturbing. While there are some areas of concern—I am no Pollyanna when it comes to the consequences of deregulation—is it not time to focus on areas where influence sidesteps citizens and removes power from voters?

apathetic to care about issue advocacy, and if interest groups sponsor very persuasive campaign ads that do, at times, sway election outcomes, why blame interest groups for this success? I would urge reformers to focus their energies instead on educating voters and energizing the electorate.

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