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The Transformation of the Campaign Financing Regime for U.S. Presidential Elections

Professor Richard L. Hasen

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Richard L. Hasen[*]

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Introduction

Since the mid-1970s, the United States system for the financing of presidential election campaigns has been a mixture of private fundraising by candidates, parties, and outside groups[1] and optional public financing for candidates (and for political party conventions). The 2008 presidential election—with its record-breaking $1.8 billion campaign (including an astounding $745.7 million raised by then-Democratic candidate Barack Obama) (FEC 2009)—demonstrated that the current system is in the midst of a major transformation. This chapter explains how the system is changing, offers possible reasons for the transformation, and evaluates the transformation normatively.

Part I shows how the system is changing in four ways. (1) The voluntary presidential public financing system is no longer viable; candidates who opt in do so out of weakness, not strength. (2) A major share of private campaign contributions to presidential candidates in 2008 have come through campaign finance "bundlers" and from micro-donors giving very small amounts via the Internet. (3) Thanks to a U.S. federal law, Bipartisan Campaign Reform Act of 2002 (BCRA), political parties can no

[*] Richard L. Hasen is the William H. Hannon Distinguished Professor of Law at Loyola Law School, Los Angeles. Portions of this chapter first appeared in Richard L. Hasen, "The Changing Nature of Campaign Financing for Presidential Primary Candidates," in Nominating the President: Evolution and Revolution in 2008 and Beyond (Jack Citrin and David Karol eds., Rowman and Littlefield Publishers, 2009). Reprinted with permission. Thanks to Inna Zazulevskaya for excellent research assistance.

longer accept very large campaign contributions ("soft money") from wealthy individuals, corporations, and labor unions to pay for political advertising. (4) Wealthy individuals, corporations, and labor unions have shifted some, though not necessarily all, of the money that used to go to political parties and to "issue advocacy" into outside groups (including so-called "527 organizations").

Part II explains that these four changes have likely arisen from a number of factors including: (1) the failure of the U.S. Congress to update the presidential public financing system, first enacted in 1974; (2) enactment of BCRA and the U.S. Supreme Court's shifting interpretation of the constitutionality of campaign finance law; (3) the rise of cheap political speech via the Internet; and (4) continued political polarization.

Part III explores normative implications. The potential for *quid pro quo* corruption of candidates appears to remain low, thanks to a series of laws imposing contribution limits. Sale of access to candidates, however, remains a feature of U.S. presidential elections even post-BCRA. From the standpoint of political equality, the transformation offers a mixed bag with somewhat offsetting effects. Thus, the collapse of the public financing system may have anti-egalitarian effects, but those effects are somewhat militated by the rise of micro-donors. The end of soft money and the rise of outside non-party political organizations in theory could lead to weakened political parties, but continued polarization of the electorate have kept parties thriving even under BCRA and the shifting constitutional ground rules of the U.S. Supreme Court.

I. The Transformation[2]

The Rules

Presidents of the United States are elected every four years (on the first Tuesday in November) in national elections.[3] Before those national elections (which take place during what is termed the "general election" season), the two major political parties, the Democrats and Republicans, hold a series of state-by-state elections (primaries or caucuses) to determine each party's nominees for president (this period is known as the "primary" season). Each party sets its own rules for choosing nominees based upon state results during the primary season; party nominees are formally chosen in party conventions held the summer before the general presidential election.

The rules for financing presidential elections are set by Congress (the U.S. national legislative body) and the Federal Election Commission (or "FEC," a regulatory body whose rules are secondary to those of Congress). Congressional laws and FEC regulations are subject to review by an independent judiciary headed by the United States Supreme Court, which has held that some, but not all, campaign finance laws and regulations violate the First Amendment to the United States Constitution guaranteeing freedom of speech and association.

Under the Federal Election Campaign Act (FECA) passed by Congress in 1974, individuals could donate up to $1,000 during the primary season and another $1,000 for the general election to presidential candidates. BCRA, more commonly known as the "McCain-Feingold law" for its two U.S. Senate sponsors, raised the FECA limits to $2,000 for each election, and the figure was $2,300 per election for 2008, thanks to an inflation adjustment mechanism built into BCRA. Federal law also imposes source limitations on contributions: corporations, labor unions, most foreign citizens, and some other entities are barred from contributing to federal candidates. Candidates may contribute unlimited sums of their own money to their campaigns.

Political parties may solicit contributions and spend set amounts in coordination with presidential candidates; independent party spending is unlimited. FECA also allows for the establishment of independent political committees (or "PACs"). These groups may accept contributions from individuals of up to $5,000 per year. PACs in turn can contribute up to $5,000 to presidential candidates directly, and spend unlimited amounts independently supporting or opposing presidential candidates. As explained below, other political groups—not registering as PACs—also have emerged in recent years to engage in presidential election activity. Candidates, parties, PACs, and at least some of these other political groups must report information about contributions and spending to the FEC (or in some cases another agency) in periodic reports.[4]

Presidential candidates also may decide to opt into a public financing system created by FECA. Candidates during the nomination season who opt in become eligible for public financing by raising $5,000 or more in contributions of $250 or more in at least twenty states. The government then matches the first $250 of additional contributions raised by participating candidates. In exchange, participating candidates agree to cap their overall total spending in the primary election season. The amount of the cap is set by a formula in FECA that Congress did not touch in BCRA. In 2004, the cap was $50.4 million; in 2008 the cap was about $52 million.[5] (Green 2006:95; FEC 2008.)

Major party nominees may choose whether or not to participate in a separate public financing system for the general election period, a choice not dependent upon whether they participated as publicly-financed candidates during the nomination process. Under the general election plan, the party nominee agrees not to raise any funds for his own campaign (though fundraising is allowed for the nominee's party organizations). In exchange, the nominee receives a flat grant from the government.

Except for a handful of self-financed candidates, all serious major party candidates accepted public financing during the primary season until the 2000 election. (Lowenstein, Hasen and Tokaji 2008:890.) In that election, George W. Bush, the eventual Republican nominee, opted out of the system, raising $95.6 million in privately funded donations. Al Gore, the eventual Democratic nominee in that election, accepted matching funds and raised contributions up to the public financing spending cap of $49.4 million (which included $15.5 million in public financing). (Malbin 2006:tbl. 11.1.) In 2004, both of the parties' eventual nominees opted out of public financing during the primary season. Each raised contributions many times the $50.4 million cap that would have applied to publicly-financed candidates. Kerry raised $234.6 million; Bush raised $269.6 million. (Malbin 2006:tbl. 11.1.).

In the 2008 election, neither John McCain, the eventual Republican nominee, nor Barack Obama, the eventual Democratic nominee, took public financing during the primary season. Once he received his party nomination, Obama became the first major party nominee to opt for private financing during the general election season. McCain, once he became the Republican nominee, accepted the public financing grant of $84.1 million. (Kuhnhenn 2008.) Despite opting in, McCain was permitted under federal law to continue fundraising for various Republican Party entities. (Luo 2008.)

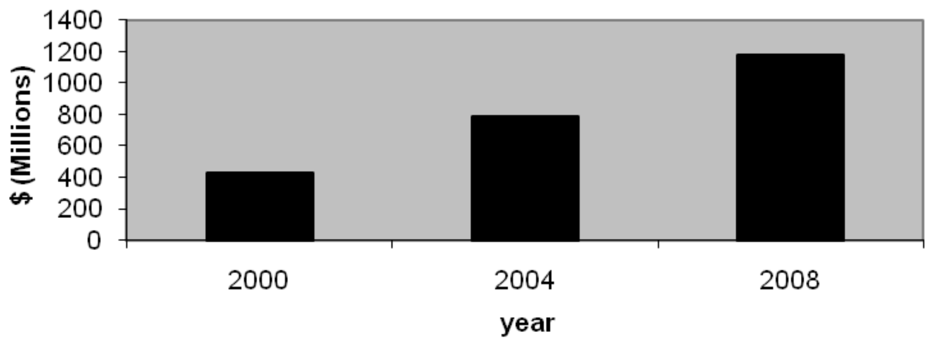
The Demise in Presidential Public Financing

By 2008 it was clear that the public financing system, with its relatively paltry spending limits, was a luxury no serious candidate could afford, at least in the primary season. Indeed, in 2008, the only candidates opting for public financing were the weak ones who could not raise funds well on their own. John Edwards agreed to take public financing as his personal fundraising collapsed (Kirkpatrick 2007), and McCain agreed to take it when he too was written off as having no chance at securing the Republican nomination. Once McCain became the front-runner, he backed out of his commitment to take public financing in the primary election season. (Mosk 2008.) Obama too suggested he would participate in the public financing system in the general election, but backed away from this pledge given his unprecedented success at private fundraising during the primary season.

During the primary season (up to each party's national convention), Obama raised \$414.2 million through private contributions,[6] McCain raised \$216.3 million. (Campaign Finance Institute 2008a:tbl. 2.) In one month alone, July 2008, Obama raised \$50 million and spent \$55 million, spending more in one month than he would have been able to spend *for the entire primary campaign season* had he opted for public financing and its accompanying \$52 million spending cap. (Kuhnhenn 2008; Kos 2008).

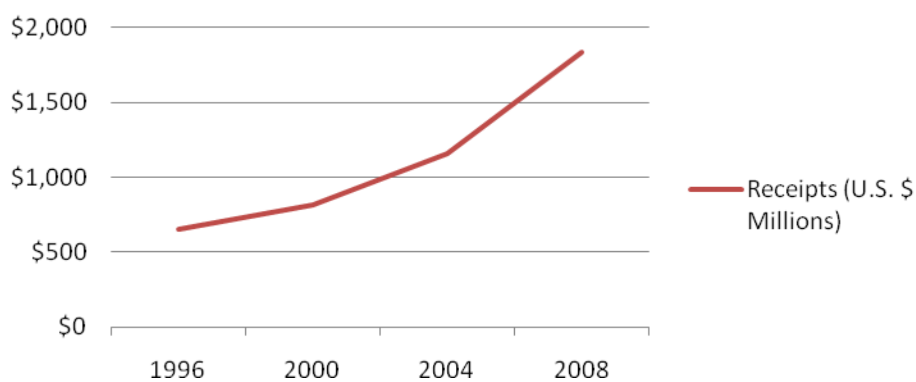
Looking at the fundraising by major party candidates during the primary seasons, the story is one of a dramatic rise in the ability of candidates to raise money. See Figure 1.

Figure 1. Total (Inflation-Adjusted) Dollars Raised by Candidates in Major Party Primary Contests, 2000-2008



It is not only the presidential candidates who have been raising a great deal of money. Looking at total receipts for presidential campaign spending for both the primary and general election periods reported to the FEC (including public financing grants), and adjusting for inflation, spending has nearly tripled since 1996 (from $655.8 million (adjusted to 2008 dollars) in 1996 to $1,834.4 million in 2008). See Figure 2.

Figure 2
Presidential Campaign Receipts By Election Year
(U.S. $ Millions, Adjusted for Inflation)



Source: FEC 2009, with figures adjusted for inflation by author using inflation calculator at http://data.bls.gov/cgi-bin/cpicalc.pl.

As Part II details, it is no surprise that candidates' use of the public financing system has declined; the opportunity cost of opting in (in terms of foregone private contributions thanks to the system's concomitant spending limits) is just too high.

The Rise of Bundling and Micro-Donors

An evolution in fundraising strategies fueled the dramatic rise in fundraising by the presidential candidates. Candidates learn from one another, emulating and building upon new fundraising strategies. In recent years, the strategies of bundling and micro-donor targeting have emerged as the most important financing innovations.

(1) *Bundling.* Though the practice of "bundling" has been around since the 1980s, it really took off beginning with George W. Bush's 2000 campaign; "bundling" occurs when candidates began asking some of their contributors to solicit their friends, acquaintances, and business associates to donate to the candidate. (Corrado 2010:122.) These volunteers, who usually ask for the maximum legal individual donation, then "bundle" checks from their circle. Those bundlers reaching a certain fundraising threshold receive access to the candidate and other perquisites from the campaign. In 2000, 226 Bush "Pioneers" each raised at least $100,000 for the campaign (in $1,000 maximum individual contributions), giving Bush over $22 million in bundled funds. (Green and Bigelow 2002:59.) In 2004, when the individual contribution limits doubled from $1,000 to $2,000, Bush raised at least $77 million through bundling, about 30

percent of his total donations. (Green 2006:104.) Kerry, the Democratic nominee, raised at least $41.5 million through bundling, about 18 percent of his total donations. (Green 2006:105). In the 2008 campaign, as of August 18, 2008, 560 bundlers raised at least $76,500,000 for McCain, and 560 bundlers raised at least $63,100,000 for Obama. (Center for Responsive Politics 2008.)

(2) *Micro-Donations and Micro-Donors*. The other notable campaign finance trend in the campaign finance process is a dramatic increase in both the total amount of donations given to campaigns in amounts under $200 ("micro-donations") and the number of donors giving $200 or less to a presidential primary campaign in the aggregate.

Micro-donations have made up an ever larger share of presidential nomination process fundraising in the last three elections. Micro-donations accounted for 25% of the total contributions to major party candidates seeking their parties' nomination the 2000 election season. The figure rose to 34% in 2004 and 38% in 2008. (Malbin 2006: tbl 11.1; Campaign Finance Institute 2008a:tbl. 2.)

While micro-donors and micro-donations were especially important to the Obama campaign, bundling was very important to the McCain campaign (during the primary season, before the campaign took the public grant and raised money only for the party). It is unclear if there is an emerging party divide on leading candidates' reliance on micro-donations and bundling. In 2000, Al Gore raised 20% of his total primary funds and George W. Bush raised 16% of his total primary funds from micro-donations. In 2004, John Kerry raised 37% of his total primary funds from micro-donations. George W. Bush raised 31% of his total primary funds in this manner. (Malbin 2006:tbl. 11.1.) Thus, before 2008 there appeared to be some parity in the reliance of the major party candidates on micro-donations. In 2008, however, Barack Obama raised more than half (53%) of his primary funds from micro-donations. In contrast, John McCain raised 31% of his funds (over $62 million) from micro-donations. (Campaign Finance Institute 2008a:tbl. 2.)

Though Obama raised much more in micro-donations in 2008 than Bush did in 2004, there was much more parity when it came to the number of *micro-donors*, that is, people who gave no more than $200 *in the aggregate* to the primary campaign. The range of reliance on micro-donors among the top major party candidates in the last two presidential primary election seasons ranged from 20-26%, with Obama coming in at 26%, compared to Bush (2004) at 25%, McCain at 21% and Kerry at 20%. (Campaign Finance Institute 2008b; see also Mosk & Cohen 2008; Cohen 2008.)

Yet because Obama's overall fundraising was so much greater than other candidates, he raised a much larger *total amount* of money in the primary period from micro-donors than Kerry (2004), Bush (2004), or McCain (2008). Obama raised $117.7 million from micro-donors in the primary, compared to $64 million for Bush, $43.1 million for Kerry, and $42.9 million for McCain. (Campaign Finance Institute 2008b.)

The Decline in Party "Soft Money" and Unregulated Issue Advocacy, and t Spending

Figure 2's description of the amounts spent on presidential election activity for the 1996 and 2000 election season underestimates actual spending in those elections, because these figures do not include largely unregulated money spent in those elections by political parties and other organizations.

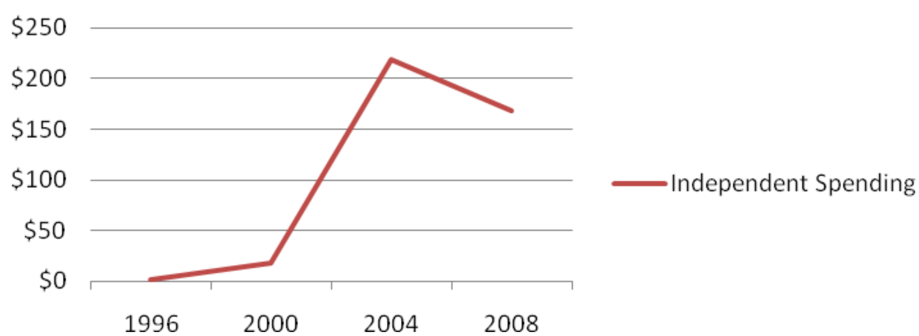
Since the passage of FECA, individuals have been limited in the amount that they are allowed contribute to political parties for federal election activity. In the 2008 period, individuals could give up to $28,500 in contributions to the national political parties (with additional amounts to state, district and local party committees for federal election activity). (Lowenstein, Hasen, and Tokaji 2008:793.) This is a so-called "hard money" limit.

Thanks to a narrow United States Supreme Court interpretation of what constituted election activity for purposes of the FECA, parties began collecting very large contributions from individuals as well as corporations and unions (usually prohibited sources for campaign contributions) to use to influence the outcome of presidential and congressional elections. These sums came to be known as "soft money," and the amounts of soft money spent by the two major parties was $272 million in 1996 and $498 million in 2000. (*McConnell v. FEC*.)

In addition, corporations, unions, and wealthy individuals spent unregulated sums on election-related advertising that, by avoiding words of express advocacy (such as "Vote for Smith" or "Vote against Jones"), skirted FECA restrictions. This spending came to be known as "issue advocacy." The amount spent on federal issue advocacy (for both presidential and Congressional elections) reached as much as $150 million in 1996 and $509 million in 2000. (Lowenstein, Hasen, & Tokaji 2008:851.)

BCRA, passed in 2003, banned the parties from collecting soft money and changed the definition of relevant election activity so that more election activity came to be under federal regulation (and therefore not count as unregulated "issue advocacy"). Though parties were banned from collecting soft money beginning with the 2004 election, the national political parties collected more in hard money alone in 2004 than they collected in hard and soft money combined in the 2000 election. (Corrado 2006:25.) In addition, thanks to other Supreme Court cases interpreting constitutional limits on political party activity (see Lowenstein, Hasen, and Tokaji 2008:770-74), parties began running significant campaigns supporting their presidential candidates *independent of* their candidate's own campaigns. Figure 3 shows the inflation adjusted rise in independent expenditures (by parties and others) in the last four presidential election cycles.

Figure 3
Independent Expenditure Spending Related to Presidential Campaigns By Election Year (U.S. $ Millions, Adjusted for Inflation)



Source: FEC 2009, with figures adjusted for inflation by author using inflation calculator at http://data.bls.gov/cgi-bin/cpicalc.pl

The Rise of "527 Organizations," and the Future of Independent Political Committees

It is commonplace to observe (sometimes with reference to the game of whack-a-mole or the "hydraulic" nature of campaign financing) that campaign finance regulations intended to stem the flow of money into electoral activity often lead to the money emerging through different forms or groups. The recent U.S. experience validates this observation, at least to some extent.

Under current U.S. law an individual wishing to influence the outcome of a presidential campaign has three options: donating to a presidential campaign or political party; independently spending money supporting or opposing a presidential candidate; or contributing that money to an independent group that in turn supports or opposes presidential candidates. The third option—contributions to an independent group—offer three primary advantages to the contributor. First, though contributions to such groups are (usually) subject to disclosure, the disclosure is less transparent. Thus, instead of an advertisement opposing the President running for reelection ending with "Paid for by John Smith," it could end with "Paid for by Americans for American Values." Only those who research the group's finances (through data released by the FEC or another source) will learn of Smith's contributions. Second, independent groups often have more expertise than individuals in running successful campaigns: thus, it may be more efficient for a person to contribute to another rather than to spend the money directly. Finally, individuals with common political goals may use groups to pool their money to take advantage of economies of scale when it comes to candidate advertising, thereby magnifying the value of the money.

The main disadvantage of using such groups is that the groups may face contribution and source limitations. As noted in the Introduction to this chapter, PACs may receive contributions of no greater than $5,000 per year, and cannot accept contributions from the general treasuries of corporations or labor unions.

For this reason, a number of groups formed during the 2004 elections with the goal of influencing the outcome of the presidential election without being characterized by the FEC as a political committee (and therefore subject to these limitations). These so-called “527 organizations” (named after a provision of the U.S Internal Revenue Code) argued that because they did not expressly advocate the election or defeat of candidates, and because they did not have the “major purpose” of electing or defeating candidates, they were not required to register as political committees. The 527 organizations therefore took the position they could take contributions larger than $5,000 (and they ended up taking contributions in the millions) and could take money from corporations and labor unions. (Briffault 2005.)

These 527 organizations played a major role in the 2004 presidential election, but their legal status was uncertain. After the 2004 election, the FEC fined a number of these groups for failing to register as political committees. Perhaps because of the legal uncertainty (and perhaps for other reasons as well, such as both candidates’ professed dislike of these groups), 527 organizations played a less important role in the 2008 presidential election. Excluding state-focused 527s, the amount of 527 spending (to influence both presidential and congressional races) fell from $432 million in 2004 to $241 million in 2008. (Center for Responsive Politics 2009.)

Going forward, the legal environment of campaign finance regulation remains uncertain. There has been considerable ideological disagreement at the FEC among its six partisan commissioners (three from each party) (Becker 2009), and it is not clear how aggressively the FEC will move to regulate 527s and other political organizations, such as so-called “501(c) organizations” (Campaign Finance Institute 2009), as political committees.

More provocatively, the constitutionality of the $5,000 contribution limitation and source limitations on contributions to political committees that engage only in independent spending activity is now in question. (*EMILY’s List v. FEC.*) It could well be that by the 2012 presidential elections, the United States Supreme Court will have struck down these limits, thereby immediately increasing the importance of political committees in presidential campaign financing. At the time of this writing, however, the legal regime related to group campaign finance limits is one of considerable uncertainty.

II. Explaining the Transformation

In this Part, I consider why the patterns of campaign financing in U.S. presidential elections have changed. I trace the changes to four factors: (1) the failure of the U.S. Congress to update the presidential public financing system, first enacted in 1974; (2) enactment of BCRA and the reactions to the U.S. Supreme Court’s shifting interpretation of the constitutionality of campaign finance law in the wake of BCRA; (3) the rise of cheap political speech via the Internet; and (4) continued political polarization in the U.S.

The public financing system for presidential candidates collapsed primarily because of a combination of legal and market forces. First, the public financing system enacted first in 1976 imposes a spending cap that has not kept up with the ability of candidates to raise money on the private market. Bush’s fundraising during the primary season in his first election, in 2000, showed that private fundraising efforts could almost double the amount available to candidates during the primary season. Bush raised $95.6

million privately, while Gore's spending was capped at $49.6 million. (Malbin 2006:tbl. 11.1.[7]) Bush's innovation increased candidates' demand for political money during the primary season. Knowing that the sky was now the limit, candidates had an ever-increasing need for funds, if only not to be outspent by an opponent.

But the supply of money has expanded as well. In 2002, Congress (through BCRA) doubled the amount that an individual could give to federal candidates. In 2004, one third of all contributions to presidential primary candidates came from donors giving at least $2,000. Bush, the eventual Republican nominee, received 44% of his contributions from this group; Kerry, the eventual Democratic nominee, received 24% from this group. (Malbin 2006:tbl. 11.1.) In the 2008 primary season, 37% of contributions came from contributors giving at least $2,300 (the new maximum, thanks to BCRA's inflation adjustment). McCain, the eventual Republican nominee, received 38% of his contributions from this group. Obama, the eventual Democratic nominee, received 32% from $2,300 donors during the primary and general election season (up to October 15, 2008). (Campaign Finance Institute 2008b:tbl. 1.)

Once Bush in 2000 showed how much more money he could raise beyond the low spending caps, the arms race began, and it received extra impetus from the increased supply of larger money that wealthier donors could now give thanks to BCRA. Though Democrats had something of an ideological commitment to the public financing system, in 2004, both the eventual Democratic nominee Kerry and the early front-runner, Howard Dean, opted out; in 2008, both the eventual Democratic nominee Obama and the early front-runner, Hillary Clinton, opted out. On the Republican side, McCain appears to have shifted his decision on opting in and opting out with his political fortunes; only when it looked like his campaign was failing did he express an interest in opting in, a position he reversed when he recovered politically. At this point, the public financing system is dead for presidential primaries unless it is reformulated by Congress.

Bundling, micro-donations, and micro-donors have replaced the central role of public financing in presidential campaigns. Candidates seeking the presidency have always pursued multiple fundraising routes, with one of the most lucrative being the $1,000-per-plate (or now $2,300 per plate) dinner with the candidate. With 500 attendees, such a dinner can now clear one million dollars. But as presidential candidates need to raise ever more money and to travel across the country in search of primary votes and not just money, other means of raising money have become attractive as well.

In this environment, the use of campaign bundlers has become central. Bundling shifts some of the onus of fundraising from the candidate to the candidate's supporters. Campaign bundlers likely are motivated by a number of reasons, including the desire to help elect a candidate of choice. But some bundlers likely are looking to curry influence with the candidate, securing perquisites such as access to the candidate at special events. Bundling became more attractive to individuals looking for access after the 2002 passage of BCRA, which outlawed the giving of six- and seven-figure "soft money" donations to the political parties. Soft money used to be the entry price for access to presidential candidates; bundling to some degree has replaced that activity.

Not everyone is capable of being a bundler. Only those people with a circle of friends or associates who can cough up maximum individual contributions (currently $2,300) can raise funds in this way. Bundling also creates a sense of competition; the publication of bundling activities likely spurs some competitiveness among bundlers for the same candidate, with different levels of participation for those who reach higher bundling levels. (Corrado 2010:122.)

Micro-donation targeting arose out of a combination of candidates' increased demand for money and the reduction in fundraising costs thanks to the Internet and, in the 2008 election, cell phone text messaging. Internet campaigning already was important in the 2004 election. (Magleby and Patterson 2006:169; Corrado 2006:28-29.) But its use appears to be accelerating rapidly. The rise of "cheap" political speech (Volokh 1995) has increased the ability of voters to exchange political messages via email, instant messaging, amateur videos posted on YouTube and related sites, and, more frequently, social networking sites such as "My Space" and "Facebook." (Pew Research Center 2008.) Text messaging is the next frontier. The Obama campaign sent 2.9 million text messages in one day to supporters who signed up to be "among the first" to hear of Obama's vice presidential pick. (Schatz 2008). The campaign then used the collected email addresses and cell phone numbers to follow up with potential contributors.

Most importantly for our purposes, the cheap speech of the Internet allows the candidate to quickly and cheaply communicate with supporters, asking many people to give small amounts of money. Once the campaign invests in the fixed costs of Internet communication, the marginal cost of sending out numerous solicitation emails are small. And supporters can be hit over again. One donor interviewed by the *Los Angeles Times* gave $700 to Obama over a period of months in $25 increments. (Morain 2008.)

Repeaters were a critical part of the Obama fundraising strategy in 2008. CFI (2008b) reports that over 200,000 Obama donors started off giving contributions of $200 or less and then crossed the reporting threshold by giving more. CFI: "About 93,000 of these repeaters gave in cumulative amounts of no more than $400 for the full primary season. Another 106,000 repeaters ended up between $401 and $999." Future studies should consider why these donors gave *repeatedly*. How much was due to enthusiasm for the candidate, how much to the long campaign, and how much to the lower transaction costs of repeat giving over the Internet with saved account information?

The Obama story is useful in seeing how campaign fundraising techniques are additive rather than substitutionary. Obama did not choose to replace bundling with Internet-based small fundraising; he aggressively pursued both.

For parties, political committees, and outside groups, shifting laws, court interpretations, and FEC enforcement decisions have influenced the collecting and spending of political money. Strictures on PACs and BCRA-imposed limits on party soft money and issue advocacy caused donors and existing groups to shift to new organizations, such as 527 organizations. When the legality of the 527 organizational form came into question in 2008, money shifted away from such organizations. Now, with the expected move at the United States Supreme Court toward constitutionally-mandated deregulation (Hasen 2008a), it seems quite likely that money will shift back to these groups, and potentially to political parties as well. Indeed, it is conceivable that within one or two more presidential elections, the Court will strike down all limits on contributions to political candidates and parties. (Hasen 2008a.). If the Court took that step, expect to see candidates shifting at least some of their fundraising attention to "super-donors" giving six- and seven-figure donations. This strategy might not completely displace bundling and the targeting of micro-donors, but it would play a central role in major campaigns.

One final factor in the explosion of U.S. fundraising is the continued high levels of party polarization among the U.S. population (Jacobson 2007.) Even if the courts completely deregulate U.S. presidential campaign financing, the amount of presidential candidate private fundraising is naturally limited by the candidates' popular support. So long as Democrats and Republicans in the United States remain firmly at odds with one another over the direction of U.S. policy, it is likely that the supply of money for presidential candidates, parties, and outside groups will remain high. At this point, there seems little prospect that the intense polarization which has characterized recent U.S. presidential elections will soon diminish.

III. A Normative Evaluation of the Transformation

The earlier parts of this chapter established that the campaign finance system for U.S. presidential elections has undergone significant changes in recent elections and that both law and market forces have caused these changes. I turn now to the normative question whether these changes are positive or negative.

Asking the normative question requires a baseline. For example, if one is concerned with the total amount of money spent on politics, then the trends emerging from the most recent presidential election nominating contests is especially bad: total spent on presidential elections are rising dramatically (see Figure 2). From my normative standpoint, however, *total* money spent on elections is is not a good measure of the health of the campaign process (despite the fact that media reports often focus on it because of the shock value of a $1.8 billion presidential campaign season). Beyond an argument that such spending is "wasteful"—which raises a "compared to what" question—primary concerns about the role of money in politics usually depend not on *total* spending, but upon some feature of the donors or the donors' relationship to candidates. That is, the real issues are those of undue influence, unequal access, or other underlying policy concerns emanating from the private financing of public elections. It is to these other policy issues that I now turn.

Corruption. Limits on contributions to presidential candidates—and later limits on "soft money" contributions to political parties—have made it more difficult for individuals to attempt to buy influence over candidates through large campaign contributions. To this extent, the amount of potential corruption in the system remains low, especially as candidates can come to rely on a larger amount of micro-donors, none of whom contribute enough money to raise the danger of a presidential candidate *quid pro quo*. Large spending through independent groups also poses minimal possibilities of *quid pro quo* corruption, so long as those engaged in spending (and the contributors to the entity doing the spending) act independently of candidates.

Sale of access. Whether or not the sale of access to presidential candidates counts as "corruption," sale of access has been a regular feature of the modern presidential campaign. The recent transformation of the presidential funding system described earlier in this chapter has shifted, but not ended, the sale of access. Before the enactment of BCRA, it was common for the national political parties to condition access to presidential candidates on the giving of large amounts of "soft money." (*McConnell v. FEC.*) Since BCRA and the soft money ban, access sales have shifted to campaign finance bundlers. Such bundlers achieve their access not by donating their own wealth, but by tapping a large network of people they know who are wealthy enough to contribute the maximum $2,300 to the candidate. Whether the shift from soft money donors to bundlers lessens the extent to which campaigns sell access to presidential candidates is a difficult question to answer absent good empirical evidence about practices that campaigns rarely advertise to the general public.

Major contributors to outside independent political groups also may gain special access to presidential candidates after the election. Presidential candidates likely notice and appreciate when an individual spends millions of dollars supporting or opposing the candidate through an independent effort.

Political equality. Is the current campaign finance regime more or less egalitarian than the past? This question too is difficult to answer, because of cross-currents: the demise of public financing has harmed the goal of political equality while the rise of micro-donors has helped it.

The public financing system, when it still worked, marginally promoted "barometer equality." (Hasen 2003:111.) Under this concept, campaign spending should roughly mirror public support for the candidate's political ideas. (Hasen 2008b.) The presidential public financing matching fund program for primaries followed this model to some extent by matching the first $250 of each campaign contribution received by a candidate. It made small donations twice as attractive as they otherwise would be and in that way created an incentive for campaigns to go after donors contributing relatively small amounts of money. Of course, the system's effects on political equality were limited: still only a small pool of people gives money to presidential candidates, and those donors tended to be wealthier than the general population.

The legal and market forces described in the last Part of this chapter caused the public financing system in the primaries to become obsolete. Moreover, the doubling of individual contribution limits in 2002 has since attracted campaigns to relatively wealthier contributors who could max out their contributions at over $2,000 each. Both of these forces have the tendency to make the system less egalitarian, making larger donations more important and smaller donations less important.

However, these factors have been counteracted by the meteoric rise of micro-donors. Micro-donors promote barometer equality: the greater the number of micro-donors supporting a candidate and the more intensely they do so, the greater the funding for the candidate to get out his or her message to the people. It is astounding that between the primary and general election Obama was able to raise $150 million from over one million individuals giving no more than $200.[8] Though Obama's fundraising may be unique to the enthusiasm surrounding his candidacy, he is not the only presidential candidate who has had impressive micro-donor fundraising. George W. Bush in 2004 raised $64 million from micro-donors. Even McCain, whose fundraising generally has lagged behind the other eventual nominees since 2000, raised about $43 million in 2008 from micro-donors. (Campaign Finance Institute 2008b, tbls. 1,2.) These trends are promising from the point of view of more Americans getting involved and helping to support their preferred candidates for president in a meaningful way.

This is not to say that the current system is a fully egalitarian one. Even in 2008, more than one-fourth of all money raised by presidential primary candidates came from

$2,300 maxed-out donors. Moreover, most eligible Americans still have not donated to political campaigns, and many are too poor to give even modest amounts to campaigns. If the class of donors differs in important ways from non-donors, then the campaign finance system might not be promoting political equality but instead may be skewed in one direction or another.

The concern that donors are unrepresentative of most Americans is one that merits further consideration. A study of donors in the 2004 presidential election found that donors who gave more than $200 were “more highly educated, older and much wealthier than most Americans.” (Institute for Politics Democracy & the Internet 2006:15). However, “[t]he small donors [i.e., micro-donors, giving under $200] stand somewhere between the large donors and the general public in many respects. Small donors were neither as wealthy nor as highly educated as large donors, although they were more so than the general population.” (Institute for Politics Democracy & the Internet 2006:15-16). There is also an age skew: micro-donors “were older, on average, than young donors, but there were also eight times as many young people among small donors as there were in the top group.” (Institute for Politics Democracy & the Internet 2006:16). Both large and micro-donors tend to be motivated by ideological considerations, but the 2004 study found “little evidence to support the concern that small donors tend to be more polarized and more negative than large donors.” (Institute for Politics Democracy & the Internet 2006:27.) We will have to see if these trends hold up in future studies of the much larger pool of micro-donors in the 2008 presidential election.

In sum, though micro-donors are not perfectly representative of the American voting population, they are more representative of the American population than large donors, who have dominated the system in the past. Moreover, the rise of micro-donors shows that a candidate with broad appeal (such as Obama or McCain) or a candidate with narrow or intense appeal (such as Paul or Kucinich) can raise enough money from people with modest means to get out the candidate's message and make the candidate a credible one if there is some popular support for the candidate's ideas. It is harder for big money to "drown out" the voices of the many. This is political equality that "levels up" the field rather than "leveling down" with spending limits. (Fleishman and McCorkle 1984.)

Indeed, the amounts of money that a popular candidate is able to raise from micro-donors can allow the candidate to compete effectively even against self-funded wealthy candidates. Contrast the size of micro-donations raised by Obama and McCain to Mitt Romney's failed 2008 candidacy. Romney donated $44.6 million to his campaign, a bit more than McCain's micro-donations and not even a quarter of Obama's. The possibility of a wealthy candidate scaring away less wealthy competitors is less credible than in the past.

Political parties. Finally, some have feared that the transformation of the campaign finance system for U.S. presidential elections will hurt political parties. So far, the end of soft money has not hurt the parties' fundraising abilities. At least in the current politically polarized climate, and with the rise of cheap speech and the ability of presidential candidates (even those participating in the public financing system) to jointly fundraise for the parties, political parties do not seem to be in great danger. However, parties may be weakened if the United States Supreme Court lifts limits on outside groups' fundraising ability but keeps the party "soft money" limitations in place.

Conclusion

At least in the United States, campaign finance systems are dynamic, not static. Changes in law, technology, and strategy interact to alter the nature of fundraising. In U.S. presidential elections, the most recent transformation has been marked by the demise of the public financing system and its replacement with bundling and micro-donations.

Though Obama's unprecedented fundraising success in the 2008 election may not soon be matched, surely other campaigns will try to replicate his success in both cultivating micro-donors and in building bundling networks (the latter an innovation pioneered by the George W. Bush campaign). The largest question mark for the near future about the financing of presidential campaigns is the legal regime. It is not clear how quickly, or how far, the United States Supreme Court will move in the deregulation of campaign financing. Should the Court move sharply in the deregulatory direction, candidates, parties, and outside groups will no doubt adapt, finding new ways to raise and spend maximum amounts of money to influence the outcome of the presidential vote. Outside groups will also be looking for new ways to influence the new president through strategic fundraising and spending.

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End Notes

[1] Outside the U.S., such groups often are referred to as "third parties." In the U.S., that term typically refers to minor parties (aside from Democrats and Republicans) who run candidates in some elections. For this reason, I use the term "outside groups."

[2] This chapter considers only campaign financing for major party (Democratic and Republican) presidential candidates. It does not consider (1) minor party candidates for president; (2) congressional campaign financing; or (3) state and local campaign financing issues.

[3] Though the election is national, results are tallied within each of the 50 states. Each state is allocated a number of electoral votes based on the number of House and Senate seats each state holds. Most states award all of the state's electoral votes to the candidate who receives the most votes within the state, but there are a few states that allocate some of their electoral votes based upon certain sub-state results. The president must receive a majority of the electoral votes; otherwise the choice goes to Congress under a set of complex rules. The details of this process are beyond the scope of this Chapter. For details and a critique, see Bennett 2006.

[4] For more details on the law described in this introduction, see Lowenstein, Hasen, & Tokaji 2008: 792-93, 889-92.

[5] These figures do not include additional funds (of up to 20% of the spending limit) that may be raised for legal and administrative expenses (so called "GELAC" funds). (FEC 2008.)

[6] During that same period, Senator Obama raised an addition $41.9 million to be used for the general election campaign. (Campaign Finance Institute 2008a, tbl. 2.)

[7] Note that the "primary season" runs until the summer nominating convention, so that once a party candidate becomes the presumptive nominee, he or she may continue to raise funds and then spend them attacking the other party's candidate(s) during that period.

[8] Obama eventually reached at least 2 million total donors. (Political Intelligence 2008.)