

GOODBYE SOFT MONEY, HELLO GRASSROOTS: HOW CAMPAIGN FINANCE REFORM RESTRUCTURED CAMPAIGNS AND THE POLITICAL WORLD

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The communications media of this new century are something else entirely—more iterative, more participatory, more transparent, more personal, more honest, more one-to-one, more global, and more *democratic*. In this technology-driven era, people are less passive consumers and more active participants.¹

—Simon Rosenberg

I. INTRODUCTION

On the heels of the 2008 election, a crucial question for campaign finance reformers is whether the much-heralded small-donor revolution represents a meaningful and lasting change in the composition of political donors in the electorate.

Of course, an open-seat contest for the presidency is unusual in the span of history, and the successful campaign by President Obama is both a testament to the candidate and to the shift in political winds that made the nation receptive to political change. Indeed, Obama's candidacy was ground-breaking in many ways, not the least of which was the manner in which his campaign made use of lightning-fast, low-cost, Internet-based technologies both for organizing supporters and for gathering contributions.

Although it is possible that such a campaign could have taken shape in this way without a change in the campaign finance landscape, it is equally true that a set of key reforms in campaign financing—in particular the passage of the 2002 Bipartisan Campaign Reform Act (BCRA)—laid the groundwork for it, altering incentives that had, prior to the 2008 election cycle, helped push the political parties out of the arms of large, corporate donors and into doing the important work of recruiting contributions from individuals.

While many observers point to softer factors that encouraged the small donor revolution, the evidence shows that the changes to hard incentives wrought by BCRA played a critical and catalyzing role. Law matters, and future changes that would water down or overturn these rules would mean a significant step backward.

This shift has been dramatic and has occurred over a scant few election cycles at an accelerating pace. The landmark reforms of BCRA (also widely known as “McCain-Feingold” for its Senate co-sponsors) were preceded by several decades of political neglect of all but the largest individual donors. Due to a number of factors, including a political realignment of the electorate

1. Simon Rosenberg, *Foreword* to JEROME ARMSTRONG & MARKOS MOULITSAS, CRASHING THE GATE: NETROOTS, GRASSROOTS, AND THE RISE OF PEOPLE-POWERED POLITICS, at xii (2006).

indicated by the appeal of Reagan-era Republicanism,² the Democratic Party moved away from its base starting in the 1980s, and increasingly toward the political center. The shift helped the Democratic Party compete with Republicans for wealthy donors and corporate dollars, but it also led to—and reinforced—a growing addiction to unregulated, so-called “soft money.” Starting in 2000, some signs of a reversal in these patterns became evident, and the passage of BCRA rapidly accelerated these changes in at least two notable ways: by removing soft-money enticements; and by increasing the amount of money that individuals could give, which rewarded the parties for recruiting new donors.

Yet, few observers acknowledge BCRA’s success.³ Instead, over the past year, experts across the political spectrum have pointed to the alleged “collapse of the campaign finance regime.”⁴ While the campaign finance playing field experienced a marked shift after BCRA, this shift was far from a collapse. By better distributing financial power among the parties’ small donor “activists” at the same time that new tools available on the Internet facilitated far better and lower-cost communication and peer-to-peer activity, the change in incentives for the parties that BCRA brought about has in fact transformed and revitalized the parties—particularly the Democratic party—from the inside out.

Some of these transformations were likely beyond the purview of reformers who advocated for BCRA because of the abuses of power and scandals in the 1990s. To the extent BCRA was motivated by a backwards-looking view, it was a limited reform aimed at the biggest single abuse in the system and was intended to restore some of the integrity of the existing campaign finance restrictions, which had badly eroded over time.⁵ It was never, as critics often mistakenly suggest,⁶ intended to reduce the amount of money in politics or to solve all of the problems plaguing the system, and it certainly has not done so.

Nonetheless, the case for BCRA was also forward-looking, and it has been a resounding success in meeting those objectives. The hope and clear intent of reformers was that eliminating the nearly limitless amounts of “soft money” would democratize fund-raising in just the manner that did in fact happen.⁷ In

2. See, e.g., SEAN WILENTZ, *THE AGE OF REAGAN: A HISTORY, 1974–2008* (2008).

3. See, e.g., Mark Schmitt, *Can Money be a Force for Good? The Revolutionary Potential of Small-Donor Democracy*, AM. PROSPECT, Feb. 4, 2009, available at http://www.prospect.org/cs/articles?article=can_money_be_a_force_for_good.

4. *Id.*; see also Thomas E. Mann, *A Collapse of the Campaign Finance Regime?*, FORUM, Vol. 6, Issue 1, Art. 1, at 1–4 (2008); Bradley A. Smith, *Obama’s Huge Haul Should End This Fight*, WASH. POST, Oct. 26, 2008, at B1.

5. Fred Wertheimer, *More Money, More Problems*, DEMOCRACY J., June 4, 2007, at 77, 78–79.

6. See Smith, *supra* note 4, at B1.

7. Wertheimer, *supra* note 5, at 81–82.

so doing, the soft-money restrictions did, as the section heading in the law provided, effect a “reduction of special interest influence.”⁸

Consider a single fact: when the Democratic National Committee (DNC) conducted an internal study to determine the sources of its funds in 1997, it found that a very small number of wealthy contributors were responsible for a shockingly high percentage of overall soft-money contributions.⁹ Nearly \$25 million—or twenty percent of the total \$122 million collected in 1996—had been contributed by just 168 people.¹⁰

BCRA changed this distribution curve dramatically. As Thomas E. Mann, a Senior Fellow in Governance Studies at the Brookings Institution, observed about the presidential primary elections in July 2008:

Large soft-money contributions to parties from corporations, unions, and wealthy individuals (often arranged through intense pressure from elected and party officials) are no longer a part of the picture. Presidential candidates have focused on hard-money contributors, which are limited to \$2,300 per donor.¹¹

This is exactly the result Congress sought in enacting BCRA: a regime in which candidates and parties have ample resources to express their political views, but in which no single contributor can purchase undue influence over federal elected officials by writing a multimillion-dollar check to a political party.

BCRA had a positive impact on parties in two significant ways: First, the law provided a cap on contributions to candidates that encouraged high donors to give more money directly to the parties; and second, it pushed the parties toward individual contributions by eliminating soft money. As David Magleby noted in his comprehensive new book, *The Change Election: Money, Mobilization, and Persuasion in the 2008 Federal Elections*:

BCRA encouraged the parties to raise money from individuals by increasing the aggregate contribution limits for individuals wishing to contribute to parties and by indexing these contributions to inflation By banning the unlimited soft money contributions from individuals and groups and especially from unions and corporate general funds, BCRA added another reason for parties to emphasize raising money from individuals.¹²

8. Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 107-155, tit. I, 116 Stat. 81.

9. Seth Gitell, *The Democratic Party Suicide Bill*, ATLANTIC MONTHLY, July/August 2003, available at <http://www.theatlantic.com/doc/200307/gitell>.

10. *Id.*

11. Thomas E. Mann, *Money in the 2008 Elections: Bad News or Good?*, CHAUTAUQUAN DAILY, July 1, 2008.

12. THE CHANGE ELECTION: MONEY, MOBILIZATION, AND PERSUASION IN THE 2008 FEDERAL ELECTIONS 36 (David B. Magleby ed., 2009).

Importantly, none of the vocal concerns about the potential negative consequences of BCRA, including the myriad predictions of profound harm to the Democratic party,¹³ have come true. In the run-up to its passage, the conventional wisdom held that Democratic candidates would be bereft of the soft-money donations they would need to compete with Republicans' traditional donor base.¹⁴

In fact, BCRA has not been the political parties' "suicide pact"; instead, the parties are flourishing under it.¹⁵ In the two elections prior to the enactment of BCRA, the national parties raised over \$2 billion, almost half of which was unregulated soft money. In the 2004 and 2006 elections—the first two after BCRA went into effect—the parties raised more so-called "hard money," or contributions from individuals subject to BCRA's federal contribution limits, than they did in the two previous elections.¹⁶ As David Magleby noted, "the Republican National Committee and the Democratic National Committee raised more hard money alone in 2004 than they had in both soft and hard money contributions combined in 2002."¹⁷

More recent data from the Federal Election Commission shows that in the 2008 election, the parties' national fund-raising committees "overshadowed" pre-BCRA totals by \$149.8 million (\$129 million for Democrats and \$21 million for Republicans) in comparison with the 2000 election, and by \$249 million (\$191 million for Democrats and \$58 million for Republicans) in comparison with the 2002 election.¹⁸

While the amount of money has increased, the collateral consequences of raising money in a different way have been astonishing. BCRA's ban, by cutting off the flow of unregulated money into party coffers, pushed the national parties to reach out aggressively to both new and smaller donors, reconnecting the parties to a broad base of individual donors who are both its financial and ideological enthusiasts.

13. See, e.g., Gitell, *supra* note 9.

14. See, e.g., PETER FRANCIA ET AL., THE FINANCIERS OF CONGRESSIONAL ELECTIONS 29–41 (2003). By comparing data from the Congressional Donors Survey, the 1996 American National Election Study, and the Census, Peter Francia and his co-authors concluded that the population of partisan donors has long been dominated by white, wealthy, highly-educated men who are middle-aged and older, and generally of non-Evangelical Protestant religious affiliation. *Id.* at 29–33. This group has been more readily tapped by Republican candidates. *Id.* at 37.

15. See David B. Magleby, *Rolling in the Dough: The Continued Surge in Individual Contributions to Presidential Candidates and Party Committees*, FORUM, Vol. 6, Issue 1, Art. 5, at 10 (2008) ("Contrary to the speculation of some prior to the implementation of BCRA, the soft money ban did not 'short-circuit the efforts . . . to revitalize political parties.'").

16. Norman Ornstein & Anthony Corrado, Jr., *Reform That Has Really Paid Off*, WASH. POST, Mar. 31, 2007, at B3; see also Magleby, *supra* note 15, at 1.

17. Magleby, *supra* note 15, at 1.

18. Press Release, Fed. Election Comm'n, *Party Financial Activity Summarized for the 2008 Election Cycle: Party Support for Candidates Increases* (May 28, 2009), available at <http://www.fec.gov/press2009/05282009Party/20090528Party.shtml>. Please note that these figures have been rounded for the reader's convenience.

Seeking new sources of campaign dollars to replace soft money, candidates also went to the grassroots. Politics and the run-up to the 2008 election became remarkably more exciting when two candidates who began as underdogs won their respective party's presidential nomination.¹⁹ As both candidates and parties replaced soft money with accumulated small donations, the transition in turn effected a shift in the orientation and organization of political campaigns.

The shift to grassroots tactics has been even more notable for the parties. Both national parties intensified their renewed pursuit of grassroots donors following the enactment of BCRA. Additionally, having learned from Democratic primary candidate Howard Dean about the burgeoning potential of the Internet for soliciting donations and organizing, both presidential candidates in the 2004 election raised unprecedented amounts of money in small contributions.

In 2008, those lessons were most fully applied in the presidential race by the Obama campaign, which sought to harness the power of the Internet outreach to small donors as a source of legitimacy and independence. While the party infrastructure played a role in the general election, it was overshadowed by Obama's strategy for full-circle organizing, which required a central appeal, candidate-led coordination, and broad base of mobilized supporters. BCRA pushed the parties to transform themselves, and the political candidates, particularly the presidential candidates, absorbed these lessons well.

As Brian Wolff, Chair of the Democratic Congressional Campaign Committee (DCCC), recently summarized to *The American Prospect*, BCRA "forced us to do what we should have been doing all along, which was including more people in the political process."²⁰ This approach to political fund-raising stands in stark contrast to the Democrats' pre-BCRA strategy in which, according to Wolff, "[Democrats] basically reached out to labor unions and said, give to this member of Congress. . . . Nothing was programmatic."²¹

By forcing parties to invest in the harder challenge of appealing to a larger number of individual donors rather than a small cadre of wealthy donors, BCRA increased public engagement by the parties. Coupled with transformational changes in campaign practices made possible by the Internet, this new focus enhances the legitimacy of those elected by engaging many more people in the process.

When the new limits on large contributions became meaningful, the reforms created a space for smaller donations to matter and enabled more individuals to

19. For just one example of the press coverage regarding Clinton's clear early advantage, see Harold Meyerson, *How Hillary's Done It—So Far*, AM. PROSPECT, Nov. 19, 2007, available at http://www.prospect.org/cs/articles?article=how_hillarys_done_it_so_far.

20. Tim Fernholz, *What to Expect When You're Expecting a Majority*, AM. PROSPECT, Oct. 1, 2008 (quoting Brian Wolff), available at http://www.prospect.org/cs/articles?article=what_to_expect_when_youre.expecting_a_majority.

21. *Id.*

reconnect to the parties and candidates. When coupled with the new Internet-based tools and an emphasis on community organizing principles, the changes have been profound, extending far beyond fund-raising to include a renewed spirit of volunteerism, increased online and offline activism, and party structures that are becoming more bottom-up and far less top-down.²² The parties' attitudinal shift toward their members and activists is a little-chronicled but highly-welcomed development, and was, in fact, linked to the changes spurred by BCRA as it weaned the parties off of their dependency on large contributions and donors.

These salutary changes point the way to future reforms that would further enhance political engagement, including rewarding political investments in small donors by using matching funds and public funding systems. Moreover, subsequent elections will likely see far more candidates in congressional and state-level elections who will likely benefit from the newly revitalized party infrastructures and their deeper connections to individuals.

In Part II, this Article presents a brief history of party fund-raising to provide an understanding of how the ebb and flow of party dependence on large industry soft-money contributions led to recent upheavals in the political fund-raising system. Part III calls for reform of the soft-money system and offers evidence illustrating how the incentives for outreach to smaller donors were greatly increased by BCRA. Part IV demonstrates how the alterations in legal parameters coincided with an explosion of new Internet-based communications tools, leading to a revolution in the practices of campaign politics. This Part also looks to historical analogues from the Progressive Era that show the productive interaction between structural reforms and policy change. Finally, this Article will make a brief case for public financing of both congressional and presidential elections as the next step for progress in campaign finance and, in turn, our democratic evolution.

II. A BRIEF HISTORY OF POLITICAL PARTY FUND-RAISING

A. Direct Mail Fund-raising and the Seeds of a Republican Revolution

After the Watergate scandal led to President Nixon's resignation and the 1974 loss of seventy-four Republican seats in the House of Representatives, the Republican Party suffered a severe decline in donations and public support.²³ Over the next six years, it set out to expand its donor base and

22. See, e.g., ARMSTRONG & MOULITSAS, *supra* note 1, at 136; Powerpoint Presentation by Micah Sifry, The Making of the President 2.0: How the Process Changed in 2008, <http://www.slideshare.net/Msifry/the-making-of-the-president-20-how-the-internet-is-changing-the-political-game-presentation>.

23. Paul S. Herrnson, *Party Leadership and Party Organizational Change*, in POLITICS, PROFESSIONALISM, AND POWER: MODERN PARTY ORGANIZATION AND THE LEGACY OF RAY C. BLISS 186, 194 (John C. Green ed., 1994).

strengthen its foundering organization.²⁴ Forced to innovate in order to survive, the National Republican Congressional Committee (NRCC) made a concerted effort to incorporate sales and marketing techniques into campaign efforts.²⁵ Under the leadership of William Brock, the Republican National Committee (RNC) moved away from the grassroots level reforms initiated by Ray Bliss in the 1960s and instead focused on strengthening the party from the top down.²⁶ Brock's efforts prioritized national institutional growth and organizational development.²⁷

Although the RNC already had a strong direct-mail program in place, Brock "expanded [it] from 350,000 to 1.2 million contributors."²⁸ This increase was due in part to the targeting of individuals who were likely to donate as determined by registration lists, demographics, and consumer habits.²⁹ The RNC's sophisticated direct-mail network was subsequently credited for decades of Republican advantage in raising hard-money contributions.³⁰ In addition, the NRCC aggressively sought donations from business-driven Political Action Committees (PACs), and "spent millions of dollars on a national advertising campaign" that promoted the GOP as a vehicle for change.³¹

Meanwhile, the Democrats had controlled both houses of Congress since 1954 and, as of 1977, had President Jimmy Carter in the White House. Unlike its Republican counterpart, the DCCC was complacent, relying largely on the power of incumbency.³² The difference between the approaches was evident during the 1980 election cycle when the NRCC's income was thirteen times that of the DCCC.³³ While many left-leaning groups were using direct mail for fund-raising, the Democratic Party declined to make much use of the tool. Robert Kuttner, in an article for *The New Republic*, argued that the Democrats' neglect of small donors was intentional.³⁴ DNC Chairman Robert Strauss made a public display of scrapping the 600,000-name McGovern donor list and cultivating the PACs. The Democrats

"had a list about three times the size of the Goldwater list that started the Republican direct mail," said a former DNC official, "but Bob

24. *Id.* at 194–99; BROOKS JACKSON, HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS 53–54 (Alfred A. Knopf ed., 1988).

25. Herrnson, *supra* note 23, at 195.

26. *Id.*

27. *Id.*

28. *Id.*

29. JACKSON, *supra* note 24, at 53–54.

30. Center for Responsive Politics, *Party Fundraising Totals by Cycle*, <http://www.opensecrets.org/bigpicture/ptytot.php?cycle=2006> (last visited May 12, 2009).

31. JACKSON, *supra* note 24, at 54.

32. *See id.* at 53.

33. *Id.* at 54.

34. Robert Kuttner, *Ass Backward*, NEW REPUBLIC, Apr. 22, 1985, at 18.

Strauss threw the McGovern list out the window because he wanted to build a party dependent on his network of wealthy contributors, people who didn't really share the philosophy of the national party.”³⁵

Others suggest that while Strauss did use direct mail, as well as telethons, the return realized by the DNC from the McGovern small donor lists was minimal due to the high cost of direct mail, the fact that many other groups were also using the lists, and because McGovern supporters had been more connected to McGovern himself than to the Democratic party.³⁶

When the Republican Party won both the presidency and control of the Senate in 1980, it was a rude awakening for the Democrats. Suddenly, with control of the House of Representatives at risk, fund-raising had a powerful new impetus. However, having relied for years on a “narrow base of affluent liberals and lobbyists,” the DCCC simply lacked any fund-raising machine to set in motion, much less one positioned to match the NRCC’s investments in then-novel technologies.³⁷

B. The Democrats’ Response: Mixing Business with Politics

The disparities between the Republican and Democratic Parties’ respective fund-raising capabilities began to change when Tony Coelho, a little-known congressman from California, became head of the DCCC in 1981.³⁸ Over the course of the previous decade, the political power of business and labor had grown dramatically.³⁹ Recognizing this growth, as well as the fund-raising gap between the parties, Coelho set out to turn the DCCC into an effective fund-raising business, modeled after its Republican counterpart.⁴⁰

He did so as the growth of PACs accelerated, both in number and influence, reflecting a backlash against the political victories of consumer and environmental interests in the 1970s.⁴¹ Although PACs had been around since 1944, their growth took off after the Nixon administration.⁴² Capitalizing on Democratic control of the House in 1981, Coelho targeted PAC managers and

35. *Id.*

36. PHILIP A. KLINKNER, THE LOSING PARTIES: OUT-PARTY NATIONAL COMMITTEES 1956–1993, at 26 (1994).

37. *See* JACKSON, *supra* note 24, at 53–54.

38. Susan B. Glasser, *Campaign Committees Set Early Cash Records*, WASH. POST, Oct. 17, 1999, at A1.

39. *See generally* DAVID VOGEL, FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA chs. 7, 8 (1989).

40. *See* Gregg Easterbrook, *The Business of Politics*, ATLANTIC MONTHLY, Oct. 1986, available at <http://www.theatlantic.com/politics/polibig/eastbusi.htm>.

41. JACKSON, *supra* note 24, at 54.

42. JEFFREY H. BIRNBAUM, THE MONEY MEN: THE REAL STORY OF FUND-RAISING’S INFLUENCE ON POLITICAL POWER IN AMERICA 31, 36 (2000). Between 1974 and 1982, the number of PACs organized by business and labor unions increased from 608 to 2601. In 1992, the number of PACs reached 4195. *Id.* at 36.

ruthlessly traded political access for cash.⁴³ During his first year as chairman, Coelho started the Speaker's Club, a group that received audiences with members—including House Speaker Tip O'Neill and other influential Democrats—in exchange for a \$5,000 membership fee.⁴⁴ Despite Coelho's efforts and the fact that PACs typically give to incumbents, business PAC money began to increasingly flow toward Republican candidates when it appeared as though the Republican Party might regain control of the House in 1982.⁴⁵

Instead in the 1982 elections, the economy soured and Republicans lost twenty-six seats in the House.⁴⁶ When the Democrats retained, and actually increased, their majority in the House, Coelho stepped up his efforts to reclaim business donations by convincing business and labor PAC leaders that supporting incumbency yielded better political returns than supporting candidates based on ideology.⁴⁷ An emboldened Coelho "stressed over and over" to business PACs that "Democrats retained a commanding majority in the House and that the committees important to business continued to be headed by Democrats."⁴⁸

His aggressive tactics in wooing business PACs away from the Republican Party were compared to a Tammany Hall-style shakedown.⁴⁹ As one account relates:

Coelho set up candidate forums at which PAC directors could look over the party's prospects. Lobbyists and candidates all milled around in a big room wearing name tags

Coelho didn't rely wholly on the supposed business credentials of his candidates, however. He announced he would record names of those who didn't support candidates he deemed worthy. It was as though a traffic cop were stopping cars to sell tickets to the police-union ball.⁵⁰

By 1983, just two years after Coelho was appointed DCCC chairman, the Committee tripled its fund-raising from \$2 million to \$6 million.⁵¹ The sources of the funds were highly concentrated:

Coelho liked to boast that half his money came through the mail, from small donations with no strings attached. In gross terms, that was true. But [finance director Terry] McAuliffe's numbers showed

43. See JACKSON, *supra* note 24, at 53–54; Easterbrook, *supra* note 40.

44. Easterbrook, *supra* note 40, at 3.

45. JACKSON, *supra* note 24, at 76–77.

46. *Id.*

47. *Id.*

48. *Id.* at 77.

49. Susan Mandel, *How the Democrats Hold on to Congress*, NAT'L REV., Nov. 24, 1989, available at http://findarticles.com/p/articles/mi_m1282/is_n22_v41/ai_8134929/pg_6.

50. JACKSON, *supra* note 24, at 69.

51. Easterbrook, *supra* note 40, at 5.

that after deducting the heavy expenses of postage, printing, list rental, and computer processing, the committee's net income from its small-donor program was only \$900,000 in 1985 and \$1.5 million during 1986. In practical terms, Coelho was netting several times as much from PACs, lobbyists and soft-money donors than from the rank and file.⁵²

Electoral success followed: the Democrats regained control of the Senate in 1986 and maintained bicameral control until the 1994 elections.⁵³

C. A Culture of Corruption and Scandal on the Hill

Coelho's transformation of Democratic Party fund-raising has been credited for enabling Democrats to maintain control of the House for over a decade.⁵⁴ Yet the DCCC's strategic use of pork-barrel legislation, legislative gifts, political access, and other less-than-savory methods of securing corporate dollars contributed to an already insalubrious environment of corruption and scandal on Capitol Hill.⁵⁵ As this unseemly atmosphere increasingly captured public attention, Republican energy grew, and public perceptions of Congress suffered.⁵⁶

During the 1970s alone, "thirty-six representatives and Senators were found guilty of violating laws or ethics."⁵⁷ Then, in 1980, six members of the House and one Senator were caught on tape taking bribes in a sting operation set up by Federal Bureau of Investigation agents.⁵⁸ Known as the ABSCAM scandal, this operation led to one expulsion from the House, one resignation from the Senate, and a total of four prison sentences.⁵⁹

Elected in 1978, and thus a relative newcomer to the House, Republican Newt Gingrich capitalized on the unpleasant odor building up around national politics and worked to focus public attention on Congress and the institutional corruption that he attributed to decades of Democratic control.⁶⁰ After Jim Wright became House Speaker in 1987, Gingrich launched repeated attacks on his ethics.⁶¹

52. JACKSON, *supra* note 24, at 165–66.

53. Todd S. Purdum, *Democrats Appear Vulnerable in Senate Races*, N.Y. TIMES, Oct. 4, 1998, at A1.

54. David E. Rosenbaum, *Will the Gore Campaign's New Chief be a Boon or a Burden?*, N.Y. TIMES, May 15, 1999, at A12.

55. *See Convicted Lawmakers Should Lose Their Pensions*, OAKLAND TRIB., Jan. 19, 2007.

56. *See id.*; THOMAS MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 76–77 (2006).

57. MANN & ORNSTEIN, *supra* note 56, at 75.

58. *Id.*

59. *Id.* at 75–76.

60. *Id.* at 64, 76. For a detailed account of congressional corruption and associated scandal during the late 1970s to early 1990s, see *id.* at 75–80.

61. *Id.* at 76.

In 1989, those attacks eventually bore fruit when the House Ethics Committee charged Wright with “sixty counts of violations of ethics rules and procedures . . .”⁶² That same year, Coelho, then serving as the Democratic House Whip, resigned in response to media allegations that he received a seedy loan from party donors.⁶³ As Congress found itself caught up in the scandal surrounding the collapse of the savings and loan industry, five senators were accused of giving improper assistance to the chairman of the Lincoln Savings and Loan Association, Charles Keating.⁶⁴ Among the Keating Five, Republican John McCain and Democrat John Glenn were found by the Senate Ethics Committee to have “exercised poor judgment,” but the Committee did not find ethics violations.⁶⁵ The other three—all Democrats—were found guilty of ethics violations in 1991.⁶⁶ Around the same time, the “Rubbergate” scandal broke, implicating more Democrats than Republicans in illegitimate House banking practices.⁶⁷

D. The Rise of Soft Money

Concurrent with Coelho’s effort to turn the DCCC into an efficient money-raising machine, a broader change was taking place in political fund-raising: both political parties were beginning to use soft money to fund campaign activities that were ostensibly nonfederal.⁶⁸ “Soft” money was the term used to describe funds raised outside the scope of federal campaign rules.⁶⁹ Solicited from corporations, unions, and wealthy donors, soft money could be raised in unlimited quantities, so long as such funds were not used for federal campaigns.⁷⁰

62. *Id.* at 77.

63. *Id.* The Savings and Loan scandal centered on a Democratic-leaning sector of the financial industry; for a detailed account of the crisis, see generally PAUL ZANE PILZER & ROBERT DEITZ, OTHER PEOPLE’S MONEY: THE INSIDE STORY OF THE S & L MESS (Simon and Schuster 1989); STEPHEN PIZZO ET AL., INSIDE JOB: THE LOOTING OF AMERICA’S SAVINGS AND LOANS (McGraw-Hill 1989); MICHAEL WALDMAN, WHO ROBBED AMERICA? A CITIZEN’S GUIDE TO THE S & L SCANDAL (Random House 1990); LAWRENCE J. WHITE, THE S & L DEBACLE: PUBLIC POLICY LESSONS FOR BANK AND THRIFT REGULATION (Oxford Univ. Press 1991).

64. See Dennis F. Thompson, *Mediated Corruption: The Case of the Keating Five*, 87 AM. POL. SCI. REV. 369–70 (1993).

65. Associated Press, *Findings of Keating Five*, FOXNEWS.COM, Mar. 23, 2008, <http://www.foxnews.com/wires/2008Mar23/0,4670,McCainKeatingFiveHighlights,00.html>.

66. See Thompson, *supra* note 64, at 369–70.

67. MANN & ORNSTEIN, *supra* note 56, at 77–79.

68. L. PAIGE WHITAKER, CONG. RESEARCH SERV., CAMPAIGN FINANCE: CONSTITUTIONAL AND LEGAL ISSUES OF SOFT MONEY 5 (Mar. 31, 2004), available at http://www.usembassy.at/en/download/pdf/soft_money.pdf.

69. *Id.*

70. Dan Froomkin, *Campaign Finance Special Report: Soft Money — A Look at the Loopholes*, WASH. POST (Sept. 4, 1998), available at <http://www.washingtonpost.com/wp-srv/politics/special/campfin/intro4.htm>.

Although it was widely reported that a change in the definition of soft money was linked to the Federal Election Campaign Act Amendments of 1979,⁷¹ the door was actually opened by a series of permissive Federal Election Commission (FEC) Advisory Opinions, after which party committees began maintaining separate funds for federal (national) and nonfederal (state and local) election activities.⁷² The Advisory Opinions permitted the use of soft money by state and local parties to pay for voter registration activities, “get-out-the-vote” drives, and expenses that could be characterized as “party-building.”⁷³

Then, in the late 1980s, the FEC issued allocation formulas that allowed costs to be divided between federal (hard) and nonfederal (soft) funds for committee activities that had both federal and nonfederal purposes.⁷⁴ As a result, it became increasingly common to use soft money to offset the costs of party activities that partially or indirectly promoted federal campaigns.⁷⁵ This not only provided a new use for easy-to-raise soft money, but it also allowed comparatively scarcer hard money to be reserved for strictly federal campaign purposes.

By the 1988 election cycle, the presidential campaigns were raising significant amounts of soft money that the party committees then spent on “activities designed to influence federal elections.”⁷⁶ Between 1984 and 1992, the amount of soft money raised by the two parties more than quadrupled.⁷⁷

Many corporations gave to both parties, and soft-money contributions became an expected cost of doing business in Washington.⁷⁸ Evidence compiled as part of the legal defense of BCRA included the testimony of corporate officials who admitted that their soft-money contributions were an attempt to gain political access.⁷⁹ The Chairman Emeritus of United Airlines testified that corporate contributions had benefits, “namely, access and influence in Washington.”⁸⁰

71. Federal Election Campaign Act (FECA) Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339, 1340–42 (codified at 2 U.S.C. § 431 (2006)).

72. *See* Federal Election Commission Advisory Opinion 1978-10.

73. Froomkin, *supra* note 70.

74. ANTHONY CORRADO ET AL., THE NEW CAMPAIGN FINANCE SOURCEBOOK 64 (Brookings Inst. Press 2005).

75. *See* TREVOR POTTER ET AL., THE CAMPAIGN LEGAL CTR., THE CAMPAIGN FINANCE GUIDE (2009), available at <http://www.campaignfinanceguide.org/guide-34.html> [hereinafter FECA GUIDE].

76. *Id.*

77. Frank J. Sorauf, *What Buckley Wrought*, in *IF BUCKLEY FELL* 11, 21 (E. Joshua Rosenkranz ed., 1999). Soft money figures prior to 1991 are estimated. For updated figures on the 1991–92 election cycle, see <http://www.opensecrets.org>.

78. DAN CLAWSON ET AL., DOLLARS AND VOTES: HOW BUSINESS CAMPAIGN CONTRIBUTIONS SUBVERT DEMOCRACY 124 (Temple Univ. Press ed., 1998).

79. McConnell v. FEC, 251 F. Supp. 2d 176, 497 (D.D.C. 2003) (Kollar-Kotelly, J., mem.).

80. *Id.* at 498.

Though a soft money check might be made out to a political party, labor and business leaders know that those checks open the doors to the offices of individual and important Members of Congress and the Administration, giving donors the opportunity to argue for their corporation's or union's position on a particular statute, regulation, or other government action.⁸¹

The Supreme Court, in upholding BCRA against constitutional challenge, later found that "lobbyists, CEOs, and wealthy individuals alike all have candidly admitted donating substantial sums of soft money to national committees not on ideological grounds, but for the express purpose of securing influence over federal officials."⁸²

E. The Decade of Soft Money

This was the state of affairs on Capitol Hill as the 1980s made way for the 1990s and as the Democratic Party made a concerted effort to chase after soft money and capitalize on incumbency amid allegations of corruption and scandal mounted almost daily. Thus, while Coelho's fund-raising success may have prolonged the Democratic reign, it also helped to incite public outrage and pave the way for a Republican upset in 1994.

In the early 1990s, multiple factors heated up national political competition, including a recession, ambitious efforts to address the perceived health care crisis with proposals for national health insurance, and public outrage over political entrenchment and incumbency.⁸³ These developments intensified partisan spending.⁸⁴ Total expenditures in congressional campaigns went from \$450.9 million in 1986 to \$765.3 million in 1996.⁸⁵ In 1990, the national, state, and local Democratic party committees spent \$54.5 million, while Republican party committees spent \$172.4 million.⁸⁶ By the 1996 election cycle, these totals rose to \$214 million for the Democratic Party and \$408 million for the Republican Party.⁸⁷

This competitive environment led to innovative fund-raising and spending strategies that exploited loopholes in, and tested the boundaries of, federal regulation. As the 1990s progressed, presidential and congressional candidates

81. *Id.* (quoting a statement of the Chairman Emeritus of United Airlines).

82. *McConnell v. FEC*, 540 U.S. 95, 147 (2003).

83. Sorauf, *supra* note 77, at 21. In this Part, soft money figures before 1991 are estimated. For updated figures on the 1991–92 election cycle, see <http://www.opensecrets.org>. Sorauf attributes increased political competition in the early 1990s to two primary factors. First, the number of open seat contests increased due to redistricting following the 1990 census and public outcry over incumbency. *Id.* at 16. Second, as Republicans came to believe in the possibility of taking over Congress, electoral stakes intensified. *Id.* at 17.

84. *Id.* at 16–18.

85. *Id.* at 21.

86. *Id.*

87. *Id.*

became increasingly involved in soft-money fund-raising and soliciting soft-money gifts from corporations with policy interests.⁸⁸ The Democratic Party, in particular, sought soft money in order to be more competitive with the soft and hard money fund-raising prowess of the Republican Party.⁸⁹ During the 1991–92 election cycle, the Democratic Party raised over \$98 million in soft money, which was only slightly less than the \$102 million in soft money raised by the Republican Party.⁹⁰ The national party committees, for their part, aggressively pioneered new strategies for soft-money spending that went virtually unopposed by the FEC.⁹¹

Meanwhile, although frustration with the status quo led to the election of Democratic President Bill Clinton in 1992, the growing controversies surrounding the Democratic party in Congress contributed to a Republican coup in the 1994 elections. In 1993 alone, three Democratic representatives were convicted of finance-related crimes such as tax fraud, tax evasion, and bribery.⁹² In 1994, the laundry list of scandals continued to grow: a Democratic representative pleaded guilty to theft of government property and conspiring to defraud the FEC, and the Democratic chairman of the House Ways and Means Committee was indicted on seventeen felony charges, including embezzlement from taxpayer and campaign funds.⁹³

These indications of Democratic corruption resonated with themes critical of government that had first been effectively sounded by Ross Perot in the 1992 presidential race, in which he garnered nineteen percent of the popular vote despite floundering in many of his public appearances.⁹⁴ When President Clinton and House Democrats failed to respond to the Perot critique of corruption in Washington in 1993, most notably by failing to complete work on a pair of House- and Senate-passed companion bills to reform campaign fund-raising that would have banned soft money and established partial public financing for congressional elections,⁹⁵ this provided an opening for Newt

88. See FECA GUIDE, *supra* note 75.

89. Center for Responsive Politics, *Party Fundraising Totals by Cycle*, <http://www.opensecrets.org/bigpicture/ptytots.php?cycle=2-6> (last visited Aug. 19, 2009).

90. *Id.*

91. *Id.*

92. Justin Pritchard, *From the House to the Big House*, MOTHER JONES, Jan. 1, 1998, available at <http://www.motherjones.com/news/outfront/1998/01/pritchard.html>. Representative Albert Bustamante (D-TX) was convicted of racketeering and bribery; Representative Nicholas Mavroules (D-MA) pleaded guilty to tax fraud and accepting gratuities while in office; and Representative Larry Smith (D-FL) was convicted of tax evasion. *Id.*

93. *See id.*

94. Perotsystems.com, Ross Perot—Chairman Emeritus of the Board, http://www.perotsystems.com/About/Executives/CorporateLeadership/Ross_Perot (last visited Aug. 19, 2009).

95. MICHAEL WALDMAN, A RETURN TO COMMON SENSE: SEVEN BOLD WAYS TO REVITALIZE DEMOCRACY 77–78 (2008) (reciting a story from inside the Clinton White House about Congress's failure to enact the pending campaign finance reform bill).

Gingrich and other conservative “reformers” and helped to give them majority control of the House and Senate.

The Democrats’ lack of a reform agenda was contrasted with themes of smaller and more conservative government propounded by Gingrich and other Republicans during the 1994 congressional campaign. In addition, the Democrats’ implosion on health care legislation, the distraction of the fight over homosexuals in the military, and the indictment of Democratic House Ways and Means Committee Chairman Dan Rostenkowski (D-Ill.) all painted a powerful picture of Democratic insularity and ineptitude.⁹⁶

Moreover, the failure to enact public financing and legislation banning soft money in 1992 when it was vetoed by President George H.W. Bush, and again in 1994 when President Clinton was open to signing a soft-money ban but a bill failed to emerge from the conference committee in Congress,⁹⁷ may have cost congressional Democrats dearly. As Zachary Roth suggested in *The Washington Monthly*:

[W]ith a Democrat in the White House who had pledged his support for reform—[then-Speaker Tom] Foley did not let public financing out of the House. President Clinton, sensing a tough inter-party battle, chose to spend his limited political capital elsewhere. That proved a crucial turning point: With the system of private financing now unchallenged, Republicans—after taking Congress in 1994—had free rein to build the political machine they would use to dominate Democrats over the next decade.⁹⁸

In the aftermath of losing both houses of Congress in a single election after enjoying forty years in the leadership, the Democrats scrambled for dollars in an effort to regain their former glory. While the Republican Party continued to bring in hard money from its direct-mail operation and broad donor base, the Democrats concentrated on obtaining soft-money contributions from corporations, a small number of individual wealthy donors, and, occasionally, labor unions.⁹⁹ When the DNC conducted an internal study in 1997 to determine the sources of its funds collected in the prior year, it found that a very small number of wealthy contributors were responsible for a shockingly high percentage of overall soft-money contributions: twenty percent of its total \$122 million collected in 1996 came from only 168 individuals.¹⁰⁰

96. See generally RICHARD E. COHEN, ROSTENKOWSKI: THE PURSUIT OF POWER AND THE END OF THE OLD POLITICS (Ivan R. Dee ed., 2000).

97. See Wertheimer, *supra* note 5, at 79.

98. Zachary Roth, *How to Finish Off the GOP Machine: The Machiavellian Case for Public Financing of Elections*, WASH. MONTHLY, June 1, 2007, available at <http://www.washingtonmonthly.com/features/2007/0701.roth.html>.

99. RAYMOND J. LA RAJA, SMALL CHANGE: MONEY, POLITICAL PARTIES, AND CAMPAIGN FINANCE REFORM 151 (2008).

100. See *supra* note 10 and accompanying text.

It was clear that lawmakers knew and socialized with soft-money donors. Senator Alan Simpson (R-WY) testified in defense of BCRA that:

Party leaders would inform Members at caucus meetings who the big donors were. If the leaders tell you that a certain person or group has donated a large sum to the party and will be at an event Saturday night, you'll be sure to attend and get to know the person behind the donation. . . . Even if some members did not attend these events, they all still knew which donors gave the large donations, as the party publicizes who gives what.¹⁰¹

Senator Warren Rudman's (D-NH) testimony underscored the soft-money quid pro quo:

Special interests who give large amounts of soft money to political parties do in fact achieve their objectives. They do get special access. Sitting Senators and House Members have limited amounts of time, but they make time available in their schedules to meet with representatives of business and unions and wealthy individuals who gave large sums to their parties. These are not idle chit-chats about the philosophy of democracy. In these meetings, these special interests, often accompanied by lobbyists, press elected officials—Senators who either raised money from the special interest in question or who benefit directly or indirectly from their contributions to the Senator's party—to adopt their position on a matter of interest to them. Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way.¹⁰²

Soon, reports of fund-raising improprieties led to further scandal, and the 1996 presidential race became the subject of three separate federal investigations into financing.¹⁰³ Perhaps most memorable among the numerous anecdotes regarding the Clinton scandals were allegations of selling the Lincoln Bedroom to the highest bidder.¹⁰⁴ As Seth Gitell reported later in a piece in *The Atlantic Monthly*: “By the summer of 1998 . . . Democratic operatives would wonder out loud whether the party was going to receive more subpoenas that year than [Major League Baseball star player Mark] McGwire would hit home runs.”¹⁰⁵

Chosen to head the DCCC in 1998, Chairman Patrick Kennedy created “Team 2000,” a club that rewarded donors of \$100,000 or more with exclusive

101. *McConnell v. FEC*, 251 F. Supp. 2d 176, 671 (D.D.C. 2003) (Kollar-Kotelly, J., mem.).

102. Declaration of Senator Warren Rudman, at 3 n.7, *McConnell*, 251 F. Supp. 2d 176 (No. 02-0582).

103. Fred Lucas, *New Clinton Scandal Mirrors “Chinagate,” Say Analysts*, CNSNEWS.COM, Sept. 3, 2007, <http://www.cnsnews.com/public/content/article.aspx?RsrcID=31399>.

104. *Id.* In 1997, President Clinton admitted to inviting major campaign donors to stay overnight in the White House, and the Clintons are reported to have hosted 404 overnight guests. *Id.*

105. Gitell, *supra* note 9.

events.¹⁰⁶ One such event was “a weekend of clambakes and sightseeing at the Kennedy Family compound in Hyannisport.”¹⁰⁷ Between 1994 and 1997, eight more Democratic House members were convicted of or sentenced for crimes relating to corruption.¹⁰⁸

The Republicans were equally, if not more, guilty of inventing creative ways to raise funds. As the money chase of the 1990s intensified, dinners, events, and weekend trips were routinely used by both parties as a way of exchanging donations for political access.¹⁰⁹ Enjoying their taste of power and frustrated with the Democrats’ successful approaches to soliciting business contributions, the Republicans set out to replicate Tony Coelho’s fund-raising successes.¹¹⁰ Having learned that it could not rely solely on its deregulatory ideology to attract support from big business, the Republican Party channeled Tony Coelho and focused on providing legislative gifts to entice corporate donors.¹¹¹ It also initiated the “K Street Project,” which pressured lobbying firms into hiring Republicans, “reward[ed] loyal GOP lobbyists with access to influential officials,” and sought to cut off money going into Democratic campaign coffers.¹¹²

The Brennan Center’s Michael Waldman described the Republicans’ scheme as follows:

Under Texas Rep. Tom DeLay, from 1995 to 2006, the House Majority Whip and then Majority Leader, the trading of cash for policy reached a level of explicit vulgarity not seen since the Gilded Age. When the GOP won the Congress in 1994, DeLay summoned lobbyists to his office and showed them their names on lists deeming them “Friendly” or “Unfriendly” based on whether they gave campaign contributions only to the GOP. . . . Key industries went

106. Glasser, *supra* note 38.

107. *Id.* Some of the first donations were more than double the asking price and came from two large labor organizations: the Communications Workers of America, and American Federation of State, County, and Municipal Employees. *Id.* Early subscribers also included AT&T, the founder of Price Club, and a wealthy Texan law firm. *Id.* To attract large donations from wealthy donors, the DCCC also traded on personal attention from Kennedy and influential Democratic legislators such as Gephardt. *Id.*

108. *See* Pritchard, *supra* note 92.

109. *See* Robert Biersack & Melanie Haskell, *Spitting on the Umpire: Political Parties, the Federal Election Campaign Act, and the 1996 Campaigns*, in FINANCING THE 1996 ELECTION 155, 173 (John C. Green ed., 1999).

110. *The Tony Coelho Factor*, WASH. TIMES, Jan. 18, 2006, <http://www.washtimes.com/news/2006/jan/17/20060117-092150-3845t/>.

111. *Id.*

112. *See* SourceWatch, *K Street Project*, http://www.sourcwatch.org/index.php?title=K_Street_Project (last visited Aug. 19, 2009).

from splitting their contributions to pouring twice as much money to Republicans as to Democrats.¹¹³

The resulting frenzy turned the soft-money competition of the mid- to late 1990s into an “‘arms race’ characterized by spiraling competition and incentives that rewarded donors with unusual access to federal officeholders and led to corporate shakedowns by partisan elites.”¹¹⁴ As demonstrated in Figure A below, the Democratic Party’s soft-money take increased 250 percent between the 1991–92 and 2001–02 election cycles. During that same period of time, the Republican Party’s soft-money receipts increased by 243 percent. Soft money was the Democratic Party’s main source of funding during these years, and it allowed the Democratic Party to remain at least somewhat competitive with the fund-raising behemoth that was the Republican Party.¹¹⁵

Furthermore, as resources were increasingly shifted toward these soft-money-enhancing structures, the connection of the parties to average voters among the party faithful waned. Essentially, the role of the political parties became that of financial intermediaries, providing campaign services and technology to support party candidates.¹¹⁶

The cause and effect may be unclear, but the correlation is evident: the Democrats’ fund-raising shift was also accompanied by some notable policy shifts towards the political center. After losing ground in the 1994 election and following a perceived shift of the country’s electorate towards the center right, the Democratic Party’s fund-raising and policy development efforts increasingly reflected a siege mentality. After the mid-1990s when Vice President Al Gore “reinvent[ed] government” by transferring substantial amounts of work and money to private contractors and consultants,¹¹⁷ and welfare reform was implemented over the protests of Progressives,¹¹⁸ the Democrat’s reliance on corporate—rather than union—PACs and big soft-money donors increased dramatically.¹¹⁹

113. WALDMAN, *supra* note 95, at 64 (2008) (citing David Maraniss & Michael Weisskopf, *Speaker and His Directors Make the Cash Flow Right*, WASH. POST, Nov. 27, 1995, at A1).

114. Casey Byrne Knudsen Dominguez & Kathryn Pearson, *Big Dollars, but How Much Change?: An Analysis of Soft Money Donors Post-BCRA* (Apr. 7, 2005) (unpublished manuscript), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/0/8/5/8/5/p85851_index.html.

115. See Center for Responsive Politics, *Party Fundraising Totals by Cycle*, <http://www.opensecrets.org/bigpicture/ptytots.php?cycle=2006> (last visited Aug. 10, 2009).

116. See Biersack & Haskell, *supra* note 109, at 155–56; Diane Dwyre & Robin Kolodny, *Throwing Out the Rule Book: Party Financing of the 2000 Elections*, in FINANCING THE 2000 ELECTION 133, 133–34 (David B. Magleby ed., 2002).

117. See, e.g., Robert B. Reich, *Why Business Should Love Gore*, AM. PROSPECT, Jul. 31, 2000, available at http://www.prospect.org/cs/articles?article=why_business_should_love_gore.

118. Tom Diemer, *Welfare Reform Bill a Necessity for Clinton*, CLEVELAND PLAIN DEALER, Aug. 2, 1996, at 8A.

119. Center for Responsive Politics, *Party Fundraising Totals by Cycle*, *supra* note 115.

Figure A, below, shows the rise of soft money in political party fund-raising between 1991 and 2002.¹²⁰

Soft Money Fund-raising, 1991–2002¹²¹

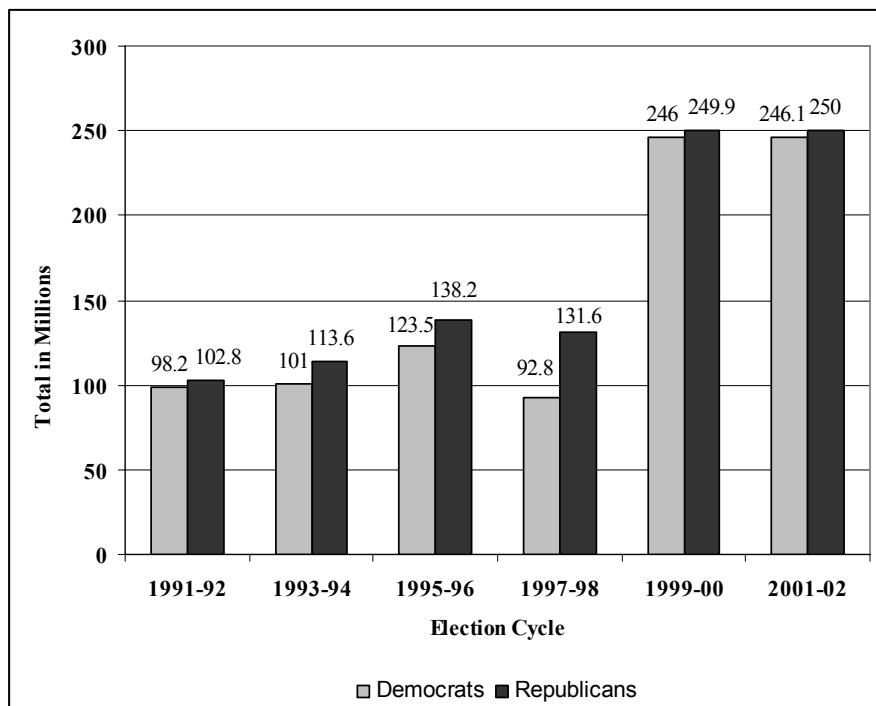


Fig. A

III. A CALL FOR REFORM OF THE SOFT-MONEY SYSTEM

Fred Wertheimer, a campaign finance stalwart, described reformers' doggedness in pursuing a campaign finance agenda in light of the corruption throughout the late 1980s and early 1990s as follows:

Beginning in 1987, Senate Democrats took the lead in pursuing congressional public financing in various forms and repeatedly mustered Senate majorities for their proposals. Their persistent commitment to the issue was demonstrated by the fact that legislation was considered on the Senate floor in 1987, 1988, 1990, 1991, 1992, 1993 and 1994. Both the Senate and the House passed campaign finance reform bills in three Congresses in a row, from

120. *Id.*

121. *See id.* Please note that these figures have been rounded.

1990 to 1994. The legislative efforts were all blocked, however, by a combination of Republican-led minority filibusters, stalling tactics by House Democratic leaders, and a presidential veto.¹²²

The recurrence of scandals throughout the 1990s held the attention of lawmakers and citizens alike and energized campaign finance reform efforts. In 1991, Congress, led by Democrats, passed a ban on soft money as part of a system of public financing and spending limits for congressional races; however, President George H.W. Bush vetoed the ban.¹²³ In 1993, President Bill Clinton proposed enacting a soft-money ban as part of a comprehensive reform package, which included public financing. While the House and Senate each passed a version of Clinton's proposal in 1993, the House Democrats blocked appointment of a conference committee until the last weeks of the 1994 session, which allowed a Republican filibuster to kill it.¹²⁴

With the Republican takeover of Congress in 1994, prospects for public financing dimmed.¹²⁵ However, after more than a decade of organizing and effort and by subsequently narrowing the focus of the campaign finance reform agenda to soft money, a bill garnered strong bipartisan backing in a drive led by Senators John McCain (R-AZ) and Russell Feingold (D-WI) and Representatives Christopher Shays (R-CT) and Martin Meehan (D-MA).¹²⁶

A version of the McCain-Feingold bill was first proposed in 1995—before the 1996 election scandals—with strong backing from many Democrats.¹²⁷ McCain then raised the profile of the bill by making it a plank in the platform of his 2000 presidential election campaign.¹²⁸

Given the Republicans' fiscal advantage in the 2002 election, in which Republicans outraised Democrats by over one-third,¹²⁹ some Democrats vehemently opposed BCRA out of concern that it would close off the party's primary means of competing with the Republican fund-raising prowess. BCRA was labeled a "suicide pact" by party insiders, and it was widely assumed that both Democrats and Republicans would suffer if BCRA passed.¹³⁰ The bill was even the subject of a notorious confrontation between Senators Russell Feingold and Hillary Clinton (D-NY) at a gathering of

122. Wertheimer, *supra* note 5, at 78–79.

123. Roth, *supra* note 98.

124. See WALDMAN, *supra* note 95, at 77–78 (reciting a story from inside the Clinton White House about Congress's failure to enact the pending campaign finance reform bill).

125. Wertheimer, *supra* note 5, at 79.

126. *Id.* at 80.

127. *Id.* at 81.

128. WALDMAN, *supra* note 95, at 77–78.

129. Roth, *supra* note 98.

130. Gitell, *supra* note 9.

Democratic lawmakers. Reportedly, Senator Clinton confronted Feingold, shouting that he was not operating in the “real world.”¹³¹

But the campaign finance reform agenda did provide a chance for Democrats to reassert their working party image, giving them “rhetoric they needed in order to counterbalance the image of wealthy donors being feted at lavish resorts.”¹³² Despite the doomsday predictions, many Democrats supported the bill on principle.¹³³ The Committee for Economic Development, consisting of roughly two hundred business leaders, also supported the bill, which promised to end the shake-down for political contributions.¹³⁴ Finally, in 2002, after a heroic decade-long struggle, BCRA was pushed across the finish line to passage in the wake of the Enron scandal.¹³⁵

The new law prohibited national party committees from raising or spending money outside of federal contribution limits and thus eliminated soft money from federal elections. By removing corporate and labor soft-money dollars from party financing, BCRA reinstated the norms that were in place before parties began exploiting FECA loopholes to chase after soft money.¹³⁶

*A. The Supreme Court Upholds the Soft-Money Ban*¹³⁷

Shortly after its enactment, BCRA faced constitutional challenges in the courts.¹³⁸ Following a statutorily expedited appeal, the United States District Court for the District of Columbia, in *McConnell v. FEC*, considered an “overwhelming” evidentiary record that led it to conclude: “From 1996 until the enactment of BCRA, the parties used nonfederal funds for the exact purpose that the Supreme Court stated those funds cannot be used for: ‘to influence a federal campaign.’”¹³⁹

The Supreme Court found that “candidates and donors alike [had] in fact exploited the soft-money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders, with the

131. Timothy J. Burger, *Hillary, Dem Shout it Out at Capitol*, DAILY NEWS, July 19, 2002, available at http://www.nydailynews.com/archives/news/2002/07/19/2002-07-19_hillary_dem_shout_it_out_at.html.

132. Gitell, *supra* note 9.

133. *Id.*

134. See Motion of the Committee for Economic Development for Leave to File, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (No. 02-582), *aff’d in part, rev’d in part*, 540 U.S. 93 (2003).

135. Gitell, *supra* note 9, at 109; Dominguez & Pearson, *supra* note 114.

136. See FECA GUIDE, *supra* note 75.

137. For this section of the article, I am heavily indebted to Monica Youn of the Brennan Center for Justice and draw extensively on the amicus brief submitted in the pending challenge to BCRA brought by the RNC. *Republican Nat'l Comm. v. FEC*, Civ. No. 08-1953 (D.D.C. filed Nov. 13, 2008).

138. *McConnell v. FEC*, 251 F. Supp. 2d 176, 183 (D.D.C. 2003).

139. *Id.* at 767 n.29 (Leon, J., mem.) (quoting Colo. Republican Fed. Campaign Comm’n v. FEC, 518 U.S. 604, 616 (1996)), *aff’d in part, rev’d in part*, 540 U.S. 93 (2003).

national parties serving as willing intermediaries.”¹⁴⁰ Extensive testimony in the record demonstrated that, for the national parties, anything less than a complete ban on large soft-money contributions would fail to achieve the anti-corruption goals of both the existing campaign finance regime and BCRA.

Former Senator Alan Simpson testified:

Although soft money cannot be given directly to federal candidates, everyone knows that it is fairly easy to push the money through our tortured system to benefit specific candidates. I always knew that both the national and state parties would find ways to assist my candidacy with soft money, whether it be staff assistance, polling, get-out-the-vote activities, or buying television advertisements.¹⁴¹

As the Court noted, Professor Donald Green of Yale University also testified in *McConnell* that soft-money contributions to the political parties carry an inherent risk of corruption because soft-money fund-raising practices feature

the conditions that give rise to corruption. Scholars who study corruption have emphasized three such conditions: (1) large payoffs to those involved, (2) small probabilities of detection and punishment, and (3) enduring relationships between donors and politicians so that informal deals can be monitored and enforced. Unlimited soft-money donations satisfy all of these conditions.¹⁴²

Thus, the Court found that “large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used.”¹⁴³ Consequently, the Court held that the only solution was a complete ban on soft money for the national parties: “The best means of prevention is to identify and to remove the temptation.”¹⁴⁴

The district court had previously noted that large donors were known to both party officials and candidates, remarking that “the record suggests that for a Member not to know the identities of these donors, he or she must actively avoid such knowledge as it is provided by the national political parties and the donors themselves.”¹⁴⁵ This opinion highlighted two examples that

140. *McConnell* v. FEC, 540 U.S. 93, 146 (2003).

141. Declaration of Alan K. Simpson ¶ 7, *McConnell*, 251 F. Supp. 2d 176 (No. 02-582); *see also* DONALD P. GREEN, REPORT OF THE BIPARTISAN CAMPAIGN REFORM ACT 16 (2002) (“Under the pre-BCRA provisions, the parties demonstrated great ingenuity in moving money around so as to minimize the amount of hard money needed to fund federal election activity.”).

142. GREEN, *supra* note 141, at 28 (citing HANDBOOK OF CRIMINOLOGY 1062 (Daniel Glaser ed., 1974)).

143. *McConnell*, 540 U.S. at 155.

144. *Id.* at 153.

145. *McConnell*, 251 F. Supp. 2d at 488 (Kollar-Kotelly, J., mem.) (“Donors or their lobbyists often inform a particular Senator that they have made a large donation.” (quoting Declaration of Senator John McCain, Oct. 4, 2002)). As Professor Green explained: “When donors make soft money donations to parties on behalf of candidates, neither the donors nor the

demonstrated how permitting large soft-money contributions to be made to the national parties puts federal officeholders under a cloud of undue influence.

Senator McCain testified:

[T]here's an appearance [of corruption] when there's a million dollar contribution from Merck and millions of dollars to your last fundraiser that you held, and then there is no progress on a prescription drug program. There's a terrible appearance there. There's a terrible appearance when the Generic Drug Bill, which passes by 78 votes through the Senate, is not allowed to be brought up in the House shortly after a huge fundraiser with multimillion dollar contributions from the pharmaceutical drug companies who are opposed to the legislation.¹⁴⁶

In addition, Senator Feingold stated: “[A] \$200,000 contribution [was] given 2 days after the House marked up a bankruptcy bill by MBNA. OK, it is not illegal. Conceded. Maybe it is not even corrupt, but it certainly has the appearance of corruption to me and I think to many people.”¹⁴⁷

The district court in *McConnell* also cited polling data that demonstrated that the presence of large contributions leads ordinary citizens to believe that their elected representatives may give short shrift to their constituents’ interests in favor of large-donor interests.¹⁴⁸

parties have any incentive to hide this fact from the candidates” GREEN, *supra* note 141, at 28.

146. *McConnell*, 251 F. Supp. 2d at 515 (Kollar-Kotelly, J., mem.).

147. *Id.* at 684 (citation omitted) (quoting 145 CONG. REC. S12,593 (daily ed. Oct. 14, 1999) (statement of Sen. Feingold)); *see also* Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 390 (2000) (“Democracy works ‘only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.’” (quoting United States v. Miss. Valley Generating Co., 364 U.S. 520, 562 (1961))); Report of Thomas E. Mann, Sept. 20, 2002, at 32 (“[S]ince most of the largest soft-money donors had high stakes in decisions made by Washington policymakers, the public has a substantial basis for its concerns about conflicts of interest and corruption of the policy process.”).

148. *McConnell*, 251 F. Supp. 2d at 683 (Kollar-Kotelly, J., mem.). Mellman and Wirthlin’s survey found that seventy-one percent of those polled believe that members of Congress make decisions based on what the big contributors to their party want, even if it is not what their constituents want or what the member thinks is in the best interests of the country. *Id.* An even greater percentage, eighty-four percent, believe that members are more likely to listen to large party contributors because of their contributions, and sixty-eight percent think that big contributors to political parties have blocked decisions by the federal government that could improve people’s everyday lives. *Id.* The poll also reflects that the public perceives that their views are given less attention than those of large contributors. Eighty-one percent of those polled believe that the views of those corporations, unions, interest groups or individuals who donate \$50,000 or more to a political party would likely receive special consideration from members of Congress, while only twenty-four percent believe a member is “likely to give the opinion from someone like them special consideration.” *Id.* (citations omitted). Additionally, a Zogby poll of 301 business executives found that seventy-three percent agreed “that BCRA’s prohibition on soft money was good for both them personally and for the country.” Megan King, *Business Likes*

B. BCRA and the Small Donors: The Numbers in the 2004 and 2006 Elections

After the victory for reform in *McConnell*, some lamented the decision as the death knell for citizen participation. In a 2004 piece, Professor Raymond La Raja suggested, in dramatic terms, that:

[T]he Court justified a thick web of campaign finance regulations that will exacerbate some of the worst features of the American political system. These laws do nothing less than fragment the nation's politics and raise the bar for citizen participation by weakening political parties and empowering a campaign finance elite.¹⁴⁹

No prediction could have been further off the mark. After BCRA, party fund-raising shifted unequivocally toward smaller donors.¹⁵⁰ All of the national committees stepped up their hard-money fund-raising,¹⁵¹ “investing more resources in direct mail, telemarketing, and Internet fundraising,” and targeting individual—and generally small—donors.¹⁵² By May 2004, the Democrats had replaced almost all of their pre-BCRA soft money with new infusions of hard money, primarily from the contributions of small donors.¹⁵³

As Figure B demonstrates, party organizations made up for nearly all of the lost soft-money contributions with hard-money donations.¹⁵⁴

Soft-Money Ban, But Wants More, ROLL CALL, Apr. 6, 2005; *see also* David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy*, 5 ELECTION L.J. 23, 33 (2006) (arguing that limits on campaign contributions by organizations have a statistically significant positive effect on public opinion, as does public disclosure of campaign contributions).

149. Raymond J. La Raja, *Breaking Up the Party: How McConnell Downsizes Party Campaigns*, 3 ELECTION L.J., 271, 271 (2004).

150. *See* MICHAEL J. MALBIN & SEAN A. CAIN, CAMPAIGN FINANCE INSTITUTE, THE UPS AND DOWNS OF SMALL AND LARGE DONORS: AN ANALYSIS OF PRE- AND POST-BCRA CONTRIBUTIONS TO FEDERAL CANDIDATES AND PARTIES, 1999-2000, at 4 (2007) (describing BCRA’s effect on small donor contributions).

151. Anthony Corrado, *National Party Fundraising Remains Strong, Despite Ban on Soft Money*, THE BROOKINGS INST., May 19, 2004, http://www.brookings.edu/papers/2004/0519campaignfinancereform_corrado.aspx?p=1.

152. *Id.*

153. *Id.*

154. David B. Magleby & Kelly D. Patterson, *War Games: Issues and Resources in the Battle for Control of Congress*, in *WAR GAMES: ISSUES AND RESOURCES IN THE BATTLE FOR CONTROL OF CONGRESS* 1, 43 (David B. Magleby & Kelly D. Patterson eds., 2007), *available at* <http://csed.byu.edu/Assets/Pew/2006%20Monograph.pdf>.

Total Contributions by Party, 1994–2006¹⁵⁵

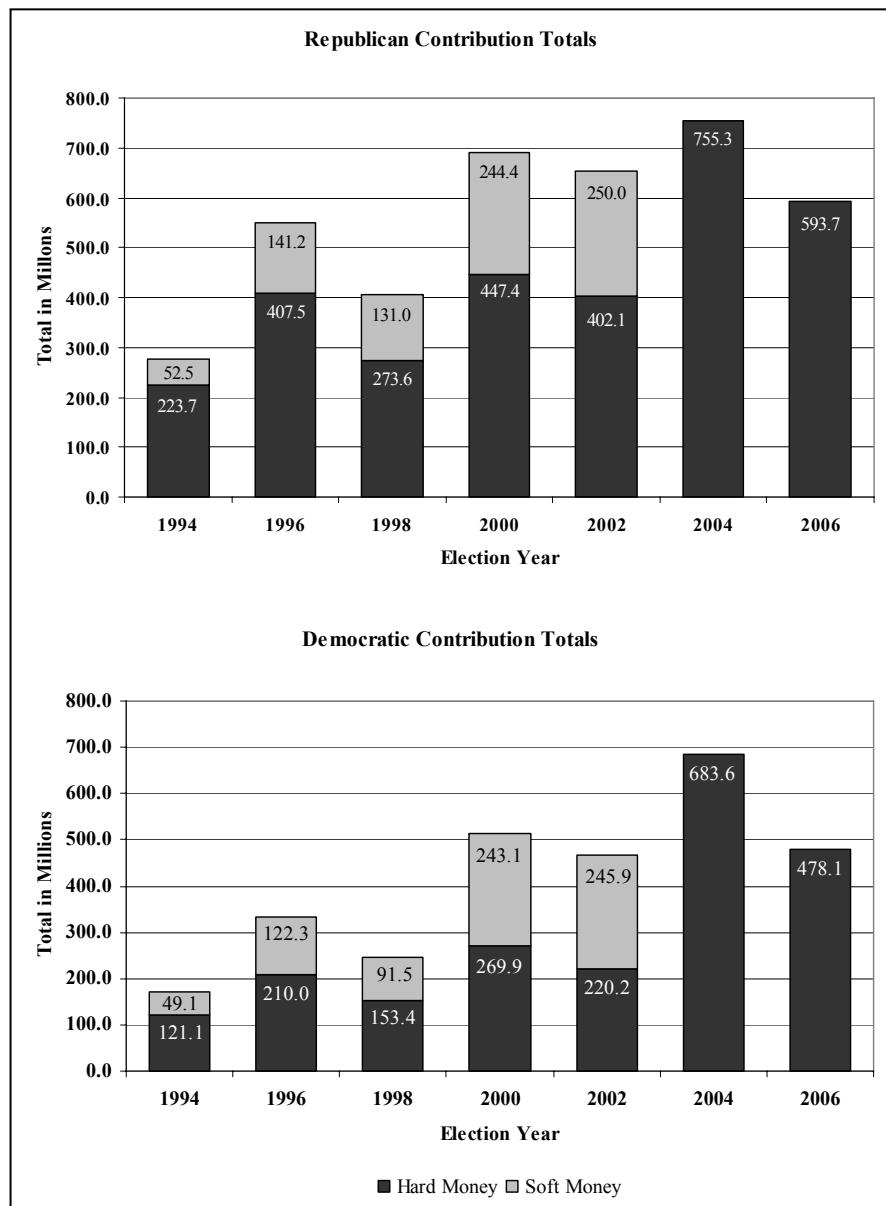


Fig. B

155. *Id.* at 43 tbl.1-1. Please note that these figures have been rounded.

Hard Money Contributions by Committee, 1994–2006¹⁵⁶

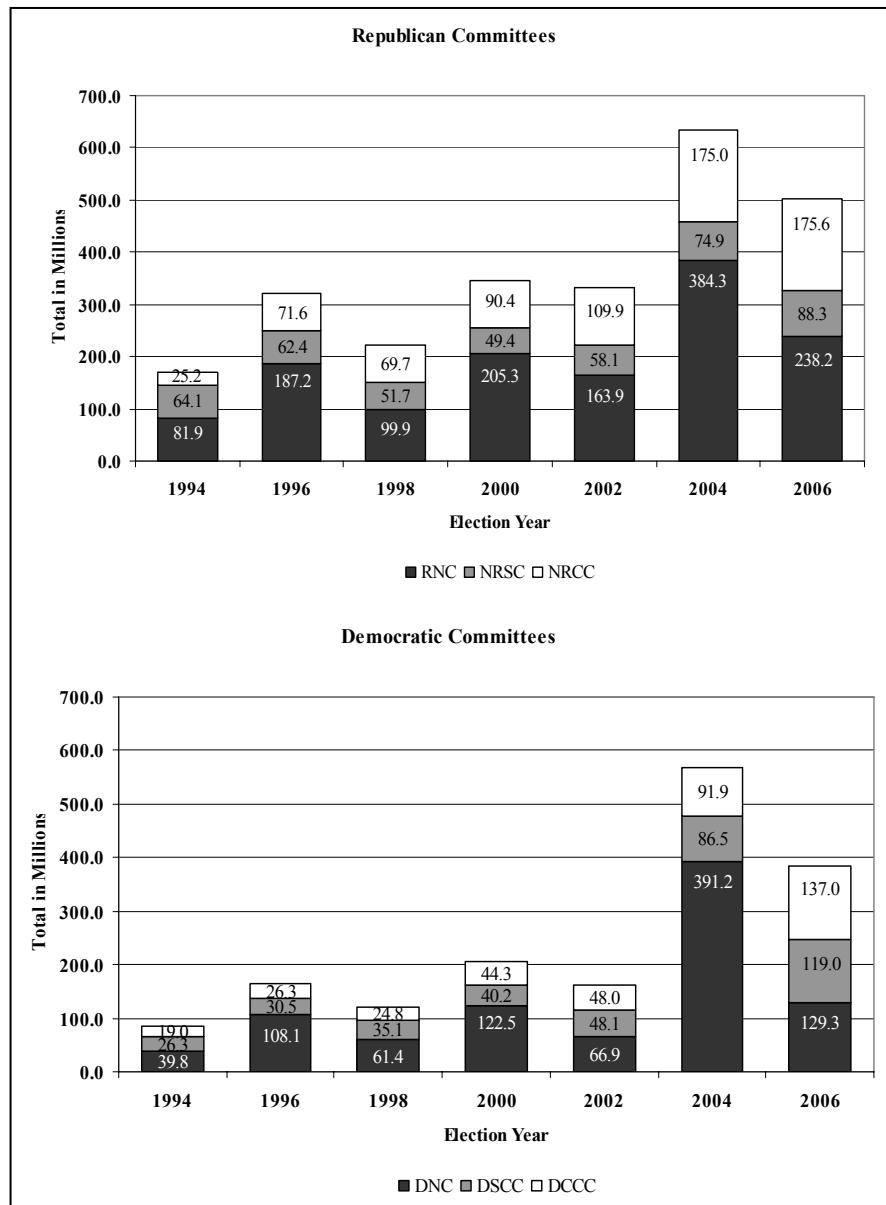


Fig. C

156. *Id.* Please note that these figures have been rounded.

Much of the increase in hard-money donations came from contributions channeled through the national party committees. As Magleby and Patterson's data show, "[t]he four *congressional* campaign committees set new records in 2005–2006 in hard money fund-raising, and in the case of the DSCC, DCCC, and NRSC there were significant increases over 2004 . . ."¹⁵⁷ In addition, "[b]y 2007, the DSCC and DCCC raised more money from individuals than their equivalent [Republican] committees," which was a "remarkable turnaround."¹⁵⁸

Notably, "[t]he NRCC was the only congressional campaign committee that raised less from individuals in 2006 (\$109 million) than in 2004 (\$135 million)."¹⁵⁹ Magleby and Patterson ascribe at least some of the marked increase in hard money raised by Democrats to their large-scale deployment of data for fund-raising and mobilization. "The fund-raising dataset was called 'Demzilla' and the voter file was called 'Data Mart.'"¹⁶⁰

In 2004, Thomas Mann and Norman Ornstein reported that:

[T]he Democratic Party has created a sophisticated set of programs to expand its small donor base, and built a centralized voter-contact and fund-raising system (called "Demzilla") to expand the donor base among those able to give the maximum. In the process, the DNC increased its direct mail donors from 400,000 to more than 1 million, and raised almost \$32 million in small donations, an eighty-five percent increase over the comparable year 1999. Chairman Terry McAuliffe, the architect of this plan, noted, "The fundamental structure of our fund-raising apparatus has changed. The average direct mail donation is only \$37."¹⁶¹

Moreover, Anthony Corrado and Katie Varney reported that the parties "spent more money in 2006 directly supporting congressional candidates than they had in any previous election—devoting more than one out of every four dollars they received to these efforts."¹⁶² The substitution of individual contributions for soft money was almost one-to-one: "While unlimited soft money donations were the primary source of party money in 2002, small contributions from individuals were the principal source of receipts in 2006. In 2002, about one of every two dollars received by the national party committees came from soft money donations."¹⁶³ Corrado and Varney further observed:

157. *Id.* at 19 (emphasis added).

158. Magleby, *supra* note 15, at 9.

159. Magleby & Patterson, *supra* note 154, at 20.

160. *Id.* at 33.

161. Thomas E. Mann & Norman J. Ornstein, *Separating Myth from Reality in McConnell v. FEC*, 3 ELECTION L.J. 291, 295 (2004).

162. ANTHONY CORRADO & KATIE VARNEY, PARTY MONEY IN THE 2006 ELECTIONS: THE ROLE OF NATIONAL PARTY COMMITTEES IN FINANCING CONGRESSIONAL CAMPAIGNS 1 (2007).

163. *Id.*

“Overall, \$309 million of the \$903 million raised by the two parties came from unitemized individual contributions of \$200 or less.”¹⁶⁴

It is important to note that the disappearance of soft money did not, as had been predicted, starve the parties.¹⁶⁵ The data from the 2004–08 cycles belie the fatalistic pre-BCRA expectation that the law would cut off the flow of adequate contributions to political organizations and campaigns.¹⁶⁶ In particular, suggestions that BCRA would “emasculate[] the parties” were shown to be groundless.¹⁶⁷ As David Magleby noted: parties are “rolling in the dough,” due primarily to the influx of individual contributions.¹⁶⁸

The Democrats’ redoubled effort to appeal to individual contributors was aided, at least in part, by enhanced fluency with Internet-based coordination of campaigning and fund-raising efforts.¹⁶⁹ Concurrently, smaller donors rose in prominence: the proportion of national party committees’ contributions that were “small” jumped from just twenty-four percent before the election cycle in 2004, to almost double that amount—forty-six percent—after BCRA went into force, as evidenced by the numbers from the 2004 and 2006 congressional races between Representatives Mike Sodrel and Baron Hill.¹⁷⁰

Moreover, two detailed investigations of outside spending in the 2004 election cycle found that the increase in expenditures by so-called 527 organizations and other groups, while substantial, did not replace lost soft-money receipts.¹⁷¹ Stephen Weissman and Ruth Hassan concluded that the increase in federally active 527 committees was less than half of the political party soft-money spending and that 527 donors were not, in the main, soft-money donors.¹⁷² Another study found that the shift to ground war tactics by outside interest groups—in particular, publicly traded large corporations and

164. *Id.* at 7.

165. See Magleby, *supra* note 15, at 1–2; Press Release, Fed. Election Comm’n, Party Financial Activity Summarized for the 2006 Election Cycle (Mar. 7, 2007), available at <http://www.fec.gov/press/press2007/partyfinal2006/20070307party.shtml> (last visited Aug. 20, 2009).

166. Anthony Corrado & Thomas Mann, *Despite Predictions, BCRA has Not Been a Democratic ‘Suicide Bill’*, ROLL CALL, July 26, 2004, available at http://www.rollcall.com/issues/50_12/guest/6363-1.html.

167. *Id.*; see also Sidney M. Milkis, *Parties Versus Interest Groups*, in INSIDE THE CAMPAIGN FINANCE BATTLE 40, 40 (Anthony Corrado et al. eds., 2003) (anticipating that BCRA would wither political parties’ finances); Gitell, *supra* note 9.

168. Magleby, *supra* note 15, at 8–9 (tracking amounts and proportions of individual contributions to national party committees across election cycles); see also Anthony Corrado, *Party Finance in the Wake of BCRA*, in THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 25 (Michael J. Malbin ed., 2006) (noting that the sum of individual contributions to party organizations in 2004 was more than the sum of hard- and soft-money contributions in the 2000 election cycle).

169. Magleby & Patterson, *supra* note 154, at 20.

170. *Id.* at 43.

171. See Stephen Weissman & Ruth Hassan, *BCRA and the 527 Groups*, in THE ELECTION AFTER REFORM 79, 79–80 (Michael J. Malbin ed., 2006).

172. *See id.*

their employees—began just before BCRA and that the soft-money ban did not shift these donors to 527s and other such groups.¹⁷³

Indeed, exempting grassroots organizing activity from the scope of BCRA's regulations only accelerated the turn toward the grassroots by left-leaning outside groups:

But even though the [liberal] groups had chosen their paths before BCRA, BCRA certainly fueled the intensity of their efforts. The absence of party soft money, combined with their intense animus against George W. Bush, gave the groups a powerful reason to work together toward what they saw as a common goal. Hence the groups were willing to focus on a coordinated attempt to boost turnout, rather than spend their energies trying to make their own issues and voices heard over the din.¹⁷⁴

C. BCRA and the Return to Organizing: The Story behind the Numbers in 2004 and 2006

While BCRA provided a major shift in incentives, use of the Internet as a tool for soliciting and making donations also explains, in part, the burgeoning participation of new, smaller donors, especially among younger people.¹⁷⁵ In the 2004 election cycle, the number of unsolicited contributions to presidential campaigns appears to have increased as a result of the Internet.¹⁷⁶ Solicitation, however, remains the principal method of fund-raising.¹⁷⁷ After soft money was banned, the Democratic Party worked particularly hard to encourage participation and solicit donations.

After courting large donors and chasing soft money throughout the 1990s, the Democratic Party entered the BCRA era at a significant disadvantage.¹⁷⁸ However, in the years after BCRA went into effect, then-DNC Chairman Terry McAuliffe began to mimic Republican fund-raising tactics and to develop the DNC's hard-money fund-raising infrastructure.¹⁷⁹ In an effort to catch up with the Republican Party's historic direct-mail advantage, the DNC focused on building and improving its donor database.¹⁸⁰ According to McAuliffe, in a period of two years the DNC built a sophisticated voter file and increased the

173. Robert G. Boatright et al., *Interest Groups and Advocacy Organizations After BCRA*, in THE ELECTION AFTER REFORM 112, 113–14, 132 (Michael J. Malbin ed., 2006).

174. *Id.* at 132.

175. See INSTITUTE FOR POLITICS, DEMOCRACY & THE INTERNET, SMALL DONORS AND ONLINE GIVING: A STUDY OF DONORS TO THE 2004 PRESIDENTIAL CAMPAIGNS 43 (2006) [hereinafter 2004 CAMPAIGN DONOR STUDY], available at <http://www.ipdi.org/UploadedFiles/Small%20Donors%20Report.pdf>.

176. *Id.* at 18.

177. *Id.*

178. Gitell, *supra* note 9.

179. *Id.*

180. See *id.* at 113.

number of its direct-mail donors from 400,000 to almost 700,000.¹⁸¹ In the first four months of 2004, “the DNC mailed 35 million fund-raising letters, more than it sent out during the 1990s.”¹⁸²

Over the same period, a few candidate campaigns were climbing up the learning curve, pursuing new techniques for outreach to voters. In 2000, the Bush campaign used microtargeting techniques to locate supporters and market both the candidate and party to them.¹⁸³ And as David Magleby explained:

The John McCain campaign in 1999 and 2000 made some early use of the Internet as a mode of raising money, pulling in a modest but pioneering \$5 million to \$6 million online. In 2003, having seen the impact the Internet was having for interest groups like MoveOn.Org and others, the Howard Dean campaign made online donations a primary source of funds. About half of Dean’s \$51 million raised came over the Internet, with over one million unique donors Dean’s campaign manager, Joe Trippi, characterized Internet fund-raising as “the opening salvo in a revolution.”¹⁸⁴

This revolution was not televised—it occurred online. Trenchant partisan blogger Markos Moulitsas, founder of the political blog *DailyKos*, directly credited BCRA with the renewed focus on individual fund-raising that in turn supported the burgeoning power of the so-called “Netroots” within the Democratic party:

[L]et’s take a quick look at how this balance of power within the Democratic Party began to shift—and why. For us, the spark is clear—it was the McCain-Feingold campaign finance reform law (CFR). . . .

For party leaders and operatives, having the “soft money” pipeline turned off was terrifying Rather than build the party, these large donations [had] decimated the Democratic Party’s donor base.¹⁸⁵

As Moulitsas recounts, when Vermont Governor Howard Dean’s candidacy in the presidential primary became well-known, the centrist Democratic Leadership Council circulated a memorandum that is still posted on its website. The memo argued that the pro-Dean forces were misguided and out-of-touch—a disagreement on tactics that is unremarkable in itself. Yet the terms in which the memo described party “activists” were notable for their

181. *Id.*

182. Paul Farhi, *Small Donors Grow into Big Political Force: Both Parties See Number of Contributions Soaring*, WASH. POST, May 3, 2004, at A1.

183. Adam Nagourney, *The '08 Campaign: Sea Change for Politics As We Know It*, N.Y. TIMES, Nov. 4, 2008, at A1.

184. Magleby, *supra* note 15, at 5 (citations omitted).

185. ARMSTRONG & MOULITSAS, *supra* note 1, at 134; see also Joshua Green, *The Amazing Money Machine*, ATLANTIC MONTHLY, June 2008, available at <http://www.theatlantic.com/doc/200806/obama-finance> (recognizing role of McCain-Feingold in small donor and networking push).

acute disdain: “[T]he great myth of the current cycle is the misguided notion that the hopes and dreams of activists represent the heart and soul of the Democratic Party. Real Democrats are real people, not activist elites.”¹⁸⁶

In February 2005, shortly after BCRA went into effect, Dean was appointed Chairman of the DNC.¹⁸⁷ Moultsas claimed that Dean’s appointment was due in large measure to the organizing efforts of the Netroots.¹⁸⁸ Vowing to rewrite the rules of Democratic campaigning, and with an eye to the 2008 presidential election cycle, Dean unveiled a new “50-state strategy” for party organizing, which focused on training local organizers in every state to recruit and train neighborhood volunteers and organize grassroots events.¹⁸⁹

Dean’s efforts actually pushed along a new DNC agenda that had first begun in March 2004.¹⁹⁰ By May 2004, it was reported that the DNC had hired and trained more than “176 field organizers, communication directors and researchers and placed them in state parties to build election teams, launch coordinated campaigns,” and promote the Democratic message.¹⁹¹ The DNC also invested more than \$8 million to modernize the party’s voter file¹⁹² and began a “neighbor to neighbor” program that assigned potential supporters to volunteer as canvassers for their own neighborhood and used the Internet to coordinate a huge voter database for get-out-the-vote calls and other persuasion purposes.¹⁹³

Magleby and Patterson documented evidence of those efforts in 2004—the election cycle immediately after BCRA’s advent. Their findings about stepped-up “ground war” activity (that is, investments of time and money by campaigns in canvassing, direct mail, and phone and Internet contact) suggest two things: first, parties had begun to shift their focus to smaller donors even before BCRA’s passage in 2002; and second, BCRA’s ban on soft-money contributions almost certainly accelerated that shift.¹⁹⁴ As the authors noted,

186. Al From & Bruce Reed, *The Real Soul of the Democratic Party*, DEMOCRATIC LEADERSHIP COUNCIL, May 15, 2003, http://www.ndol.org/ndol_ci.cfm?contentid=251690&kaid=1.

187. See Sam Stein, *DNC Memo: This is the 50-State Strategy Realized*, HUFFINGTON POST, Nov. 6, 2008, http://huffingtonpost.com/2008/11/06/dnc-memo-we-deserve-some_n_141878.html (last visited Aug. 17, 2009); see also Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

188. ARMSTRONG & MOULITSAS, *supra* note 1, at 137–38.

189. See DEMOCRATIC NAT’L COMM., THE 50-STATE STRATEGY, http://www.democrats.org/a/2006/09/50-state_strate_17.php (last visited Aug. 20, 2009); Sam Stein, *Obama and Dean Team Up to Recast the Political Map*, HUFFINGTON POST, June 5, 2008, http://www.huffingtonpost.com/2008/06/05/obama-and-dean-team-up-to_n_105419.html.

190. Stein, *supra* note 189.

191. DEMOCRATIC NAT’L COMM., *supra* note 189.

192. Stein, *supra* note 187.

193. See David Paul Kuhn, *DNC Blunts GOP Microtargeting Lead*, POLITICO, May 24, 2008, available at <http://www.politico.com/news/stories/0508/10573.html>.

194. See David B. Magleby & Kelly D. Patterson, *Stepping out of the Shadows? Ground War Activity in 2004*, in THE ELECTION AFTER REFORM 161, 171 (Michael J. Malbin ed., 2006).

BCRA specifically “created incentives for the shift to ground-war activity by not including these activities in the definition of electioneering communications.”¹⁹⁵

Magleby and Patterson further noted that unions made the first breakthrough efforts to reestablish personal contact with voters through political advertising barrages and that their tactics were quickly adopted by national Republican campaign organizations.¹⁹⁶ Most importantly, however, what seems to have started out as an assortment of uncoordinated tactics was integrated into a coherent and extremely potent strategy implemented by the national parties in 2006 and 2008¹⁹⁷ and eventually by the Obama campaign.

Of course, the availability of new fund-raising tools through the Internet further accelerated this greater emphasis on outreach to small donors. Law professor Richard Hasen noted in early 2008 that “[b]ig money is beginning to matter less, rather than more, thanks in large part to the enhanced role of the Internet.”¹⁹⁸ In addition, the Campaign Finance Institute (CFI) found in a 2007 study that “[l]arge contributions to the parties (\$20,000+) went down by more than 50% in the elections post-BCRA.”¹⁹⁹

New and returning donors also played a larger role in political fund-raising.²⁰⁰ A 2006 study published by the Institute for Politics, Democracy and the Internet indicated that the number of new donors contributing to the 2004 presidential campaigns was no greater than in previous races.²⁰¹ However, the overall pool of donors to the presidential campaigns tripled from 2000 to 2004.²⁰²

As Joshua Green in *The Atlantic Monthly* described:

Two big changes had just come about when Kerry got going in 2003. The McCain-Feingold campaign-finance law had taken effect for the first time in a presidential campaign, limiting the large “soft money” donations to political parties that Democrats in particular relied on; for years, they had solicited large donations from corporations and the rich to build the party. Now the only way to raise money was to attract small donors, a task Democrats had never done well. . . . The

195. *Id.* at 164.

196. *Id.*

197. See Magleby, *supra* note 15, at 8–11.

198. Richard L. Hasen, *Political Equality, the Internet, and Campaign Finance Regulation*, FORUM, Vol. 6, Issue 1, Art. 7 at 1 (2008), available at <http://www.bepress.com/forum/vol6/iss1/art7/>; see also Clyde Wilcox, *Internet Fund-raising in 2008: A New Model?*, FORUM, Vol. 6, Issue 1, Art. 6, at 1 (2008), available at <http://www.bepress.com/forum/vol6/iss1/art6/> (“[I]t is possible that internet fundraising will have a more profound impact on who contributes, and how they become involved in politics.”).

199. MALBIN & CAIN, *supra* note 150, at 8.

200. 2004 CAMPAIGN DONOR STUDY, *supra* note 175, at 41–43.

201. *Id.* at 1.

202. *Id.* at 43.

other important change was the Iraq War, which had energized the Democratic Party.²⁰³

The most dramatic growth came from small donors; there were more first-time donors to Democratic candidates than to Republicans.²⁰⁴ By 2007, CFI reported that, after BCRA, national parties were relying more on small donors than large.²⁰⁵ According to David Magleby, the pattern extended to congressional party committees as well:

The sources of the surge in individual contributions for the DSCC and DCCC include small donors. . . . Some of the growth in small donors on the Democratic side has come from people contributing through the Internet, and part of the explanation for these donors likely is the war in Iraq. But for Internet donors the compliance costs are relatively low as are the fund-raising costs. This may be evidence of a growing contrast in fund-raising style between the NRSC and the Democratic committees, which are more attuned to Internet fundraising.²⁰⁶

The Democrats made major gains in the 2006 elections. Still, as Dean campaign director Joe Trippi later remarked in comparing the 2008 Obama effort to the 2004 Dean campaign, “They were Apollo 11, and we were the Wright Brothers.”²⁰⁷

IV. A NEW KIND OF CAMPAIGN: ELECTION CYCLE 2008

In the 2008 presidential race, small donors affected politics to an unprecedented degree, particularly with their support for Democratic presidential candidate Barack Obama.²⁰⁸ While every campaign had a website enabled to accept donations and fully loaded with candidate video and schedules of campaign events, not every campaign made use of its website and Internet-based tools in the same way. Much of the Obama strategy was informed by a move to capitalize on the lessons learned by watching the parties’ prior organizing efforts, as well as Obama’s own desire to coordinate his messages and outreach—a desire that could only be realized through a powerful outreach-centered organization. As Magleby writes, “[t]he Obama Online Operation, or ‘Triple O,’ numbered about 30 staff employees and had strong support from the candidate and senior campaign staff.”²⁰⁹

203. Green, *supra* note 141.

204. 2004 CAMPAIGN DONOR STUDY, *supra* note 175, at 5, 39.

205. MALBIN & CAIN, *supra* note 150, at 4.

206. Magleby & Patterson, *supra* note 194, at 20.

207. Nagourney, *supra* note 183.

208. Press Release, Campaign Finance Inst., Obama’s Small Contributions Surged in June, but McCain’s Party-Based Strategy Gave the GOP Side a Combined Cash Advantage on June 30 (July 22, 2008), available at <http://www.cfinst.org/pr/prrelease.aspx?releaseid=201>.

209. THE CHANGE ELECTION, *supra* note 12, at 19 (citations omitted).

Hillary Clinton appeared to expect that securing existing networks of big donors early in the campaign would be sufficient to win the Democratic presidential nomination, but Obama knew that he could only win by expanding the field.²¹⁰ While Clinton fundraisers tapped out major donors early, the Obama team could return to the same small donors for additional funds over and over again.²¹¹ The result of Obama's approach was remarkable:

[Three] million donors made a total of 6.5 million donations online adding up to more than \$500 million. Of those 6.5 million donations, 6 million were in increments of \$100 or less. The average online donation was \$80, and the average Obama donor gave more than once.²¹²

Although the Internet enabled more ambitious outreach and coordination efforts, candidates who both failed to take note of the necessary shift in campaign strategy brought about by BCRA and failed to reach out to individual donors—notably Hillary Clinton²¹³ and former Massachusetts Governor Mitt Romney²¹⁴—were left behind in the primary money race.

The influx of smaller donations affected the flow and competitiveness of the primary season. Hasen observed that “[s]mall donors . . . boosted the campaigns of long-odds candidates, such as Dennis Kucinich . . . and Ron Paul . . . , allowing them to get their message out and participate credibly at the beginning of the nomination process.”²¹⁵ Texas Republican Representative Ron Paul, in particular, was fueled by Internet enthusiasm and maintained real-time donation data on his campaign website to stimulate donations and to monitor several infusions of planned grassroots “money bombs.”²¹⁶

The Obama campaign was also a major beneficiary of these changes. While the impact of BCRA arguably was just one reason for the adaptations made by Obama's campaign, it was recognized as a major catalyst. A campaign reporter for *The Atlantic Monthly* noted in a June 2008 analysis:

210. See generally Roger Simon, *Relentless: How Barack Obama Outsmarted Hillary Clinton*, POLITICO, Aug. 25, 2008, available at <http://www.politico.com/relentless/>.

211. Magleby, *supra* note 15, at 7.

212. Jose Antonio Vargas, *Obama Raised Half a Billion Online*, CLICKOCRACY, http://voices.washingtonpost.com/44/2008/11/20/obama_raised_half_a_billion_on.html.

213. Center for Responsive Politics, *Summary Data for Hillary Clinton*, <http://www.opensecrets.org/pres08/summary.php?id=N00000019> (“She started 2007 as the candidate to beat in the money race, [raising \$229.4 million through the end of May,] but Obama surpassed her early in 2008. Clinton left the race with \$22.5 million in debt, at least \$11.4 million of which came from her own pocket.”).

214. Center for Responsive Politics, *Summary Data for Mitt Romney*, <http://www.opensecrets.org/pres08/summary.php?id=n00000286> (noting that Romney's fund-raising dropped off after February 2007, which suggests that his use of personal wealth to outspend opponents did not translate into a persuasive campaign).

215. Hasen, *supra* note 198.

216. Micah L. Sifry, *Getting the Download from Joe Trippi*, TECHPRESIDENT, Mar. 30, 2008, www.techpresident.com.

Obama is a gifted politician by anyone's measure, but what distinguishes him from earlier insurgents is his ability to fully harness the excitement that his candidacy has created, in votes and dollars. Three forces had to come together for this to happen: the effect of the campaign-finance laws in broadening the number and types of people who fund the political process; the emergence of Northern California as one of the biggest sources of Democratic money; and the recognition by a few Silicon Valley entrepreneurs and venture capitalists that the technology and business practices they had developed in their day jobs could have a transformative effect on national politics.²¹⁷

An analysis by CFI published in April 2009 reported the significance of small contributions in deciding the race in the primaries. The total of Obama's primary-season contributions in amounts of \$200 or less was \$217 million—more than what Clinton and McCain gathered from all contributions combined.²¹⁸ Further, “[a]lmost three-quarters of the financial advantage Obama ultimately held over Clinton [could] be explained by his advantage in small contributions.”²¹⁹

Individual Donors to Presidential Candidates, 2004 & 2008²²⁰

Candidate	Total Individual Donors	Total Amount of Itemized Contributions	Net Individual Contributions	Percent of Individual Contributions from:		
				Donors Amounting to \$200 or less	Donors Amounting to \$201–999	Donors Amounting to \$1000 or more
2008 Democratic						
Obama	403,341	\$301,118,063	\$452,852,990	26%	27%	47%
Clinton	170,777	\$167,048,346	\$210,901,574	16%	21%	63%
Edwards	33,135	\$31,060,174	\$38,638,348	15%	22%	63%
2008 Republican						
McCain	169,783	\$154,806,518	\$206,363,245	21%	20%	59%
Romney	44,795	\$52,972,073	\$63,065,340	14%	13%	73%
Giuliani	39,489	\$51,211,030	\$61,022,495	15%	9%	76%
Paul	32,234	\$18,372,743	\$34,336,193	39%	29%	32%
Thompson	17,058	\$13,905,983	\$23,369,742	38%	18%	44%
Huckabee	13,728	\$10,449,883	\$15,991,901	29%	24%	47%
2004 Democratic						
Kerry	209,894	\$164,134,439	\$215,915,455	20%	24%	56%
Dean	57,448	\$27,947,961	\$51,360,995	38%	30%	28%
Edwards	18,589	\$20,173,933	\$21,880,659	7%	14%	78%
2004 Republican						
Bush	190,640	\$183,235,226	\$256,081,557	25%	13%	60%

Fig. D

217. Green, *supra* note 141.

218. MICHAEL J. MALBIN, CAMPAIGN FINANCE INST., SMALL DONORS, LARGE DONORS AND THE INTERNET: THE CASE FOR PUBLIC FINANCING AFTER OBAMA 11 (2009).

219. *Id.*

220. *Id.* at 16 tbl.3.

Notably, the percentage of Obama's \$200 or less donors—twenty-six percent—is approximately the same as that of George W. Bush in 2004—twenty-five percent. However, Obama received 300 million itemized contributions, nearly double Bush's 180 million.²²¹ In comparison, Clinton received 167 million itemized contributions and McCain received 154 million, making Obama's numbers a blowout.²²² Moreover, a large percentage of Obama's donors—twenty-seven percent—gave between \$201 and \$999, which, when compared to Bush's thirteen percent in 2004, was again nearly double.²²³ The Obama campaign's small-donor numbers are also remarkable due to the sheer scale of the response his campaign received, judged both by the absolute numbers and by the multitude of donors those numbers represent. Twenty-six percent of \$452 million was an astonishing \$117 million—or nearly double Bush's 2004 total of \$64 million from \$200-or-below donors.²²⁴

Overall, in the 2007–08 election cycle, a large number of individuals gave unitemized contributions—that is, contributions that aggregate to no more than \$200 per individual donor over the course of the election cycle. Out of the \$1.3 billion contributed by individuals to presidential candidates in the 2008 election cycle, \$540 million, or forty percent, came in the form of unitemized contributions of \$200 or less.²²⁵

The percentages of small contributions were high for the national parties as well. Approximately sixty percent of the money contributed to the DNC by individuals came from individuals giving \$200 or less.²²⁶ The RNC, on the other hand, raised approximately fifty-four percent of its contributions from individuals giving \$200 or less.²²⁷

Notably, the four congressional campaign committees raised significantly fewer small individual contributions, on a percentage basis, as follows: Democratic Senatorial Campaign Committee at twenty-three percent;

221. *Id.*

222. *Id.*

223. *Id.*

224. *See id.*

225. *See* Fed. Election Comm'n, Presidential Campaign Finance: Contributions to All Candidates by State, <http://www.fec.gov/DisclosureSearch/mapApp.do> (last visited Aug. 20, 2009).

226. *See* Fed. Election Comm'n, FEC Form 3X: Report of Receipts and Disbursements (filed Jan. 31, 2009), <http://query.nictusa.com/cgi-bin/dcdev/forms/C00010603/401047/> (last visited Aug. 20, 2009); Fed. Election Comm'n, FEC Form 3X: Report of Receipts and Disbursements (filed Apr. 3, 2008), <http://images.nictusa.com/pdf/001/28931030001/28931030001.pdf#navpanes=0> (last visited Aug. 20, 2009).

227. *See* Fed. Election Comm'n, FEC Form 3X: Report of Receipts and Disbursements (filed Apr. 6, 2009), <http://query.nictusa.com/cgi-bin/dcdev/forms/C00003418/411034/> (last visited Aug. 20, 2009); Fed. Election Comm'n, FEC Form 3X: Report of Receipts and Disbursements for Republican National Committee (filed Feb. 2, 2008), <http://images.nictusa.com/pdf/001/28990440001.pdf#navpanes=0> (last visited Aug. 20, 2009).

Democratic Congressional Campaign Committee at thirty-four percent; National Republican Senatorial Committee at forty-one percent; and National Republican Congressional Committee at forty-three percent.²²⁸ Of course, the focus on the presidential race likely affected Congressional committee fund-raising in 2008.

As was true for the analysis of the cost of small donors to Coelho and the DNC, or for Robert Strauss and the McGovern lists, direct mail and traditional fund-raisers typically must spend millions to make millions—yet the Obama campaign reports that some of its highest fund-raising totals occurred during the Republican convention, without any fund-raising efforts at all.²²⁹ Of course, the clear advantage of a well-executed Internet fund-raising and outreach operation is that it dramatically lowers the cost of communications and collection of contributions.

In its sheer reach and scope, the presidential campaign also essentially redrew the electoral map. As Adam Nagourney of the *New York Times* concluded on November 4, 2008:

[The Obama campaign] has rewritten the rules on how to reach voters, raise money, organize supporters, manage the news media, track and mold public opinion and wage and withstand political attacks, including many carried by blogs that did not exist four years ago. It has challenged the consensus view of the American electoral battleground, suggesting that Democrats can at a minimum be competitive in states and regions that had long been Republican strongholds.²³⁰

228. See Fed. Election Comm'n, FEC Form 3X: Report of Receipts and Disbursements (filed May 13, 2009), <http://images.nictusa.com/pdf/677/29933747677/29933747677.pdf#navpanes=0> (last visited Aug. 20, 2009); Fed. Election Comm'n, FEC Form 3X: Report of Receipts and Disbursements (filed Feb. 17, 2009), http://images.nictusa.com/cgi-bin/fecimg/?_29020104312+0 (last visited Aug. 20, 2009); Fed. Election Comm'n, FEC Form 3X: Report of Receipts and Disbursements (filed Jan. 30, 2009), <http://query.nictusa.com/cgi-bin/dcdev/forms/C00075820/399911/> (last visited Aug. 20, 2009); Fed. Election Comm'n, FEC Form 3X: Report of Receipts and Disbursements (filed May 16, 2008), <http://images.nictusa.com/pdf/402/28020240402/28020240402.pdf#navpanes=0> (last visited Aug. 20, 2009); Fed. Election Comm'n, FEC Form 3X: Report of Receipts and Disbursements (filed Jan. 31, 2008) <http://images.nictusa.com/pdf/952/28020021952/28020021952.pdf#navpanes=0> (last visited Aug. 20, 2009); Fed. Election Comm'n, FEC Form 3X: Report of Receipts and Disbursements (filed Jan. 31, 2008), <http://images.nictusa.com/pdf/618/28930311618/28930311618.pdf#navpanes=0> (last visited Aug. 20, 2009); Fed. Election Comm'n, FEC Form 3X: Report of Receipts and Disbursements (filed Jan. 31, 2008), <http://query.nictusa.com/cgi-bin/dcdev/forms/C00000935/320116/> (last visited Aug. 20, 2009); Fed. Election Comm'n, FEC Form 3X: Report of Receipts and Disbursements for National Republican Senatorial Committee (filed Jan. 30, 2009), http://images.nictusa.com/cgi-bin/fecimg/?_29020061294+0 (last visited Aug. 20, 2009).

229. Associated Press, *Obama Raises \$10 Million After Palin Speech*, MSNBC, Sept. 4, 2008, <http://www.msnbc.msn.com/id/26551384/> (last visited Aug. 20, 2009).

230. Nagourney, *supra* note 183.

The Obama campaign's much-vaunted e-mail list reportedly contains thirteen million names, which is more than twenty percent of the sixty-nine million supporters who voted for him.²³¹ A base of 3.1 million donors, and an email list of thirteen million subscribers, is an enviable political tool for any new president.²³² As Magleby's 2009 book notes, "[i]n 2008, the Obama campaign expanded the voter rolls by about 12 million voters in a dozen key states—Ohio, Florida, Georgia, North Carolina, Virginia, Indiana, Missouri, Colorado, Iowa, Nevada, New Mexico, and Pennsylvania."²³³

Of course, it is important to note that larger donations also played a very prominent role in financing for all of the candidates in the 2008 election, including Obama's presidential campaign. A study published by CFI analyzing contributions made to the 2008 presidential candidates found that forty-seven percent of the total amount contributed to Obama's campaign was made in contributions of \$1000 or more.²³⁴ By using loopholes that allow joint fund-raising with the party, Obama's campaign was able to raise individual contributions in excess of \$25,000.²³⁵ It is estimated that in September 2008 alone, more than 600 donors contributed \$25,000 or more to the party committees in support of Obama's campaign.²³⁶

According to the *New York Times*, the securities and investments industry, including executives from Bear Sterns, Lehman Brothers, and AIG made up the largest portion of these mega-donations.²³⁷ In addition to large individual donations, Obama was also the benefactor of bundling activity, through which donations are collected by people identified with the campaign. For example, two "bundlers" working in the entertainment industry each raised at least \$500,000 for Obama.²³⁸

Overall, bundlers were a major factor for both Obama's and McCain's presidential campaigns. An investigation by Public Citizen of publicly reported information from federal and campaign records found that Obama's

231. Jonathan D. Salant, *Obama's Army of E-mail Backers Gives Him Clout to Sway Congress*, BLOOMBERG, Dec. 1, 2008, <http://www.bloomberg.com/apps/news?pid=20601087&sid=aEVXKOC3s8.k> (last visited Aug. 20, 2009); People's March for Justice!, *69 Million Americans Voted for Obama*, http://peoplesmarchforjustice.org/?page_id=25 (last visited Aug. 20, 2009).

232. Salant, *supra* note 231 (noting that conservative activist Richard Viguerie said that such a list "could be life-changing for American politics").

233. THE CHANGE ELECTION, *supra* note 12, at 18.

234. MALBIN, *supra* note 218.

235. Patrick McDonald, *Barack Obama's Slippery Fund-Raising Slope*, L.A. WKLY., Oct. 30, 2008, available at <http://www.laweekly.com/2008-10-30/news/barack-obama-39-s-slippery-fund-raising-slope>.

236. Michael Luo & Griff Palmer, *In Fine Print, a Proliferation of Large Donors*, N.Y. TIMES, Oct. 21, 2008, available at <http://www.nytimes.com/2008/10/21/us/politics/21donate.html>.

237. *Id.*

238. McDonald, *supra* note 235.

campaign raised \$750 million from 605 bundlers, while McCain's campaign raised less money from more donors, totaling \$375.5 million from 851 bundlers.²³⁹

Although McCain accepted public financing in the general election, the Republican Party used the same joint large-donor fund-raising to support its candidate. As the *Washington Post* reported, the commencement of the general election period did not stop McCain from raising money from large donors for his campaign:

While McCain had to stop raising money for his campaign committee after he accepted the GOP nomination in St. Paul, Minn., earlier this month, he has hardly been idle. On Monday night, he helped bring in more than \$5 million at a Miami hotel, and his campaign has found ways to both raise money and spend it through coordinated efforts with the RNC. According to Republican sources, money is pouring in to a joint fundraising committee that can legally accept up to \$70,000 from a single donor. . . . Joint committees are not new. But the way the McCain campaign is using them, in the view of some election lawyers, makes it hard for donors to tell the difference between a contribution to the joint fund and a donation directly to McCain's campaign.²⁴⁰

Overall, McCain's number of small- and mid-range donors, which made up twenty-one and twenty percent of his donors respectively, lagged behind Obama.²⁴¹ McCain, like Obama, accepted donations through the Internet. A September 2008 article described McCain's Internet fund-raising efforts:

Contributions made through McCain's Web site have quadrupled in recent days, according to party officials. The site routes potential donors to a separate page that collects money for the joint committee, distributing money to the RNC, state Republican party accounts, and a compliance fund that pays the McCain campaign's legal bills. The message on the site says, "The best way to help our campaign is to give to McCain-Palin Victory 2008."²⁴²

A. Small Donors, Volunteerism, and the "Virtuous Circle": A Marriage of Offline and Online Activism

The goals of the major party candidates went well beyond mere fund-raising. Indeed, Obama "built his candidacy off of the pledge to expand the electoral

239. *White House for Sale*, PUBLIC CITIZEN, <http://www.whitehouseforsale.org> (last visited Aug. 20, 2009).

240. Matthew Mosk, *McCain Able to Skirt Limits of Federal Financing*, WASH. POST, Sept. 17, 2008, at A4.

241. MALBIN, *supra* note 218, at 16.

242. Mosk, *supra* note 240.

playing field.”²⁴³ Unable to rely at the outset on an existing network of wealthy donors as Hillary Clinton had, Obama hired “techies” to develop an online campaign, which was pivotal in his enormous fund-raising success.²⁴⁴ Putting his organizing background to good use, Obama’s campaign also committed more resources to connecting online strategies to in-person grassroots organizing.²⁴⁵

With large volunteer turnouts, as well as steady donations, the Obama campaign’s innovations paid off.²⁴⁶ The campaign melded the organizing efforts into its fund-raising operation, allowing donors far more options for contributing to the campaign. Although Obama ran a disciplined press and campaign communications effort, he also built online communities and devolved control of campaign messaging downward to the grassroots, which put a tremendous emphasis on peer-to-peer networks. Even though the Obama campaign website was far from an ideal social-networking tool, it did offer a powerful means for local groups to self-identify and self-organize.²⁴⁷ Furthermore, the new tools were used to facilitate more human-to-human outreach, not less, because the campaign invited collaboration in messaging and outreach.²⁴⁸

The Obama campaign also promoted volunteering for the campaign as both a ready substitute and supplement for monetary donations by organizing a well-coordinated online and on-the-ground offensive.²⁴⁹ The campaign used lessons from a famous Chicago-based community organizer, Saul Alinsky, who pioneered the use of “escalating commitment” to entice volunteers to

243. Stein, *supra* note 189.

244. Greg Gordon, *With Her Donors Tapped Out, Clinton Turns to the Internet*, MCCLATCHY NEWSPAPERS, May 4, 2008, <http://www.mcclatchydc.com/homepage/story/35793.html> (last visited Aug. 20, 2009).

245. Matthew Mosk, *Obama Rewriting Rules for Raising Campaign Money Online*, WASH. POST, Mar. 28, 2008, at A6 (noting that the goal of the campaign was to “build an online relationship” with donors and volunteers).

246. See Editorial, *The Cost of Clinton’s Narcissism*, GLOBE & MAIL, June 4, 2008; Gordon, *supra* note 244.

247. For a nuanced review of successes and failures of MyBarackObama.com, see Patrick Ruffini, *The Secret of MyBarackObama.com? Egroups!*, TECHPRESIDENT, July 12, 2008, <http://techpresident.com/taxonomy/term/4017> (last visited Aug. 20, 2009). For a critique of campaigns’ use of volunteers recruited through the Internet, see <http://rasmuskleisnielsen.net/2009/03/31/the-labors-of-internet-assisted-activism-overcommunication-miscommunication-and-communicative-overload/> (Mar. 31, 2009).

248. See Sifry, *supra* note 22.

249. Nancy Benac, *AP Impact: The People in Obama’s Army of Small Donors*, SEATTLE TIMES, May 8, 2008, available at http://seattletimes.nwsource.com/html/politics/2004400992_apobamasarmy.html (last visited Aug. 20, 2009).

become committed to a cause.²⁵⁰ Alinsky rightly believed that small contributions would often lead individuals to further investment in a cause.²⁵¹

As White House Special Counsel Norm Eisen, an early and experienced Obama campaign activist, noted at a May 2009 Brennan Center conference:

We attempted to make it a continuous feedback loop where the on-line and the off-line would feed each other. . . . You'd have people sign up on Tuesday on the Internet and Wednesday, they would be knocking on doors, and conversely, we would go door to door in Iowa and we'd fill out these pledge cards and the youngsters would stay. We'd bring them back at the end of the day, come straggling in at 8:00, 9:00 with these cards, and the youngsters would stay there and enter that data. They would update it [such that] all those people would be on our e-mail list by the time you came back the next morning. And you would come back to these doors and they would say oh, I started getting e-mails from you. We attempted to start a virtuous cycle.²⁵²

Moreover, the Obama team brought on Marshall Ganz, a professor at Harvard University's Kennedy School of Government and former Howard Dean campaign advisor, who was once the National Organizing Director for the United Farm Workers under César Chávez.²⁵³ Ganz dramatically deepened the psychological appeal of Obama's organizing efforts by implementing a training and leadership development program called "Camp Obama," which asked volunteers to connect their "story of self" to the campaign's "story of us."²⁵⁴ In so doing, the campaign backed up its online efforts with face-to-face organizing that deepened the affiliations of volunteers and nurtured natural leaders.²⁵⁵

Perhaps even more importantly, as a percentage of its budget, the campaign invested far more money in online advertising and field recruitment, and less in broadcast advertising than a traditional campaign. David Plouffe, Obama's campaign manager, told *Portfolio* magazine:

250. SAUL ALINSKY, RULES FOR RADICALS (Vintage 1971); Benac, *supra* note 249 (noting Michael Malbin's observation about Alinsky's principles).

251. ALINSKY, *supra* note 250.

252. Transcript, Brennan Center for Justice, Money in Politics 2009: New Horizons for Reform Conference (May 8, 2009), at 20 (on file with author) (comments of Norm Eisen, White House Special Counsel).

253. Zack Exley, *Obama Field Organizers Plot a Miracle*, HUFFINGTON POST, Aug. 27, 2007, http://www.huffingtonpost.com/zack-exley/obama-field-organizers-pl_b_61918.html (last visited Aug. 20, 2009).

254. See Camp Obama, <http://campobama.blogspot.com/> (last visited Aug. 30, 2009); Karim Bardeesy; see also Marshall Ganz: *Lighting a Fire*, THE CITIZEN, Feb. 12, 2008, available at <http://harvardcitizen.com/2008/02/12/marshall-ganz-lighting-a-fire/>.

255. Micah Sifry, *Marshall Ganz on the Future of the Obama Movement*, TECHPRESIDENT, Nov. 20, 2008, <http://techpresident.com/node/6545> (last visited Aug. 30, 2009).

[W]e spent obviously a lot of money on TV, but as a ratio of our spending, it was much lower than historically is done, and that's because we spent a lot of money in the field and on the ground. And, in fact, when we did our baseline budget, the field was fully funded because we thought it was very, very important. . . . Our first priority was the ground operation because we thought that was essential to us winning. . . . In a lot of campaigns, the media gets funded first. . . . And we kind of did it in reverse.²⁵⁶

Plouffe noted that while media spending is typically seventy to seventy-five percent, the Obama campaign spent less than fifty percent of its overall budget on traditional media.²⁵⁷ Plouffe also remarked that “we thought a human being talking to a human being is the most effective in communication.”²⁵⁸

As Micah Sifry of Personal Democracy Forum has pointed out, television is a scarce medium when compared to the capabilities of the Internet, and the Obama campaign’s peer-to-peer organizing effectively traded the traditional paradigm—an economy of scarcity—for a new one—an economy of abundance.²⁵⁹ In its attempt to harness what Sifry called “surplus powerfulness,” or what Clay Shirky labeled “cognitive surplus,”²⁶⁰ Obama’s presidential operation was in fact the first twenty-first century campaign.

Instead of counting dollars, the post-BCRA paradigm invites candidates and campaigns to count heads. Clay Shirky observed in his recent book that, sometimes, a difference in numbers becomes a difference in kind, producing value that is far greater than the sum of its parts and requiring new structures, rules, and systems to channel these effects.²⁶¹ Small donors were a part of the strategy, but they mainly gave and mattered because the campaign was open to all kinds of collaborations with supporters; the campaign did not generally treat them like cash-producing machines who were merely important for their money.

Michael Malbin nicely summarized the structural shifts in his April 2009 analysis:

[I]t would be a mistake to see Obama’s Internet operation as a one-dimensional fundraising tool. Many of his donors gave more than once. They also volunteered: the givers were also doers The

256. Lloyd Grove, *World According to . . . David Plouffe*, PORTFOLIO, Dec. 11, 2008, <http://www.portfolio.com/views/columns/the-world-according-to/2008/12/11/David-Plouffe-Interview> (last visited Aug. 20, 2009).

257. *Id.*

258. *Id.*

259. See generally Sifry, *supra* note 22.

260. Micah Sifry, *LiveBlogging from Berkman: Organizing in an Age of Surplus Powerfulness*, TECHPRESIDENT, Dec. 10, 2008, <http://techpresident.com/node/6597>; Gin, Television, and Social Surplus, <http://www.herecomeseverybody.org/2008/04/looking-for-the-mouse.html> (Apr. 26, 2008, 10:48 EST).

261. Gin, Television, and Social Surplus, *supra* note 260.

campaign's integrated social networking tools became the engine of its voter mobilization campaign, imitating and improving on the Republican innovations of 2002 and 2004. The Obama staff built a structure within the campaign that previously had been handled by ongoing organizations with more permanence than a candidate's campaign committee. Among Republicans this work typically was done by the party; among Democrats it was handled by labor unions and advocacy groups. Because these resources belonged to the candidate, the same tools that helped Obama raise more money than Clinton or McCain also helped him to out-organize them. They were the keys to his victory.²⁶²

While the Obama campaign had unique assets, its success points to a more universal lesson: integrating fund-raising into an overall strategy for voter engagement is a necessary component of an effective campaign.

Causation in politics is complicated, but it seems fair to ascribe at least some of these recent changes to BCRA. And it is logical to do so: by forcing national parties and the presidential candidates to give up soft money, BCRA induced a major lurch forward, marrying advances in outreach technologies with the incentives to use them.

B. Low Numbers of Small Donors in 2008 Congressional Campaigns

While the impact of small donors from the presidential race increased the contributions that flowed to congressional campaigns through the political parties, small donors notably were not more directly invested in supporting congressional candidates than they had been in the past.²⁶³ For Senate candidates, according to the CFI, overall contributions from donors giving \$200 or less accounted for fifteen percent of total contributions, compared with forty-one percent from donors giving more than \$1,000, and thirty-six percent from PACs.²⁶⁴ Small donors were even less involved in House of Representatives races, with contributions from donors giving \$200 or less accounting for only eight percent of overall contributions, contributions of \$1,000 and above accounting for thirty-five percent, and contributions from PACs comprising forty-six percent of overall contributions.²⁶⁵

As a notable exception to these trends, in 2008 and prior elections, the Netroots support for members of Congress on sites like *DailyKos* produced substantial additional funds from smaller donors across the country because of the targeted platforms that these relatively new, lower-cost communication

262. MALBIN, *supra* note 218, at 14.

263. Transcript, Brennan Center for Justice, *supra* note 252.

264. *Id.*

265. *Id.*

tools provide. Indeed, “bloggers on Web sites such as *DailyKos* and *MyDD.com* raised \$1.5 million for candidates in 2006.”²⁶⁶

The Democratic-leaning websites typically use Actblue as the website for transferring donations. ActBlue appears to have raised \$66 million for Democratic candidates in the 2008 election cycle.²⁶⁷ As ActBlue Executive Director Jonathan Zucker noted, “[s]mall dollar donations are the key to Democratic strength, because as we’ve seen with the Obama campaign, sustainability comes from being able to return to your base and ask for help when you need it.”²⁶⁸ Therefore, “[y]ou don’t have to be a national campaign to harness the power of small donors.”²⁶⁹

Even the small money adds up. According to ActBlue, since its inception in 2004, it has raised over \$97 million for 3200 Democratic candidates from more than 420,000 donors, with a median contribution of only \$50.²⁷⁰

V. THE RNC’S ATTEMPT TO RE-LITIGATE *McCONNELL*

After losing the 2008 presidential election, the Republican Party wasted no time in challenging the constitutionality of the bans on soft money and coordinated spending that were championed by its presidential nominee. A group of national and state Republican Party committees filed two lawsuits challenging restrictions on soft-money donations and spending: one in federal court in Washington, D.C., that challenged soft-money restrictions, dividing the state and national parties,²⁷¹ and a second in federal court in Louisiana that challenged the limits on coordinated spending between candidates and the national parties under FECA.²⁷²

In the first suit—the challenge to soft money—the RNC and its co-plaintiffs claimed that BCRA restrictions on soft-money contributions are

266. Leslie Wayne, *A Fund-Raising Rainmaker Arises Online*, N.Y. TIMES, Nov. 29, 2007, available at <http://www.nytimes.com/2007/11/29/us/politics/29actblue.html>.

267. See Emily Cadei, *ActBlue’s Greener Pastures*, CQ WEEKLY, Feb. 9, 2009 (reporting that Actblue raised \$1 million for the 2004 election and \$16 million for the 2006 election); Mark Schmitt, *Can Money be a Force for Good?*, AM. PROSPECT, Feb. 4, 2009, available at http://www.prospect.org/cs/articles?article=can_money_be_a_force_for_good (reporting that Actblue has raised \$83 million in total since its creation in 2004). In calculating the \$66 million result, the money that Actblue raised for the 2004 and 2006 election cycles was subtracted from the total amount of money that Actblue has raised since its inception.

268. *Democratic Fundraising on ActBlue Tops \$50 Million*, ACTBLUE, June 10, 2008, <http://blog.actblue.com/blog/2008/06/democratic-fund.html> (last visited Aug. 20, 2009).

269. *Id.*

270. *About ActBlue*, ACTBLUE, <http://www.actblue.com/about> (last visited Aug. 20, 2009).

271. Compl. for Declaratory and Injunctive Relief at 1, 3, 5, 7, Republican Nat’l Comm. v. FEC, No. 08-1953 (D.D.C. filed Nov. 13, 2008).

272. Compl. for Declaratory and Injunctive Relief at 1–2, Cao v. FEC, No. 08-4887 (E.D. La. filed Nov. 13, 2008).

unconstitutional when those contributions are not “unambiguously related to the campaign of a particular federal candidate.”²⁷³

The prohibition keeping the national parties from raising and spending soft money and the requirements that state parties use hard money to pay for expenditures on federal activities were upheld against a facial challenge in 2003 in *McConnell v. FEC*.²⁷⁴ The rules assure that the ban on soft money given to the national parties is not easily circumvented and that limits on contributions by individuals are not rendered meaningless by direct infusions of party funds to candidates.²⁷⁵ In its brief, the RNC argued that BCRA’s rationales for soft-money limits do not apply in certain types of political races and for certain types of national party functions, and the limits are therefore unconstitutionally applied in those situations.²⁷⁶

The suit also challenged the restrictions on national parties’ solicitations of soft money.²⁷⁷ If allowed to raise soft money and use it for these purposes, the RNC claimed, the Court should trust that the parties would not use soft money to benefit federal candidates, despite a multi-decade record of abuse. The *New York Times* editorialized:

The Republican Party’s suit was clearly prompted by its troubles in the 2008 election, in which Mr. Obama proved far more adept at fundraising than John McCain. It is disturbing that the R.N.C. sees its salvation in clearing the way for corporations and other special interests to flood its campaign coffers once again.²⁷⁸

The case is pending in federal district court.²⁷⁹ A judgment in favor of the RNC would effectively turn back the clock on nearly a decade of party-building and voter-engagement gains.

In the meantime, at least some of the transformations in political fund-raising are here to stay. For example, Internet fund-raising is likely now a permanent feature of the campaign landscape, even for candidates less forward-thinking and charismatic than President Obama. Websites that raise money for political candidates, such as ActBlue and other online fund-raising clearinghouses or interest groups, are also likely to persist and play an increasingly important role in political campaigns.

273. Compl. for Declaratory and Injunctive Relief, *supra* note 271, at 11, 13.

274. *See supra* Part III.A.

275. Mem. of Points and Authorities of the Brennan Center for Justice at NYU School of Law, Common Cause, Demos, League of Women Voters of the United States, and the U.S. Public Interest Research Group as *Amici Curiae* Opposing Plaintiff’s Motion for Summary Judgment at 5–8, *Republican Nat’l Comm.*, No. 08-1953.

276. *Republican Nat’l Comm.*, No. 08-1953.

277. *Id.*

278. Editorial, *A Threat to McCain-Feingold*, N.Y. TIMES, Jan. 12, 2009, available at <http://www.nytimes.com/2009/01/12/opinion/12mon1.html>.

279. *Republican Nat’l Comm.*, No. 08-1953.

Republicans also acknowledge that an Internet strategy is the most important new political horizon, requiring users to embrace technological organizing tools. “It would be suicide for the Republican Party and conservatives to not aggressively embrace technology,” said Matt Lewis of the conservative website *Townhall.com*.²⁸⁰

A. The Case for Small-Donor Reforms in Campaign Finance

Despite the adaptations in campaigning, public concern about the power of large contributors to influence politics remains pressing. After Democrats moved into the majority in the House and Senate, key industry giving patterns adjusted to target the new decision-makers.

In 2008, the same election cycle that brought record presidential fund-raising from grassroots donors, the pharmaceutical industry contributed nearly \$22 million to members of Congress.²⁸¹ It hedged contributions evenly between the Republican and Democratic Parties for the first time in nearly twenty years.²⁸² For example, Pfizer, a longtime donor to the Republican Party, doled out fifty-two percent of its campaign contributions to Democrats during the 2008 election cycle.²⁸³

Lawmakers have indicated the influence that campaign contributions have at the bargaining table. In response to the pharmaceutical industry’s increasing contributions to Democrats, Representative Pete Stark (D-CA), Chairman of the House Ways and Means Subcommittee on Health, told the *New York Times* in October 2008 that industry representatives “understand who will be writing legislation in the next few years. They want to be at the table.”²⁸⁴ James C. Greenwood, president of the Biotechnology Industry Organization, flatly conceded that he attended a greater number of fund-raisers for Democrats because they were now “the gatekeepers for legislation.”²⁸⁵

Also in the 2008 election cycle, the financial services sector contributed more money—roughly \$69 million nearly evenly split between the two major

280. Alexander Mooney, *GOP Warned to Embrace Technology or Face ‘Suicide,’* CNNPOLITICS, Dec. 12, 2008, <http://www.cnn.com/2008/POLITICS/12/12/gop.technology/index.html> (last visited Aug. 30, 2009).

281. Center for Responsive Politics, *Pharmaceuticals/Health Products: Money to Congress*, Mar. 2, 2009, <http://www.opensecrets.org/industries/summary.php?ind=H04&recipdetail=A&sortorder=U&cycle=2008> (last visited Aug. 20, 2009).

282. Eliza Krigman, *Drug Industry Dough Shifting to Dems*, CENTER FOR RESPONSIVE POLITICS, Oct. 14, 2008, <http://www.opensecrets.org/news/2008/10/drug-industry-dough-shifting-t.html>; see also Center for Responsive Politics, *Pharmaceuticals/Health Products: Long-Term Contribution Trends*, Mar. 2, 2009, <http://www.opensecrets.org/industries/indus.php?cycle=2008&ind=H04> (last visited Aug. 20, 2009).

283. Center for Responsive Politics, *Pfizer Inc: Summary*, May 12, 2009, <http://www.opensecrets.org/orgs/summary.php?id=D000000138> (last visited Aug. 20, 2009).

284. Robert Pear, *Drug Industry, Having Long Smiled on G.O.P., Now Splits Donations Equally*, N.Y. TIMES, Oct. 13, 2008, at A18.

285. *Id.*

parties—to candidates for Congress and the presidency, as well as political parties, than did any other sector.²⁸⁶ Recipients of bailout funds have also been political high-rollers. AIG, for example, spent nearly \$4 million in twenty-eight states during the 2004, 2006, and 2008 elections and contributed to more than 400 political committees.²⁸⁷ Over the past ten years, AIG has spent \$9.6 million on federal elections, split nearly evenly between Democrats and Republicans.²⁸⁸

Senator Dick Durbin (D-IL), the Majority Whip in the Senate, described the banking industry as the “most powerful lobby on Capitol Hill” and pointed out that the industry “own[s] the place”—even after causing the current financial meltdown.²⁸⁹ While discussing the mortgage crisis on *Bill Moyers Journal* in May 2009, Senator Durbin made clear his belief that the “way we finance our campaigns” lies at the heart of the current crisis.²⁹⁰

During a legislative showdown over the terms of the mortgage banking crisis bill, and despite President Obama’s subsequent statements about “stand[ing] up to the special interests” at the bill-signing ceremony, the *New York Times* reported that the banking industry both defeated a provision it disliked and “walked away with billions in new bailout money.”²⁹¹

According to the *New York Times*:

The outcome left some Democrats frustrated and fuming. “This is one of the most extreme examples I have seen,” said Senator Sheldon Whitehouse, Democrat of Rhode Island, shortly before the vote, “of a special interest wielding its power for the special interest of a few against the general benefit of millions of homeowners and thousands of communities now being devastated by foreclosure.”²⁹²

286. Center for Responsive Politics, *2008 Overview: Totals by Sector*, <http://www.opensecrets.org/overview/sectors.php> (last visited Aug. 20, 2009).

287. NICOLE ALBERTSON, NAT’L INST. ON MONEY IN STATE POLITICS, *Names in the News: American International Group*, (2008), available at http://www.followthemoney.org/press/Reports/NN_AIG2008Update_Final.pdf; see also Eric Umansky & Sharona Cutts, *Gov’t-Owned AIG: We’re Still Lobbying!*, PROPUBLICA, Oct. 10, 2008, <http://www.propublica.org/article/govt-owned-aig-were-still-lobbying-1010> (last visited Aug. 20, 2009).

288. Center for Responsive Politics, *AIG: Summary*, <http://www.opensecrets.org/orgs/summary.php?id=D000000123> (last visited Aug. 20, 2009).

289. Posting of Adam Doster to Progress Illinois, <http://progressillinois.com/2009/4/29/durban-banks-own-the-place> (Apr. 29, 2009, 14:00 EST); see also Kevin Drawbaugh, *Awash in Bank Money, Washington Faces Reform Test*, REUTERS, Nov. 18, 2008, <http://www.reuters.com/article/vcCandidateFeed2/idUSTRE4AH6R020081118> (last visited Aug. 20, 2009); Lindsey Renick Mayer & Eliza Krigman, *Races to Watch IX: Wall Street’s Favorite Candidates*, CENTER FOR RESPONSIVE POLITICS, Oct. 9, 2008, <http://www.opensecrets.org/news/2008/09/races-to-watch-v-lobbyists-fav.html> (last visited Aug. 20, 2009).

290. *Bill Moyers Journal*, (PBS television broadcast May 8, 2009), available at <http://www.pbs.org/moyers/journal/05082009/transcript1.html> (interview with Senator Durbin).

291. Stephen Labaton, *Ailing, Banks Still Field Strong Lobby at Capitol*, N.Y. TIMES, June 5, 2009, at A1.

292. *Id.*

The *New York Times* coverage provided substantiation for Senator Durbin's impression that the banks were buying a seat at the negotiating table. A chief lobbyist for the banks

report[ed] that the political action committees run by his association alone have built a war chest of nearly \$2 million, a 40 percent jump over the last year, even though members have had to cut other expenses in the recession.

"The banks get it," [the lobbyist] said. "They understand you need a strong political action committee to get access to the fund-raisers. That's where the lawmakers are."²⁹³

As Senator Durbin suggested, these political constraints should be taken seriously as structural impediments to sound policy. Simon Johnson, the former chief economist of the International Monetary Fund (IMF) and a professor at the Massachusetts Institute of Technology's Sloan School of Management, has laid out the economic inefficiencies caused by the interdependence of politicians and corporate America.²⁹⁴ Johnson observed that the IMF's first task in countries experiencing an economic crisis is to address the interdependencies between large economic actors and the political leadership, which he calls "oligarchy." Breaking this nexus is critical.²⁹⁵

As Johnson observed, in the U.S. many solutions strangely remain off the table because corporations "us[e] their influence to prevent precisely the sorts of reforms that are needed, and fast, to pull the economy out of its nosedive," thereby giving "the financial sector a veto over public policy."²⁹⁶ "Indeed," as Johnson recognized, "this is a self-reinforcing cycle."²⁹⁷ The increased influence of Wall Street allowed corporations to push deregulation through Congress, thereby increasing their wealth, which in turn increased their influence and gave them, in Johnson's words, "enormous political weight—a weight not seen in the U.S. since the era of J.P. Morgan (the man)."²⁹⁸ Thus, both as the deregulation-driven bubble expanded, and now, as the economy contracts, corporate influence is exercised for short-term gain to the detriment of the economy as a whole in both the short- and long-term.²⁹⁹

Watching the fights in Congress, Ezra Klein of the *Washington Post* fulminated in June 2009 that:

293. *Id.*

294. Simon Johnson, *The Quiet Coup*, ATLANTIC, May 2009, available at <http://www.theatlantic.com/doc/200905/imf-advice>.

295. *Id.*

296. ANDREW BOYLE & LAURA MACCLEERY, BRENNAN CENTER FOR JUSTICE, SPRING AWAKENING (2009) (citing Johnson, *supra* note 294), available at http://www.brennancenter.org/blog/archives/spring_awakening_the_case_for_corporate_disclosure_of_political_contributio/.

297. *Id.*

298. Johnson, *supra* note 294.

299. *Id.*

[w]e have a political system that most observers can confidently predict will be completely unable to avert the fiscal or the climate crisis. That's like a police force that can't respond to emergency calls, or a fire department unable to put out fires. I think that analytically honest political commentators right now should be struggling with a pretty hard choice: Do you try to maximize the possibility of good, if still insufficient, outcomes? Or do you admit what many people already know and say that our political process has gone into total system failure and the overriding priority is building the long-term case for structural reform of America's lawmaking process? Put another way, can you really solve any of our policy problems until you solve our fundamental political problem? And don't think about it in terms of when your team is in power. Think of it in terms of the next 30 years, and the challenges we face.³⁰⁰

The structures of Congressional fund-raising—and an over-reliance on fund-raising by congressional committees that depend primarily on large donors—may also play a major role in partisan gridlock over policy. As Malbin found in 2004:

Within Congress, fewer than 40 percent of the roll call votes from 1963 through 1993 had a majority of one party voting against a majority from the other party. (This is *Congressional Quarterly's* definition of a “partisan vote.”) Since 1993 more than half of the votes fit this description. In 2003 the percentage of partisan votes was 52 percent in the House and a record high of 67 percent in the Senate.³⁰¹

If the issue is how well the legislative branch functions in solving pressing national problems, then how should the incentives for members of Congress be adjusted? The lack of small-donor giving to congressional coffers in 2008 appears to indicate that more compelling incentives are needed to drive the kind of transformative change in candidate tactics that pushed presidential-election and party giving in 2008. While it is true that public attention is often riveted on the presidential candidates, the amount of small-donor activity on the Internet—through candidate webpages, ActBlue, or similar groups—for down-ballot races is a promising sign.

Reforms that extend the small-donor revolution to Congress in a more decisive way would address a central piece of unfinished business in a pro-democracy campaign-finance agenda. In addition, a program of alternative funding of elections for members of Congress would realign these incentives

300. Ezra Klein, *Can We Save This Village?*, WASH. POST, June 26, 2009, available at http://voices.washingtonpost.com/ezra-klein/2009/06/can_we_save_this_village.html.

301. Michael J. Malbin, *Political Parties Under the Post-McConnell Bipartisan Campaign Reform Act*, 3 ELECTION L.J. 177, 179 (2004).

and produce many of the same positive impacts that the disappearance of soft money has had for the parties and the presidential election.

This kind of ambitious reform of our political economy—a small-donor-based system of voluntary alternative funding for congressional elections—would make an enormous difference by channeling public energy and breaking the stranglehold of entrenched interests. A bill that would implement these reforms, the Fair Elections Now Act (FENA), is currently being co-sponsored in the Senate by Senators Dick Durbin (D-IL) and Arlen Specter (D-PA), and in the House of Representatives by Representatives John Larson (D-CT) and Walter Jones (R-NC).³⁰²

Introduced in both the Senate and the House in March 2009, FENA would create a federal system of voluntary and fair election funding that roughly tracks existing state programs in Arizona, Maine, and Connecticut.³⁰³ The proposal has been adapted from previous versions to reflect the small-donor revolution that occurred during the 2008 presidential election.³⁰⁴ It is garnering support from major labor and environmental groups, as well as a number of prominent lobbyists and corporate leaders.³⁰⁵

Under FENA, candidates would be required to collect a minimum number of qualifying contributions that cannot exceed \$100 in order to qualify for fair election funds.³⁰⁶ Upon qualifying, candidates would receive fair elections funds for the primary and general elections and would be subject to restrictions on accepting funds from other sources.³⁰⁷ In addition to these grants, candidates may continue raising small donations that are then matched four-to-one by fair elections supplemental funds, subject to a cap on the total fair elections funds available to any one candidate. Donors may contribute up to \$100 on three separate occasions: (1) the pre-primary qualifying contributions; (2) primary election supplemental contributions; and (3) the general election supplement contributions—making the effective limit \$300 per donor.

The program is partially modeled on successful programs in the three states with legislative and statewide public financing programs. In all three states, participation rates in the program have been remarkably high and bipartisan. In Connecticut, which recently held its first election under the new system in

302. See Fair Elections Now Act, S. 752, 111th Cong. (2009); Fair Elections Now Act, H.R. 1826, 111th Cong. (2009).

303. See S. 752 § 101(b); H.R. 1826 § 101(b).

304. See S. 752 § 101(b); H.R. 1826 § 101(b).

305. Eliza Newlin Carney, *Campaign Finance Reform Finds Unlikely Allies: Some Prominent Conservative And Business Groups Are Joining The Cause*, NAT'L J., Mar. 16, 2009, available at http://www.nationaljournal.com/njonline/no_20090316_8535.php (last visited Aug. 21, 2009); Bara Vaida, *Lobbyists Backing Campaign Finance Reform*, NAT'L J., Mar. 25, 2009, available at <http://undertheinfluence.nationaljournal.com/2009/03/lobbyists-backing-campaign-fin.php#more> (last visited Aug. 21, 2009).

306. See S. 752 § 102; H.R. 1826 § 102.

307. See S. 752 § 102; H.R. 1826 § 102.

2008, three-quarters of candidates for the General Assembly chose to participate.³⁰⁸ Also in 2008, sixty-seven percent of general election candidates participated in a similar system in Arizona,³⁰⁹ and eighty-one percent of general election candidates for the state legislature participated in Maine's system.³¹⁰ In Arizona, which has had a public financing system in place since 1998, and in Maine, which has had such a system since 2000, participation has increased with every election cycle.³¹¹

The systems are popular with state-level candidates because they allow the candidates to spend more time talking to voters about their needs and concerns, and less time fund-raising.³¹² Such programs also enhance the significance of the small donors who provide the qualifying contributions for prospective candidates.³¹³

Public financing systems also enhance electoral competition. A new multi-state regression analysis by the Brennan Center and George Mason Economics Professor Thomas Stratmann, found that an incumbent's mean margin of victory is fifty-seven percentage points in states with contribution limits but no public financing, and thirty percentage points in Minnesota and Maine, the two states with public financing that were studied.³¹⁴ "States with public financing have a 4 percent higher likelihood of having a close election, and a 29 percent lower likelihood that the incumbent [will] win[] with more than 85 percent of the popular vote."³¹⁵

In a separate analysis published in the same report, a Brennan Center investigation found that increased competition under public financing systems does not lead incumbents to leave the system.³¹⁶ Indeed, in Maine, "out of the 28 state senate incumbents who had previously won by less than ten percent of the vote, only eight chose not to accept public financing. None of the eight

308. Beth A. Rotman & James Talbert-Slagle, *The Citizens' Election Program: Creating Change in the Land of Steady Habits*, Jan. 26, 2009, <http://www.ct.gov/seec/cwp/view.asp?a=3556&q=432196> (last visited Aug. 21, 2009).

309. ARIZ. CITIZENS CLEAN ELECTIONS COMM'N, 2008 ANNUAL REPORT 8 (2009), available at http://www.azcleanelections.gov/Libraries/2007-2008-docs/Annual_Report.sflb.ashx.

310. MAINE CLEAN ELECTION ACT: OVERVIEW OF PARTICIPATION RATES AND PAYMENTS 2000–2008, at 1 (2009), available at http://www.maine.gov/ethics/pdf/publications/2008_mcea_overview.pdf.

311. ARIZ. CITIZENS CLEAN ELECTIONS COMM'N, 2000–2006 ELECTION DEMOGRAPHICS, http://www.azcleanelections.gov/Libraries/2005-2006-docs/Election_Demographics.sflb.ashx (last visited Aug. 30, 2009); MAINE CLEAN ELECTION ACT, *supra* note 310, at 1.

312. *See, e.g.*, Rotman & Talbert-Slagle, *supra* note 308.

313. *See, e.g.*, NANCY WATZMAN, PUBLIC CAMPAIGN, ALL OVER THE MAP: SMALL DONORS BRING DIVERSITY TO ARIZONA'S ELECTIONS 1 (2008), available at http://www.publiccampaign.org/sites/www.publiccampaign.org/files/%20aotm_report_05_20_08_final_web.pdf.

314. CIARA TORRES-SPELLISCY ET AL., BRENNAN CENTER FOR JUSTICE, ELECTORAL COMPETITION AND LOW CONTRIBUTION LIMITS 11 (2009).

315. *Id.*

316. *Id.*

non-participating candidates participated in [Maine's public financing system] in the prior general election.”³¹⁷ In addition, “no state senate incumbent chose to forgo public financing between 2000 and 2006 after having accepted it during a competitive election.”³¹⁸

Another reform of the current federal presidential public financing system is also needed. As reformers often pointed out publicly as the 2008 election unfolded, the long-neglected and out-of-date presidential public funding program needs urgent repair.³¹⁹

The Obama campaign declined to use the system in both the general election and the primary, citing its myriad flaws and insufficient amount of money available for the general election.³²⁰ While Senator John McCain did use public financing in the general election, he made ample use of a loophole allowing joint fund-raising with the RNC.³²¹

In a recent paper, Michael Malbin of CFI explained that in the current system, presidential primary candidates are strait-jacketed by a campaign finance system that is badly out-of-step with modern primary calendars and campaign practices. Malbin provided a detailed history of the presidential primary schedule over various presidential election years, showing that the delegate selection process has moved earlier and earlier.³²² This phenomenon, in turn, has put tremendous pressure on the primary arrangements for the presidential public financing program.³²³

Malbin's paper also noted that before the most recent two election cycles, the system worked relatively well for the thirty years since its enactment after Watergate, allowing challengers to beat incumbents in three of the six presidential races.³²⁴ In addition, the system generally receives credit for assisting Ronald Reagan's successful presidential bid.³²⁵ Malbin writes:

317. ZACHARY PROULX, BRENNAN CENTER FOR JUSTICE, PUBLIC FINANCING AND COMPETITIVENESS IN MAINE SENATE ELECTIONS 2–3 (2009).

318. *Id.*

319. See, e.g., Laura MacCleery, *Parallel Public Financing System? Not Quite, But Don't Lose Hope*, HUFFINGTON POST, Apr. 15, 2008, http://www.huffingtonpost.com/laura-maccleery/parallel-public-financing_b_96763.html (last visited Aug. 21, 2009); Laura MacCleery & Andrew Stengel, *Presidential Public Financing, Extreme Makeover Edition*, HUFFINGTON POST, May 7, 2008, http://www.huffingtonpost.com/laura-maccleery-and-andrew-stengel/presidential-public-fundi_b_100691.html (last visited Aug. 21, 2009).

320. *Obama Opted Out of Public Financing*, June 19, 2008, USA TODAY <http://blogs.usatoday.com/onpolitics/2008/06/obama-opts-out.html#more> (last visited Aug. 21, 2009).

321. Mosk, *supra* note 240; Press Release, Public Citizen, “*Mega-donors*” Pump Millions Into McCain's Presidential Campaign, *Public Citizen Analysis Shows*, July 18, 2008, <http://www.citizen.org/pressroom/release.cfm?ID=2699> (last visited Aug. 21, 2009).

322. MALBIN, *supra* note 218, at 6–8.

323. *Id.*

324. *Id.* at 5–6.

325. *Id.* at 5.

Ronald Reagan (1976) had only \$43,497 in cash on hand at the end of January 1976. President Gerald Ford had fifteen times as much in the bank on that day. If the challenger's campaign had not received \$1 million in public money in January, and another \$1.2 million in February, his advisors have said they could not have continued. Reagan's strong campaign in 1976 fueled his success in 1980.³²⁶

In fact, since the program began in 1976, public funding has been accepted by both Republican and Democratic candidates in *every* general election—even in 2000 and 2004 when primary fund-raising totals broke records.³²⁷ Legislators are now contemplating a bill to reform the presidential public financing system. Under the proposed fix, small donors would be the “key players” in financing presidential campaigns, and the amount of money available for the primary and the general elections would be dramatically increased to competitive levels.³²⁸ During the primary, the system would allow candidates to receive a four-to-one match for small contributions of \$200 or less, compared with the current system’s one-to-one match.³²⁹ The system would also allow candidates to spend an unlimited amount of contributions of \$200 or less, over and above the primary spending limit.³³⁰

In the general election, candidates would be able to supplement a base grant with unlimited small contributions of \$200 or less. The bill would also close the joint fund-raising loophole.³³¹ A coalition of reform organizations is working to build momentum for the bill, which heeds the events of the past election cycle and works to enlarge those positive developments while limiting the role of large donors in the presidential race.³³²

B. Historical Analogue: The Progressive Era and the Importance of Process Reform

In light of this history of party fund-raising practices, changes in the technologies and the methods of fund-raising in elections transform incentives and party structures in ways that can render campaigns indebted to wealthy elites or that can fundamentally democratize them. Indeed, the evidence strongly suggests that changes in campaign finance law—because they address

326. *Id.*

327. *Id.* at 2.

328. Editorial, *Campaign Spending*, PHILLY.COM, Oct. 22, 2008.

329. Brody Mullins & T.W. Farnam, *After Costly Race, Groups Aim to Alter Public Financing for Presidential Runs*, WALL ST. J., Nov. 10, 2008, at A6, available at <http://online.wsj.com/article/SB122627565397112081.html> (last visited Aug. 21, 2009).

330. Kenneth P. Doyle, *Public Financing: Reform Groups Push Revised Proposal to Revamp Presidential Campaign System*, in BNA MONEY & POLITICS REPORT (2008).

331. Mullins & Farnam, *supra* note 329.

332. Doyle, *supra* note 330; Alexander Bolton, *Groups Press Obama on Campaign Finance Reform*, THE HILL, Nov. 6, 2008, available at <http://thehill.com/leading-the-news/groups-press-obama-on-campaign-finance-reform-2008-11-06.html> (last visited Aug. 21, 2009).

the motivations of lawmakers at the wholesale level and alter the basic rules of institutions—are game-changers that make progress possible on other, substantive, policy goals.

As in evolutionary biology, where rapid transformations occur over relatively brief periods of time, major achievements—such as passage of child labor laws and the creation of the Food and Drug Administration in the Progressive Era, or passage of the National Labor Relations Act and Social Security during the New Deal—were preceded by structural shifts in power: namely, suffrage for women and the direct election of senators.³³³

History shows that when electoral reforms are enacted, the results can be remarkable. The Progressive Era, for example, saw rapid political restructuring over four years in the early 1900s:

[G]iven the long-term forces involved, it is notable how suddenly the main elements of the new political order went into place The brief period from 1904 to 1908 saw a remarkably compressed political transformation. During these years the regulatory revolution peaked; new and powerful agencies of government came into being everywhere. At the same time . . . organized social, economic, and reform-minded groups began to exercise power more systematically than ever before.³³⁴

The leaders of the Progressive Era, including Teddy Roosevelt and Woodrow Wilson, capitalized on popular discontent by departing from party doctrine and calling for ethical governance and restrictions on the power of special interests. Coalescing around an agenda for reforms that put electoral changes at the helm, a new set of priorities characterized this emerging group of politicians:

The first of these tendencies is found in the insistence by the best men in all political parties that special, minority, and corrupt influence in government—national, state, and city—be removed; the second tendency is found in the demand that the structure or machinery of government, which has hitherto been admirably adapted to control by the few, be so changed and modified that it will be more difficult for the few, and easier for the many, to control; and finally, the third tendency is found in the rapidly growing conviction that the functions of government are too restricted and that they must be increased and extended to relieve social and economic distress.³³⁵

333. Andrew M. Scott, *The Progressive Era in Perspective*, 21 J. POL. 685, 701 (1959); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism and the Family*, 115 HARV. L. REV. 947, 1008 (2002).

334. Richard L. McCormick, *The Discovery that Business Corrupts Politics: A Reappraisal of the Origins of Progressivism*, 86 AM. HIST. REV. 247, 252 (1981).

335. BENJAMIN PARKER DEWITT, THE PROGRESSIVE MOVEMENT 4–5 (1915).

Progressives also took aim at the corrupting influence of money in funding political campaigns. Freeing lawmakers from the interests of large donors and corporate financiers was another crucial electoral reform intended to pave the way for the substantive reform demanded by the people. Indeed, the roots for much of the modern campaign finance reform movement originate in the Progressive period.³³⁶

In 1904, President Theodore Roosevelt was accused of receiving large donations from corporations seeking to curry favor with the administration.³³⁷ Although he originally denied receiving gifts, several companies eventually admitted to financially supporting Roosevelt's campaign. In the wake of the controversy, Roosevelt began to publicly call for campaign finance reform and regulation of corporate influence on politics.³³⁸

Congress responded in 1907 with the Tillman Act, prohibiting corporations and banks from contributing to federal campaigns.³³⁹ Emboldened by the success, activists pushed for more extensive reform.³⁴⁰ By 1907, President Roosevelt was promoting a system of public financing for major parties.³⁴¹ "The need for collecting large campaign funds would vanish if Congress provided an appropriation for the proper and legitimate expenses of each of the great national parties," Roosevelt said in a 1907 address to Congress.³⁴² Ultimately, legislators balked at this notion, but contemporary advocacy for public financing of political campaigns largely traces back to his proposal.³⁴³

To the extent that current crises, just as in the Progressive Era, will likely enlarge the role of government to some degree, the concurrence of process-focused reforms with an expansion in the role of government is no accident, historically speaking, because it is strategically well-advised. Renovations in the democratic process can enable power swings from the powerful to the powerless. They increase the political capital of reformers and outsiders, and scramble power relationships. In moments of dislocation, strange bedfellows form coalitions around innovations.

By increasing accountability, process reforms make other changes more feasible. These types of reforms also tend to enhance public legitimacy for programmatic changes, so that when big new ideas are enacted, they enjoy

336. ANTHONY CORRADO ET AL., THE NEW CAMPAIGN FINANCE SOURCEBOOK 7–10 (Brookings Inst. Press 2005).

337. *Id.* at 10–11.

338. *Id.* at 11–12.

339. *Id.* at 12–13.

340. *Id.* at 13.

341. *Id.*

342. R. SAM GARRETT, CONG. RESEARCH SERV., RL 33814, CRS REPORT TO CONGRESS: PUBLIC FINANCING OF CONGRESSIONAL ELECTIONS, BACKGROUND AND ANALYSIS 10–11 (2007).

343. CORRADO ET AL., *supra* note 336, at 13.

wide public acceptance—at least for a time—and are not destroyed or immediately undermined by a predictable backlash.

In fact, the recent emergence of Netroots activism combines two trends analogous to those present in Progressive Era social mobilization. Early twentieth-century Progressive activists focused on empowering citizens through direct democracy while simultaneously emphasizing the role of technical expertise in policymaking.³⁴⁴ As a contemporary corollary, today's online forums and social networking sites help to unify communities of professionals, scholars, and experts with grassroots activists, enabling new strategies for advocacy and electoral impact.

VI. CONCLUSION: A TIME FOR ACTION TO IMPROVE DEMOCRACY

Today is clearly a pivotal point in American political life. High voter turnout and grassroots fund-raising revitalized the 2008 election; but big promises in the face of extraordinary challenges leave the President and Congress vulnerable to an expectation gap. Younger voters—particularly those of the so-called “millennial generation”—will want to see results, and inaction risks their disenchantment and frustration.³⁴⁵

It will be devastating if those with a professed faith in democracy do not live up to campaign promises of competence, transparency, and change. Measures that enhance public faith in Congress's ability to conduct meaningful oversight are essential, but asking for real change from members who must continue to raise money from regulated industries will be difficult, if not impossible. In light of the need to address looming crises in health care, energy, and finance, a better source of campaign funding is needed.

Democratic institutions are the public commons, but they have been privatized to our detriment. A recent poll showed that eighty-two percent of Americans believe congressional candidates should be banned from receiving contributions from industries “vital to the financial and national security of the country.”³⁴⁶ Meanwhile, another poll showed that seventy-three percent of voters believe that political donations to lawmakers were “a major factor in causing the current financial crisis on Wall Street,” and more than two-thirds of voters support public funding of congressional elections.³⁴⁷

However, public opinion does not generally track the state of the law in this area. Forty-two percent of Republicans thought that participation in the

344. DEWITT, *supra* note 335, at 5.

345. See MORLEY WINOGRAD & MICHAEL D. HAIS, *MILLENNIAL MAKEOVER: MYSPACE, YOUTUBE, AND THE FUTURE OF AMERICAN POLITICS* 4 (2008).

346. Zogby International, *Zogby Poll: Voters Not Sold on Government Bailout*, Sept. 21, 2008, <http://www.zogby.com/search/ReadNews.cfm?ID=1555> (last visited Aug. 21, 2009).

347. Lake Research Partners & The Tarrance Group, Memorandum, *National Polling on Support for a Proposal to Tackle Big Money in Congressional Elections*, Feb. 2009, available at <http://www.commoncause.org/atf/cf%67Bfb3c17e2-cdd1-4df6-92bebd4429893665%7D/POLLING%20MEMO%20FEB%202009%20FINAL.PDF>.

presidential public funding system should be mandatory (although public funding systems must be voluntary to be constitutional under prevailing law), and fifty-seven percent of all Americans favored spending limits, which are also unconstitutional. The intense public support for spending limits, even for mandatory public financing, is evidence of the deep skepticism that the public harbors about the role of money in politics.³⁴⁸

A system of public financing would also lift up the grassroots. More than two-thirds of the 500,000 Obama volunteers that answered the campaign's post-election survey responded that they "would like to continue to volunteer in the communities as part of an Obama for America 2.0 organization."³⁴⁹ By providing this burgeoning small-donor movement with a next-stage role, a revitalized campaign finance structure would help ensure that progressive ideas encounter a political structure that can support them.³⁵⁰

Public funding would enable members of Congress to listen to, and trust in the support of, their constituents. They would also spend less time fund-raising, and more time solving the critical challenges of the day. According to a study in *American Politics Research*, candidates who participate in full public funding programs spent sixty-six percent less time doing fund-raising.³⁵¹ The study also found that candidates who participated in public funding spent just eight percent of their personal schedules on fund-raising, as compared with twenty-four percent for other major party candidates.³⁵²

Moreover, even with all of the positive developments, money still carried the day in the 2008 election cycle. "The 2008 campaign was the costliest in history, [totaling] \$5.3 billion in spending by candidates, political parties, and interest groups on both the congressional and presidential races"—"a 27

348. Jeffrey M. Jones, *Campaign Financing Appears to Be Non-Issue for Voters*, GALLUP, Oct. 30, 2008, <http://www.gallup.com/poll/111652/Campaign-Financing-Appears-NonIssue-Voters.aspx> (last visited Aug. 21, 2009).

349. Micah Sifry, *OFA 2.0 Still a Work in (Hidden) Progress*, TECHPRESIDENT, Dec. 15, 2008, <http://techpresident.com/node/6612> (last visited Aug. 21, 2009).

350. John Halpin & Ruy Teixeira, *Progressivism Goes Mainstream*, AM. PROSPECT, Apr. 20, 2009 (citing two new studies that show progressive values characterize the views of more than two-thirds of Americans), available at http://www.prospect.org/cs/articles?article=progressivism_goes_mainstream.

351. Peter L. Francia & Paul S. Herrnson, *The Impact of Public Finance Laws on Fund-raising in State Legislative Election*, 31 AM. POL. RESEARCH 520, 531 (2003), available at <http://apr.sagepub.com/cgi/reprint/31/5/520>.

352. *Id.* The study included data from candidates who participated in partial public funding programs in Minnesota, Wisconsin, and Hawaii. However, such data does not include the time spent by candidates in a hybrid model because of the significant differences between those programs and the hybrid model. The partial funding programs in Minnesota, Wisconsin, and Hawaii function essentially as government subsidies providing candidates with a modest grant without additional matching funds. In contrast, the hybrid models in New York City and the proposed FENA bill provide a significant grant plus matching funds that supercharge small contributions.

percent increase over the \$4.2 billion spent in the 2004 campaign.³⁵³ The presidential candidates alone spent more than \$1 billion,³⁵⁴ and the money pressure is sure to intensify in 2010 for congressional candidates and in the 2012 presidential election. Much of the money in the past election cycle still came from large donors seeking to purchase influence and access.

This insight—that the source and size of contributions should be the focus of reform—in combination with the other lessons about voter engagement and the infinite potential of the Internet, amounts to a revitalized approach to changing politics as it has been known.³⁵⁵ The campaign finance agenda should be understood as a key part of a general restructuring of modern campaigns, and now, perhaps, of governance,³⁵⁶ that creates a new partner in the grassroots through openness and accountability, energizing voters and citizens in a democracy that remains empowered long past election day.³⁵⁷

While the “long tail” does not yet wag the dog, it could. Reforms that supercharge smaller donations and require politicians to work with the grassroots—as the new models of public financing do—would democratize campaigns and make politicians more accountable to the many—voters, volunteers, and donors—than they are to the wealthy few.³⁵⁸ Enhancements in competition for congressional seats would be another welcome change.³⁵⁹

The history of BCRA shows that the positive implications of a meaningful shift in incentives for politicians and political institutions can be hoped for, if never fully anticipated. Just as removing soft money from the campaign equation changed the game and brought millions of new donors under the tent,

353. Jeanne Cummings, *2008 Campaign Costliest in U.S. History*, POLITICO, Nov. 5, 2008, available at <http://www.politico.com/news/stories/1108/15283.html> (last visited Aug. 21, 2009).

354. Kenneth P. Doyle, *Record-Shattering \$1.8 Billion Cost for '08 Presidential Campaign, FEC Says*, in BNA MONEY & POLITICS REPORT (2009); Cummings, *supra* note 353.

355. See, e.g., Hasen, *supra* note 198, at 5–6.

356. It appears that the Obama Administration is interested in exploring new modes of public accountability and interaction. See, e.g., Ari Melber, *The President's Never-Ending Virtual Town Hall*, THE NATION, Mar. 27, 2009, <http://www.thenation.com/doc/20090413/melber> (last visited Aug. 21, 2009); Presidential Memorandum on Transparency and Open Government, Jan. 21, 2009, available at http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government/ (last visited Aug. 21, 2009).

357. For an even broader view of this agenda, see Stuart Comstock-Gay & Joe Goldman, *More Than the Vote*, AM. PROSPECT, Dec. 12, 2008, available at http://www.prospect.org/cs/articles?article=more_than_the_vote; Bob Edgar, *A 21st Century Agenda for Democratic Renewal*, AM. PROSPECT, Dec. 15, 2008, available at http://www.prospect.org/cs/articles?article=a_21stcentury_agenda_for_democratic_renewal; Larry Marx, *A Broader Definition of Democracy*, AM. PROSPECT, Dec. 15, 2008, available at http://www.prospect.org/cs/articles?article=a_broader_definition_of_democracy.

358. For another, related approach, see Schmitt, *supra* note 3. But see Wertheimer, *supra* note 5 (demonstrating that public financing can only work in a system of rules).

359. TORRES-SPELLISCY ET AL., *supra* note 314, at 1–2.

a voluntary program of public funding would likely alter politics in positive ways that even close observers cannot now foresee.³⁶⁰

Assumptions about the relationship between money and speech are worth revisiting in light of this new paradigm. Contrary to a popular misconception, in the Supreme Court's landmark campaign finance case, *Buckley v. Valeo*,³⁶¹ the Court never equated money with speech. Instead, the Court examined the cost of campaigns and concluded that considerable amounts of money were needed to communicate a candidate's message to voters. Gasoline was the operative metaphor for campaign cash, and contributions therefore powered the campaign car.

The much lower—although certainly not negligible—cost of Internet-based communications with massive numbers of people, and the evanescence of both broadcast television as a medium and of the broadcast audience,³⁶² should trigger a serious reconsideration of the Court's literal linear metaphor. A Brennan Center article suggested early last year that:

[T]oday, speech is not nearly as dependent on money as it once was because of technologies that allow expanded reach with little additional marginal cost. A reflexive money-as-speech metaphor misses out on some of this new reality. Vast sums of money are not the only, or perhaps even the preferable, way to get out a political message. Our political campaigns are now driving hybrids.³⁶³

Or as a reporter for the *Atlantic Monthly* put it: "Obama's campaign is admired by insiders of both parties for its functional beauty—not just admired but gawked at, like some futuristic concept car leaking rocket vapor at an auto show."³⁶⁴

While the small-donor revolution has yet to impact congressional politics in a significant way, its impact on presidential campaigning and the national parties encouraged far higher rates of contribution to national politics from average citizens and small donors generally. And with FENA or some similar and comprehensive system of encouragement for small donors, the new online and offline tools and party structures stand ready to make expanded small-donor support for congressional candidates a reality.

360. A call to focus on small donor reforms is also reflected in recent work by Michael Malbin of CFI. See, e.g., MALBIN, *supra* note 218, at 11, 14, 21; Michael J. Malbin, *Rethinking the Campaign Finance Agenda*, FORUM, Vol. 6, Issue 1, Art. 3 (2008), http://www.cfinst.org/books_reports/Participation/Malbin_Rethinking.pdf (last visited Aug. 21, 2009).

361. 424 U.S. 1, 65 n.76 (1976); see also Ciara Torres-Spelliscy, *Justices Should Know by Now—Money Is Not Speech*, SEATTLE POST-INTELLIGENCER, June 10, 2008, available at http://www.seattlepi.com/opinion/366105_focus08.html (last visited Aug. 21, 2009).

362. Tim Arango, *Broadcast TV Faces Struggle to Stay Viable*, N.Y. TIMES, Feb. 27, 2009, available at <http://www.nytimes.com/2009/02/28/business/media/28network.html?ref=todayspaper>.

363. Torres-Spelliscy, *supra* note 361.

364. Green, *supra* note 185.

As Brooks Jackson put it in his devastating depiction of congressional corruption in the 1980s: “The psychological, even subconscious effect of money is to chill initiatives that donors don’t want. As a practical matter, the outcome is the same as if votes had been sold outright. The effect on national policy and well-being is the same.”³⁶⁵

Voters do connect the dots between the money in politics and failed policies in Washington. An agenda for the new administration should include a codification of the principles that the Obama campaign used to revitalize the 2008 election—principles that support a small-donor model for presidential public financing, and a similar program for members of Congress.

People-powered politics is the way forward, but these new and small donors did not come out to join the party all on their own. In the wake of BCRA, candidates and parties put considerable energy into raising their hard money receipts. The Democratic Party, in particular, focused on grassroots organizing in an effort to rebuild its image as the party of the working class and to make up for years of reliance on soft money.

After more than two decades of partisan fund-raising that pushed the regulatory envelope, campaign finance reform achieved the remarkable: by forcing national parties to wean themselves off of soft money, BCRA sparked a return to the grassroots and, in terms of national politics, handed the political parties and the race for the presidency back to the people.

365. JACKSON, *supra* note 24, at 109.

