

REPORT

EVALUATING THE BIPARTISAN CAMPAIGN REFORM ACT (BCRA)*

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INTRODUCTION

We write this report because we believe that our research and that of other political scientists speaks directly to issues in *McConnell v. FEC*, Civil Action No. 02-582 (D.D.C.) (including all consolidated cases). We hope the theoretical and empirical issues that we and other scholars have wrestled with in studies of public opinion, political parties, campaign finance, elections, and related subjects will be helpful to the courts as they seek to maximize electoral integrity and personal freedom in this case. To be more specific, we believe that a careful analysis of the empirical issues raised in this case provides very strong reason to support Congress's and the President's judgment and uphold the Bipartisan Campaign Reform Act of 2002 (BCRA).

We must be clear from the outset that we limit our consideration of the BCRA to its two main components: the ban on the use of soft money donations by the national parties (extending to state and local committees with regard to federal elections), and the more realistic dividing line between electioneering and issue speech BCRA provides over the Federal Election Campaign Act (FECA). We are satisfied that the other pieces of the bill do not in any way conflict with our analysis of these two sections. While the soft money and electoral communications provisions are separate, our examination shows that they are highly complementary. For example, the notable rise in the national parties' soft money receipts in the last three election cycles from \$86.1 and \$101.6 million in 1991–2 and 1993–4 to \$262.1, \$224.4, and \$495.1 million in 1995–6, 1997–8, and 1999–2000 was fueled largely by the parties' ability to air candidate-oriented or electioneering "issue ads" with this money.¹ Though our analysis

* Editor's note: This report was submitted as an expert declaration in *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003). The Supreme Court will hear oral arguments in the case on September 8, 2003. See *McConnell v. FEC*, 123 S. Ct. 2268 (2003). The report appears here in substantially the same form as the version filed with the three-judge panel of the District of the District of Columbia, including the original citation format, but without extensive supporting appendices.

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1. Federal Election Commission, *FEC Reports Increase in Party Fundraising for 2000*, at <http://www.fec.gov/press/051501partyfund/051501partyfund.html> (May 15, 2001).

reveals the value of each provision by itself, in this case the whole is greater than the sum of its parts, a point we will demonstrate in greater detail below.

To address the major issues raised in this case we have organized our discussion into three parts. The first deals with soft money, the second with issue advocacy, and the third with the interaction between the two. In part one, we initially speak to one of the core constitutional issues in this case, corruption and its appearance, then turn to two topics important to the jurisprudence on campaign finance: the impact of BCRA on political parties and on voter turnout. Part two begins with a description of issue advocacy in the 1998 and 2000 elections and an analysis of the free speech implications of BCRA's definition of issue advocacy, then proceeds with an examination of the corruptive potential of issue advocacy under the current system. Finally, part three addresses the interactions between BCRA's two halves and concludes by summing up the main findings and our view of BCRA. Our discussion is heavily informed by a variety of empirical data ranging from FEC reports, campaign finance information from several states, tracking of television advertising, polls, an array of declarations and depositions, and press reports. As political scientists concerned with the health of American democracy and its electoral system, we find it reassuring that our examination of these data lead us to conclude that BCRA is a reasonable response to a clear threat to the integrity of our electoral system and is likely to have little or no harmful impact on free speech rights, political parties, or voter turnout.

I. SOFT MONEY

A. Corruption

1. Defining corruption

In applying the term "corruption" to campaign finance practices one immediately encounters both a variety of definitions and an evolving sense of how the public and politicians have come to view campaign financing. On the latter point, two leading scholars observe:

A generation ago, few people would have questioned the propriety of contributions to political candidates; the dominant belief used to be that those who felt strongly about electoral outcomes were entitled to contribute time, resources, and funds to get their candidates elected. . . . Public attitudes and norms have changed so much that politicians, for fear of appearing corrupt, are unwilling to acknowledge that large campaign contributors receive special favors or consideration. The

politically correct position is that large contributors only obtain greater “access” to the candidate/politician.²

Putting aside public perceptions for the moment, we are left with various versions of corruption from case law and congressional debate. The most restrictive of these would limit its meaning to explicit quid pro quo bribery, while the more expansive one, typified by the term “privileged access,” emphasizes unequal opportunities to influence policy-makers that accrue to big financial players. Another form of corruption, often called “undue influence,” lies somewhere in between bribery and unequal access. In this version, well-financed actors exercise disproportionate influence on policy not through the existence of explicit quid pro quo arrangements, but through the implicit understanding that a legislative vote or administrative action might generate financial support or opposition from a moneyed interest.

How to choose among these alternatives? The floor debates over BCRA and its 1974 predecessor, FECA, clearly indicate that members of Congress believe corruption encompasses both undue influence and unequal access. The Congressional Record is full of references to members’ concern over their meetings with large contributors and the potential for influence that this face-to-face contact breeds. The Supreme Court appears to have a similar view. For example, in *Nixon v. Shrink Missouri Government PAC* the majority notes directly that:

In speaking of “improper influence” and “opportunities for abuse” in addition to “quid pro quo arrangements,” we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.³

And, in *Federal Election Commission v. Colorado Republican Federal Campaign Committee* the Court expresses concern about privileged access by noting that parties often serve as “matchmakers whose special meetings and receptions give donors the chance to get their points across to candidates.”⁴

This perspective is consistent with the one we adopt and other political scientists adopt and reflect in their research. Political influence has been a source of abiding concern since the inception of the discipline. Political scientists, who lack the resources to investigate bribery anyway, assume a broader approach to conceptualizing influence, recognizing that it derives from different resources and is exercised in subtler, less legalistic, ways. Thus it is no surprise that the availability of data on campaign contributions following 1974 spawned a sizable literature measuring their statistical effect on various behaviors like

2. Frank Anechiarico and James B. Jacobs, *The Pursuit of Absolute Integrity* (Chicago: University of Chicago Press), 1996, p. 5–6.

3. 528 U.S. 377, 389 (2000).

4. 533 U.S. 431, 461 (2001).

legislative voting, bill sponsorship, and activity in subcommittees.⁵ By and large, these studies conclude that contributors may succeed in influencing policy in some areas, particularly on arcane questions of little interest to the broader public but of great import to a narrow group of involved citizens, corporations, unions and other organizations. Former SEC chairman Arthur Levitt's recent claim that substantial donations by accounting firms derailed his efforts in the 1990s to enact reforms of the accounting industry is a perfect example. The benefits were highly concentrated, the costs (seemingly) defuse, and the issue hopelessly complex.⁶

It is only the absence of systematic data on access that prevents political scientists from searching for relationships between access and policy-makers' behavior.⁷ Academics are no less aware than participants that successful lobbyists create relationships and trust with those they seek to persuade.⁸ This simple truth is repeated in countless accounts of influential Washingtonians who are confidants of presidents, trusted advisors to legislators, or relatives of either.⁹

There is, moreover, ample anecdotal evidence that donations help build relationships with policy-makers. Indeed, an industry of experts (often called "government affairs specialists") exists to advise donors on how to use their funds to meet and interact with government officials.¹⁰ The result, one contributor notes:

There is no question that those who, like me, make large soft money donations receive special access to powerful office holders on the basis

5. For instance, see Janet M. Grenzke, "PACs and the Congressional Supermarket: The Currency is Complex" (*American Journal of Political Science* 33: 1-24), 1989; John R. Wright, "Contributions, Lobbying, and Committee Voting in the U.S House of Representatives" (*American Political Science Review* 84: 417-38), 1990; John R. Wright, "Political Action Committees, Campaign Contributions, and Roll Calls: An Organizational Perspective" (*American Political Science Review* 79: 400-14), 1985; James B. Kau and Paul H. Rubin, *Congressmen, Constituents, and Contributors* (Boston: Martinus, Nijhoff), 1982; John W. Kingdon, *Congressmen's Voting Decisions* (3d ed., Ann Arbor: University of Michigan Press), 1997; William Welch, "Campaign Contributions and Legislative Voting: Milk Money and Dairy Price Supports" (*Western Political Quarterly* 35: 478-95), 1982.

6. Referring to the industry resistance to his attempts to institute accounting reforms and the power of their contributions, Levitt claims:

They waged a war against us, a total war. . . . It used to be that if industries had a problem they would try to work it out with regulatory authorities. Now they bypass the regulators and go right to Congress. It's almost impossible to compete with the effect that money has on these congressmen.

Jane Mayer, "The Accountants' War," *The New Yorker*, April 22 & 29, 2002, p. 64.

7. For an exception, see Richard L. Hall and Frank W. Wayman, "Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees" (*American Political Science Review* 84: 797-820), 1990.

8. For instance, see John Mark Hanson, *Gaining Access: Congress and the Farm Lobby, 1919-1981* (Chicago: University of Chicago Press), 1991.

9. Carl Hulse, "In Capitol, Last Names Link Some Leaders and Lobbyists," *New York Times*, August 4, 2002, p. A1.

10. For example, see the affidavit of Daniel H. Murray, October, 1998.

of the donations. I am close to a number of Senators, I see them on a regular basis, and I now regard the Majority Leader as a close friend. I understand that the unusual access I have correlates to the millions of dollars I have given to political party committees, and I do not delude myself into feeling otherwise. Not many people can give soft money on that scale, and it naturally limits the number of those with that level of access.¹¹

This access and these relationships are highly prized. Several insiders explain why:

While an elected official of course does not have to do something because somebody gave, a contribution helps establish a relationship, and the more you give the better the relationship. It is not that legislation is being written in direct response to somebody giving a lot of money. Rather it is one step removed: relationships are established because people give a lot of money, relationships are built and are deepened because of more and more money, and that gets you across the threshold to getting the access you want.¹²

If you have a particular problem in getting to see a Senator you can always go to the Senate Campaign Committee, and all we say is “we want five minutes with Senator X.” Like I say, we are not buying votes, we just want five minutes to see that person.¹³

Such statements suggest both that the line between access and influence is often hazy and, just as often, is inconsequential. The pursuit of access is so fervid precisely because it so often leads to political influence. And that is the nub of the matter of the issue of corruption. While it is inevitable that influence and access to policy-makers will be unevenly distributed in a large popular democracy, it is not inevitable that opportunities to sway the policy-making process—the very heart of the representative process—should be so skewed toward those who fund election campaigns most generously.

Aside from the first-hand knowledge of insiders, there are the impressions of the great mass of American citizens. Many of them believe that moneyed interests—whether corporations or trade associations or unions or wealthy individuals—use their cozy relationships with policy-makers to exert special influence over government. A majority of Americans, for instance, agree with survey statements such as “government is pretty much run by a few big interests looking out for themselves.”¹⁴ Unlike the insiders, they, as “outsiders” form

11. Declaration of Peter L. Buettenwieser, July 19, 2002, p. 6–7.

12. Declaration of Robert Rozen, April 17, 1997, p. 3.

13. Center for Responsive Politics, *PACs on PACs: The View from Inside* (Washington: Center for Responsive Politics), 1988, p. 7.

14. “Would you say government is run by a few big interests looking out for themselves or that it is run for the benefit of all of the people?” This item has been repeated every two years since 1964 (except 1986) by the National Election Studies. See National Election Studies, *Is the*

opinions on the basis of second-hand knowledge—and from inferences and appearances. From their reactions arise a profound skepticism about the fairness and responsiveness of the American political system, and inevitably a lack of confidence in it and support for it. On the crisis of confidence, the current scandal enveloping the financial markets provides a useful analogy. Both democracy and markets function well only with the trust and confidence of the public. In both cases, Congress has sought to restore public confidence, whether in corporate accounting and the valuation of securities, or the integrity of elections and policy-making. Indeed we would argue that confidence in elections and government is a precious resource worthy of even greater vigilance than the accuracy of corporate accounting.

The parallels extend beyond the matter of confidence. In both instances, Congress and the president have faced the same pivotal regulatory question: whether it is better to punish wrong-doers after the fact, or to make wrong-doing less likely in the first place. In both, too, they believed that the systems in question create incentives for, and certainly allow, behavior inimical to the interests and desires of ordinary citizens, and they have chosen to alter those incentives and behaviors. While legislators depended on advice about corporate finance and governance from experts like Alan Greenspan and Warren Buffett, they had little need for outsiders to explain how policy-makers give special service and grant special attention, possibly even deference, to donors of large sums of soft money. Their reaction in both cases was to alter or eliminate the structural features that threaten to undermine these systems. Given the importance of public confidence to democratic government, we regard such prophylaxis, where possible and reasonable, as highly desirable.

2. *The corruptive potential of soft money*

Allegations of corruption are a frequent part of partisan give and take as each side accuses the other of bad faith. For example, during the Clinton administration the overnight stays in the Lincoln bedroom helped spark a series of accusations of influence peddling ranging from special dispensation for burial in Arlington Cemetery for a large donor to more serious charges that defense procurement and foreign policy had been affected by contributions from Loral Industries and Chinese officials. Each case involved the raising of soft money by the Democratic National Committee (DNC) that was, at least in part, used to pay for issue ads aiding Democratic candidates.¹⁵ In all instances, moreover, the chorus of disapproval prominently featured the Republican National Committee (RNC) or its officials, whose filings in this case argue that soft money poses no

Government Run for the Benefit of All 1964–2000, at http://www.umich.edu/~nes/nesguide/toptable/tab5a_2.htm.

15. See generally Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105-167, at Chapters 5, 7, 18 & 32 (Majority Report).

danger to parties and that its availability will not encourage the parties to corrupt the policy-making process.

We do not know, nor do we have all the evidence necessary to determine, whether the DNC was guilty of trading legislative or policy favors for donations in any of these instances. What is clear, however, is that all of these charges are credible on their face. There are reasonable grounds from the public record to be suspicious of the Democrats' conduct and to be suspicious of the Republicans in other instances.¹⁶ We are in a better position to evaluate the RNC's broader claim in this case that soft money does not corrupt. Critics of BCRA essentially assert that it cannot, that a variety of structural features insure money routed through parties has no impact on policy-making. This argument is familiar from the record in *Colorado II* where it was rejected by the Court. In its various forms it rests on three broad assumptions: that parties are physically separate from policy-makers, that identities of donors and their interests are obscured when money is given to parties, and that party ideology dominates the interests of donors. We review them to show how they apply in the current case where soft money is at issue.

First is the notion that parties are in a sense physically separated from the elected and appointed officials who make governmental policy. The current chairmen of the DNC and RNC, for instance, are not government officials. That is not true, however, of the parties' Senate and House campaign committees, organizations that raised \$212 million in soft money during the 1999–2000 election cycle and are headed by sitting legislators.¹⁷ Simply put, no wall between the national parties and the national government exists.

The challenge to BCRA also involves the state parties, since it would prohibit them from using soft money for almost all activities related to federal elections.¹⁸ State parties are not ordinarily run by federal officials. But that does not preclude very close financial relationships with federal parties and federal officials. A recent study by the Center for Public Integrity shows that state parties received 46 percent of their funds in 2000 from the soft money accounts of federal committees.¹⁹ Nor is it clear that the remaining 54 percent was raised without any help from Washington officials. Our examination of campaign finance data from Colorado and Missouri for two previous cases revealed that federal officials, from Cabinet secretaries to members of Congress, were the star attractions in major fundraising events sponsored by the parties in these states. One need only read the itinerary of Vice President Dick Cheney in

16. *Ibid.* See also Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105-167, at Chapters 39, 10–15 & 22–25 (Minority Report).

17. Federal Election Commission, *National Party Non-federal Activity*, at <http://www.fec.gov/press/051501partyfund/tables/nonfedsumm2000.html>.

18. Levin Amendment funds are the exception.

19. The Center for Public Integrity, at <http://www.publicintegrity.org/dtaweb/index.asp?L1=20&L2=9&L3=0&L4=0&L5=0>.

2000 to see this pattern repeated. Among the scores of events that the Vice President headlined were numerous fundraisers for gubernatorial candidates whose proceeds went to the state party. Again, we see no political distance between state party organizations and national policy-makers.

The involvement of federal parties and officials in the financial affairs of state parties highlights several realities that are relevant here. First, the overwhelming financial muscle of the national committees—the result of the roster of effective fundraisers holding federal office and donors' interest in federal matters—has rearranged the traditional relationship between state and federal parties, with the former now operating frequently as virtual appendages of the latter. National organizations hire staff for state parties and are deeply involved in their operations. Even if they were not, we should point out that the state committees would retain an interest in federal elections within their boundaries. As former Senator Tim Wirth (D-CO) notes:

When I solicited contributions for the state party, in effect I solicited funds for my election campaign. I understood the solicitees who made contributions to the party almost always did so because they expected that the contributions would support my campaign in one way or another, and for the most part they expected that I would remember their contributions.²⁰

Such ties may be natural, but their existence shows that routing money through state parties does nothing to insulate it from federal policy-makers. Even if an official like Wirth were not directly raising money for state parties, these organizations might very well attract many of the same donors eager to make additional contributions beyond the federal limits to help a federal candidate's campaign.

What is less natural is the sheer complexity of the web of financial interactions between these organizations. The welter of state and federal regulations makes it advantageous for parties to act through national committees in some cases and state organizations in others.²¹ The result is a confusing blizzard of transactions between various federal, state, and local organizations as parties' accountants search for the regulatory environment most conducive to their intended action. Some of these maneuvers—nearly instantaneous transfers of funds between multiple committees—are worthy of anything practiced by Enron. These transactions deepen the relationships between various party organizations and have the additional effect of adding a level of opaqueness to campaign financing. The difficulty of tracking money once it reaches state parties is evident in the tribulations reported by the Center for Public Integrity in its study of state parties: compiling the data took a year (due to the vastly

20. Declaration of former Senator Timothy E. Wirth, May 5, 1997.

21. This is particularly true because of the need to allocate varying portions of hard and soft money for different activities. See David B. Magleby, ed., *Financing the 2000 Elections* (Washington: Brookings Institution), 2002, especially chapters 4 & 6.

different arrangements in the states) and revealed sizable discrepancies between amounts reported by federal and state committees.²² The use of state party organizations to campaign on behalf of federal candidates thus undermines the public disclosure that is one of the widely applauded hallmarks of FECA.

Rejecting the claim of physical separation between parties and policy-makers, however, does little justice to the central roles that parties and their leaders play in campaign financing and policy-making. Indeed, we argued earlier that money given to parties is a more effective way of seeking influence than merely giving to individual members of Congress.²³ As a former director of the Democratic Senatorial Campaign Committee (DSCC) explained:

If you want to get to know Members of Congress, it is more efficient to write a \$15,000 check to the DSCC and to get the opportunity to meet them at our various events than it would be to write fifteen \$1,000 checks to fifteen Senators, or Senators and candidates.²⁴

We agree and note that this is precisely the point that parties make to donors. But this still ignores the identity of the officials that donors meet. Party committees are headed by or enjoy close relationships with their leading officials, individuals who by virtue of their positions, reputations, and control of the legislative party machinery have special influence on their colleagues.²⁵ Donations—especially six- and seven- figure soft money contributions—are usually made by the arrangement with or knowledge of these most influential members of the party. Little political sophistication is needed to see that these are the people that donors most wish to meet and persuade, and that the system obliges them. The nexus between donor and policy-maker is never closer than when a legislative campaign committee mediates the transaction.

Second, the argument persists that the interests of donors are essentially laundered from their contributions to parties. It presents this cleansing as a byproduct of aggregating the hundreds of thousands of donations flowing to party committees. In the process, proponents claim, the identity of particular donors is lost. The Court specifically considered and rejected this claim in *Colorado II*, noting the systematic efforts of parties to link donations to specific campaigns via the “tally” system. In the 2000 elections tallying was superceded by an even more direct innovation, “joint fundraising committees” sponsored by Senate candidates and the party campaign committees, in which Senate

22. The Center for Public Integrity, at <http://www.publicintegrity.org/dtaweb/index.asp?L1=20&L2=9&L3=10&L4=0&L5=0&State>

23. Frank J. Sorauf and Jonathan S. Krasno, “Political Party Committees and Coordinated Spending,” prepared for the Federal Election Commission in *Colorado II*, 1997.

24. Declaration of Robert Hickmott, April 8, 1997, p. 10.

25. The power of party leaders has waxed and waned considerably in the last hundred years, depending on institutional arrangements and the individuals involved. Recently, the attacks on the committee system and seniority following Watergate have left party leaders at their most powerful point in generations. See David W. Rohde, *Parties and Leaders in the Postreform House* (Chicago: University of Chicago Press), 1991.

candidates in effect raised soft money for use in their own races.²⁶ Contrary to claims, donating to parties does nothing to obscure the identity or interests of the donors. Indeed, as the Court notes, the parties function as “matchmakers” introducing donors and candidates and providing opportunities for them to interact.²⁷ We cite one example among many:

On February 27, 1997, Senate Majority Leader Trent Lott sent out a fundraising letter on behalf of the National Republican Senatorial Committee promising contributors “plenty of opportunities to share [their] personal ideas and vision with some of our top Republican leaders, senators, and panel members.” Failure to contribute, the letter apprised potential donors, meant that “you could lose a unique chance to be included in current legislative policy debates—debates that will affect your family and business for many years to come.”²⁸

These patterns surely hold for soft money as well as hard. In fact, given the vastly greater sums of the largest soft money donations—the average amount given by the top 800 soft money donors in 1999–2000 was \$375,000—it is easy to understand why parties would be reluctant to lose track of these benefactors.²⁹ Contributors believe that their generosity is not forgotten, as a government relations specialist notes:

In recent years, contribution of soft money—that is, money that can be donated outside the purview of the Federal Elections Campaign Act—has proven to provide excellent access to federal officials and to candidates for federal elective office. Since the amount of soft money that an individual, corporation or other entity may contribute has no limit, soft money has become the favored method of supplying political support. As described above, soft money begets both access to law-makers and membership in groups which provide ever greater access and opportunity to influence.³⁰

Thus the possibility that the sheer amount of money raised by the parties has had the effect of making each individual contribution less important runs into the countervailing trend of larger and larger donations. The largest soft money gifts are many times the \$20,000 limit on hard money donations to parties, a limit that the Court characterized as “not small” in observing that these moneys may be

26. See Common Cause, *Senate Joint Fundraisers Rake in \$17.8 Million in Soft Money during 1999–2000*, at <http://commoncause.org/publications/march01/031601st.htm> (March 16, 2001). See also Declaration of Peter L. Buttenwieser, July 19, 2002.

27. “[T]he record shows that even under present law substantial donations turn the parties into matchmakers whose special meetings and receptions give donors the chance to get their points across to the candidates.” 533 U.S. at 461 (2001).

28. Affidavit of Alan Baron, October 14, 1998, p. 21.

29. See Brennan Center, *Letter From Political Scientists*, at http://www.brennancenter.org/programs/downloads/polisci_letter71001.pdf (July 9, 2001).

30. Affidavit of Daniel H. Murray, October, 1998, p. 6–7.

used to benefit specific candidates.³¹ It is also worth noting that none of the research on the impact of donations cited above tests the effect of six- and seven-figure donations (see note 5), instead examining the more pedestrian four- and five-figure sums that individuals and political action committees (PACs) may give directly to candidates under the FECA of 1974. It seems clear that the much greater size of the individual donations at issue here poses a proportionately larger risk of influencing their beneficiaries than do contributions of hard money.

The third part of the argument that parties are structurally immune from being corrupted or corrupting involves their ideology. In this view the goals, programs, and interests of a monolithic Democratic or Republican party, not the interests of the original donor, attach to the party's contributions and expenditures. So, even though the Democrats receive money from corporations and the Republicans from labor unions, each party's views take precedence over these donors' positions. But this argument gives far too much credit to parties' need for ideological consistency. When it comes to elections, parties know only one ideology, the capital "D" or "R" after the candidates' names. That practicality is reflected in funding decisions made by party committees that reflect virtually every political consideration save the candidates' views on the issues; mavericks are more than welcome if they can win.³² Thus the parties run issue ads that eschew using the words "Democrat" or "Republican" in favor of reciting the virtues or (more likely) the shortcomings of the candidates.³³ Those same ads may even take positions contrary to the party's orthodoxy when it is judged helpful to the candidate, such as a spot produced by the Republican Party of Wisconsin which praised its Senate nominee for having "stood up to his own party."³⁴

These tendencies are exemplified by the rise of legislative campaign committees (LCCs). Once moribund extensions of the party caucuses, these organizations have gained prominence commensurate with their receipts since the late 1970s. In Congress the LCCs are the two parties' Senate and House committees; many states have similar organizations or the party's caucus or its leaders act as LCCs by raising and distributing funds. As appendages of the caucuses and their leadership, the LCCs stand apart from the traditional party organizations in two salient ways. First, they have virtually no link to the parties' local organizations or local activists or to its platform. Instead, LCCs

31. 533 U.S. at 461 (2001).

32. The most recent example is the RNC's ill-fated involvement in the 2002 gubernatorial primary in California on behalf of former Los Angeles mayor, Richard Riordan, who eventually lost to a candidate who complained that Riordan's views were much closer to a Democrat's than to a Republican's.

33. Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill" (*PS* 35, No. 2: 207-12), 2002.

34. *Ibid.*

are created by groups of sitting legislators and are responsible to them and only to them.

Second, the LCCs have a set of political interests quite separate from those of the broader party. They exist to win elections, to maximize the number of their partisans in a chamber and, above all, to win or maintain a legislative majority with all of the perks that come with it. As a result, their interest and concern for the rest of the party ticket are minimal, and they accept any party ideology at their own convenience. In at least one state, New York, they have intervened in local primaries in opposition to the endorsement of the local party. The leading observer of New York's LCCs writes:

Traditional party leaders perceive these new units to be unconcerned with augmenting party membership, supporting the ticket, or aiding institutional support activities. The two camps do share a concern for winning state legislative elections and controlling a majority caucus, but that is about all. We may be hard pressed to distinguish LCCs in New York as little more than independent consulting firms working for the benefit of the legislative caucus and its leadership.³⁵

In the end, there is no reason for its beneficiaries to view money routed through the parties as "party money" instead of associating it with its actual donors, whose identities are often well known to them.

3. *Appearances*

Buckley and its successors refer not only to corruption but also to its appearance. To this point the concern about appearances seems to be mainly rhetorical; we are not aware of any campaign finance cases decided solely on the basis of how a certain practice *looks*. One reason, of course, is that behavior that seems corrupting may in reality be benign. We would not argue that irrational beliefs should drive public policy. At the same time, however, the attention devoted to appearances reinforces the notion that the purpose of campaign finance regulation is to insure the public's faith in the electoral system. This seems to us to be clear both because of the obvious importance of trust for the functioning of democratic government and also because we doubt that some other justifications for combating corruption—such as the desire for honest and efficient administration—rise to the level of constitutional imperative.

If public confidence is the goal, then the public's perceptions are at least as important as reality. We do not take this as an excuse to prohibit a vast sweep of campaign finance activities or to use polls to legislate. We do argue that in this specific case that there is ample reason that the public's suspicions about the corruptive impact of soft money are reasonable. As we have noted, citizens skeptical about the influence of large donations can find agreement from

35. Daniel Shea, *Transforming Democracy* (Albany: State University of New York Press), 1995, p. 112.

majorities in Congress, from donors, from lobbyists, from reporters and editorial writers, and from academics. Unfortunately, the sheer complexity of campaign finance regulation makes it difficult for citizens to take specific stands on specific categories of behavior created by campaign finance statutes. Nonetheless, the evidence is overwhelming that people view extra large contributions—the sort that soft money makes possible—as contrary to honest and unbiased policy-making.

The evidence for this comes from a variety of polls. For example, in March 22–25, 2001, the *Washington Post* asked respondents (N=903) if they “think politicians do special favors for the people and groups who give them campaign contributions, or not?” Ninety-three percent agreed and the vast majority of this group believed that favors were granted often (as opposed to sometimes), that it is a big problem for government, and that this behavior is unethical, although they were split on whether this was illegal or not.³⁶ Under the circumstances, it is no surprise to discover that citizens overwhelmingly support restrictions on contributions to parties, occasionally in fairly specific terms:

“As you may know, federal law limits the amount of money people can contribute to any presidential candidate’s campaign, but people can give as much money as they want to any political party. Do you think the amount of money people can contribute to political parties should be limited, or unlimited?”—63% limited, 33% unlimited.³⁷

“Congress is now considering campaign finance reform legislation proposed by Senator John McCain that would ban unregulated contributions to political parties, even though some leading Republicans oppose this bill. Do you favor or oppose such legislation?”—56% favor, 26% oppose.³⁸

“As you may know, ‘soft money’ is the amount of money that individuals, businesses and labor unions are legally allowed to contribute to the national political parties. Would you favor or oppose new federal laws limiting the amount of soft money that any individual or group can contribute to national political parties?”—72% favor, 24% oppose.³⁹

“Congress is now considering a major campaign finance reform bill that would sharply limit the ability of businesses, labor unions and individuals to make large donations to politicians and political parties. Based

36. PollingReport.com, *Influence*, at <http://www.pollingreport.com/politics.htm>.

37. ABC News.com Poll, October 13–17, 1999. N=1,020. See <http://www.pollingreport.com/politics.htm>.

38. Bloomberg News Poll, July 31–August 5, 2001. N=1,206. See <http://www.pollingreport.com/politics.htm>.

39. CNN/USA Today/Gallup Poll, October 6–9, 2000. N=1,052. See <http://www.pollingreport.com/politics.htm>.

on what you have heard of this legislation, do you favor or oppose this legislation?"—62% favor, 25% oppose.⁴⁰

Public opinion on these matters is informed by a variety of sources. To begin with, it reflects the well-publicized opinions of the various insiders and experts that we have noted. These opinions are reported in countless reports and editorials about campaign financing and its reform. Several genres of stories use campaign finance extensively in their analysis. Campaign coverage routinely features extensive discussion of the candidates' fundraising, reinforcing the lessons that campaigns cost enormous sums, that candidates are in a desperate search for funds, and that those who succeed in raising the most money are the likeliest to win election. It takes little effort to infer a link between campaign financing and policy-making from this set of facts. Indeed it is probably more difficult to hold out against the logic that candidates in need of money and donors in need of favors fail to satisfy one another.

The exchange of favors is very much a part of reporting on policy-making. Naturally, when reporters sense possible corruption they seek out credible sources for confirmation, so many of these stories—like those we referred to at the beginning of the previous subsection about former President Clinton—feature leading political figures and other experts alleging or denying that influence-peddling has occurred. Obviously, not everything that Congress or the executive branch does lends itself to the question of how donations may have played a role, but where possible this linkage is often invoked. So it is no surprise to read in the midst of the current financial scandal of Enron chairman Kenneth Lay's contributions to President Bush's campaigns, accounting firms' financial support of Republican lawmakers (see note 6), or the lobbying of Democrats by their contributors from the technology sector. The headline in the *New York Times*, "Enron's Collapse: Enron Spread Contributions on Both Sides of the Aisle," or the *Los Angeles Times*, "Global Pressured Employees to Make Campaign Donations," are fairly typical of stories that appeared in virtually every newspaper in the country and all of its leading broadcast news shows.⁴¹ We need not endorse the general allegations of influence-peddling in these cases to point out that the fact they are made creates the appearance that political contributions may have helped cause regulators and Congress to turn a blind eye to corporate malfeasance.⁴²

Obviously, these suspicions color citizens' impressions of politicians and political parties, though neither have been held in particularly high regard

40. Bloomberg News Poll, March 12–17, 2002. N=1,203. See <http://www.nationaljournal.com>.

41. Don Van Natta, Jr., *New York Times*, January 21, 2002, and Elizabeth Douglass and Karen Kaplan, *Los Angeles Times*, April 14, 2002. In fact, its supporters credited the Enron scandal as providing the impetus behind the House's passage of BCRA.

42. Polls show that citizens perceive this link: 49 percent agreed that the "political campaign finance system" was partially to blame for the corporate scandals, one of a list of potential causes. Harris Survey, July 18–22, 2002. N=1,010. See <http://nationaljournal.com>.

throughout American history. We think it is likely that they also affect people's broader attitude toward government and their ability to influence it. Political scientists have attempted to measure trust in government and political efficacy for decades using a series of survey items appearing on the National Election Studies (NES) biennial survey like the one cited above (see note 14).⁴³ Without exception, all of these measures have worsened in the past decades as citizens have grown more suspicious about government and politicians and less confident of their own power. The explanation for these developments is complex, with both trust and efficacy related to presidential approval and satisfaction with the course of the country.⁴⁴ We think it likely that campaign financing—particularly the huge gifts of soft money given to the parties with the resulting skepticism it breeds—is among the developments undermining public opinion in these areas. That means, of course, that banning soft money will not restore public confidence to its highest levels. No single piece of legislation could. But by removing an obvious irritant, it is a step in the right direction. Results from several polls suggest as much:

“I have more optimism about government since campaign finance reform passed Congress and will be implemented in November.”—50% agree, 31% disagree.⁴⁵

“In general, if new campaign finance reform legislation were passed, do you think it would make our democratic form of government work much better than it does now, just a little better, about the same, just a little worse, or much worse than it does now?”—22% much better, 37% little better, 32% same.⁴⁶

We cannot say that the effect will be as dramatic as these surveys indicate, but we have no doubt that the soft money ban in BCRA will help.

B. *Building parties*

1. *The role of political parties*

Critics, including several of the plaintiffs in this case, argue that BCRA's ban on soft money will weaken political parties by depriving them of hundreds

43. Additional questions of note include: “Do you think quite a few of the people running the government are crooked, not very many are, or do you think hardly any of them are crooked,” “Public officials don't care what people like me think (agree or disagree),” “People like me don't have any say in what the government does (agree or disagree).” See National Election Studies, at <http://www.umich.edu/~nes/nesguide>.

44. See Jack Citrin and Donald Philip Green, “Presidential Leadership and the Resurgence of Trust in Government” (*British Journal of Political Science* 16: 431–453), 1986.

45. Institute for Global Ethics/Pew, June 6–11, 2002. N=800. See <http://nationaljournal.com>.

46. CNN/USA Today/Gallup Poll, March 9–11, 2001. N=1,015. See <http://www.pollingreport.com/politics.htm>.

of millions of dollars. As political scientists, we take this charge very seriously. Parties' health is of grave concern to us and to many other scholars. All too often the ramifications for parties have been of little or no matter to many reformers. While most political scientists may not literally agree with E.E. Schattschneider that "parties created democracy, and . . . democracy is unthinkable save in terms of parties," they would recognize and appreciate the sentiment.⁴⁷ We certainly place ourselves among their number. But assessing BCRA's effect on parties is not as clear-cut as subtracting soft money from their total receipts. It requires, first of all, a more sophisticated understanding of what parties are and what they do.

Our appreciation for parties stems from many sources. It comes from the realization that no democracies exist elsewhere in the world without them, a pattern so well established that the U.S. government offers aid to build political parties in emerging democracies.⁴⁸ It grows from an understanding of how parties developed in this country, growing organically in the earliest Congresses as members organized themselves into "factions." These factions later—fairly quickly—spread to the public as citizens adopted allegiances to groups of politicians. Most of all, however, scholars have studied the ways in which parties affect government and citizens. This literature is enormous, but we would summarize it by pointing to a few of the main roles that parties play.

To begin, parties help organize government. The same need to form standing coalitions of policy-makers instead of creating new majorities from scratch with each issue that first impelled legislators into factions still exists. Indeed, many specialists believe that attempts to stifle parties within government—with civil service protections or nonpartisan forms of governance—have hindered the ability of leaders to make and institute policy.⁴⁹ Republicans in Congress have lent tremendous support, occasionally at some political risk to themselves, to the initiatives of President Bush, just as Democrats earlier rallied behind President Clinton. They do so because they know and trust one another, because they likely share a basic philosophical perspective on government, because they appeal to the same supporters, and because they are to some extent judged by the public as a group. The last adds an important element of accountability to the system. Measuring the performance of the president by one's sense of how well the nation is doing may be relatively easy, but party labels allow voters to make the same connection for legislators, heightening their stake in their party's and the nation's progress.⁵⁰

47. E.E. Schattschneider, *Party Government* (New York: Reinhart), 1942, p. 1.

48. Thomas Carrothers, *Aiding Democracy Abroad: The Learning Curve* (Washington: Carnegie Endowment for Peace), 1999.

49. For example see James L. Sundquist, "The Crisis of Competence in Our National Government" (*Political Science Quarterly* 95: 183–208), 1980.

50. For two alternate views about party accountability, see V.O. Key (with Milton Cummings), *The Responsible Electorate: Rationality in Presidential Voting, 1936–1960* (Boston: Harvard University Press), 1966; Morris P. Fiorina, *Retrospective Voting in American National*

Parties also help organize elections in several ways. First, parties recruit and nominate candidates for office, help them get elected, and work to increase the turnout of the faithful. Historically, parties have provided labor to candidate campaigns and for turnout efforts, a reflection of an enduring campaign style before the advent of television. Thus, V.O. Key argued that one of the three key elements of parties is their organizational structure, chiefly the card-carrying or active members who do much of the nitty-gritty work in elections.⁵¹ The second way in which parties help organize elections (and citizens' perceptions in between) is more symbolic in nature. Scholars argue that, while the vast majority of Americans never formally join a political party, they identify themselves with one or the other. These ties, though cognitive in nature, are remarkably enduring and powerful, coloring how people think about political figures and political issues.⁵² For example, Republicans with little knowledge of a particular proposal of the Bush administration are apt to be sympathetic once they know its provenance, while Democrats are more likely to approach the idea skeptically. In part this agreement within parties reflects a general ideology shared by many (but not all) of its adherents, but it also illustrates the parties' central position in the political psychology of individuals and, in turn, their role in simplifying the political conflict individuals observe and the information they receive.⁵³

What binds these different aspects of parties together is an overriding purpose to gain control of the government. Indeed, Schattschneider defined parties as an "organized attempt to get power."⁵⁴ In this respect parties are much different from interest groups whose goals are related to particular public policies. Parties are interested in policy, too, but often for pragmatic reasons; by some accounts parties strategically adopt positions to attract voters as they build a majority.⁵⁵ This emphasis on winning makes them both more malleable than groups and much broader in their appeal. Interest groups would happily elect candidates under their banner if they could, but their constituencies and their

Elections (New Haven: Yale University Press), 1981.

51. V.O. Key, *Politics, Parties, and Pressure Groups* (5th ed., New York: Ty Crowell Co.), 1964.

52. The huge literature on party identification begins with Angus Campbell, Philip E. Converse, Warren E. Miller, and Donald Stokes, *The American Voter* ((Midway Reprint) Chicago: University of Chicago Press), 1960.

53. It has been a long-standing goal of many of our colleagues to create more "responsible" parties, organizations with, among other things, clearer and more comprehensive ideologies. See American Political Science Association Committee on Parties, *Toward a More Responsible Two-Party System* (New York: Rinehart), 1950. Party identification's value as a simplifying device is stressed by a huge amount of work on public opinion over the last fifty years. For one influential example see Anthony Downs, *An Economic Theory of Democracy* (New York: Harper and Row), 1957.

54. Quoted in Marty Cohen, David Karol, Hans Noel, and John Zaller, "Beating Reform: The Resurgence of Political Parties in Presidential Nominations, 1980–2000" (Presented at Annual Meeting of the American Political Science Association), 2001, p. 21.

55. See Anthony Downs, *An Economic Theory of Democracy* (New York: Harper and Row), 1957.

platforms are too narrow to compete successfully for office. Parties with their necessary “big tent” compete for the allegiances of multiple groups, demographic categories, and even various ideologues simultaneously, forcing accommodation and compromise on their constituent parts as they work toward the goal of winning the government. Parties thus are a part of government, but interest groups remain largely as outsiders, lobbying lawmakers and party leaders to attain their policy goals.

One consequence of the parties’ intimate relationship to government has been a long tradition of regulation and jurisprudence stretching back into the nineteenth century. Part of this regulatory tradition has been aimed at controlling their power, including such diverse reforms as civil service, direct primaries, and a series of campaign finance laws of which BCRA is the latest example. But at the same time government has sought to limit parties, it has also acted to institutionalize them, especially the two major parties. State laws give automatic ballot lines to nominees of the Democrats and Republicans, and just occasionally to a few smaller parties, a major leg-up for parties in the struggle to contest elections. Governments sponsor party primaries, footing the bill and providing facilities for rank and file partisans to select their nominees. FECA also gives special consideration to parties in various ways, allowing them to coordinate spending with candidates and to collect larger hard money donations, and giving substantial public subsidies to the Democratic and Republican nominating conventions and presidential nominees. The result is that a leading scholar of American parties has compared them to “public utilities:”

[T]he designation “public utility” . . . suggests an agency performing a service in which the public has a special interest sufficient to justify governmental regulatory control, along with the extension of legal privileges, but not government ownership or management of all of the agency’s activities.⁵⁶

2. *Building parties with soft money*

There is no need to speculate about the immediate impact of a soft money ban on parties since there is a long record of soft money receipts and expenditures dating back a decade and longer.⁵⁷ The two national committees and the congressional campaign committees raised nearly \$1.2 billion in soft money from 1991 to 2000, including more than \$700 million in the 1997–8 and 1999–2000 election cycles.⁵⁸ Of this sum, more than \$500 million was trans-

56. Leon D. Epstein, *Political Parties in the American Mold* (Madison: University of Wisconsin Press), 1986, p. 157.

57. Soft money was “invented” earlier in 1979 from an FEC ruling, but the parties were not required to report it until after the 1990 election.

58. See note 1. These figures do not include the \$308 million raised in the 2001–2 cycle as of June 30, 2002 (<http://www.fec.gov/press/20020919partyfund/20020919partyfund.html>). Nor do these figures include soft money raised directly by state parties (see note 19).

ferred to state parties during this period, in addition to the \$235 million of hard money that the national committees sent to the states.⁵⁹ We evaluate the impact of these resources on parties by referring back to the various roles they play in our political system.

To begin, there is no evidence that these financial resources have played any appreciable role in the historic level of party loyalty achieved within Congress over the last decade.⁶⁰ Leaders on all sides have gone to great pains to confirm their willingness to steer financial support to party colleagues regardless of their voting records, and there is no reason to doubt them. There is anecdotal evidence of some financial strong-arming in the states as party leaders in legislatures with highly centralized systems like New York's or California's have reputedly used their control of electoral resources to reward and punish legislators according to their support of the leadership. In Congress, however, this has not been the case. This conclusion does not contradict our earlier argument about the corruptive potential of soft money, for the behaviors in each situation are fundamentally different. The use of soft money to enforce party discipline involves leaders using their control of campaign resources as leverage on the entire caucus on a broad swath of roll-call votes important to the leaders. Our argument about corruption, on the other hand, involves the donors' use of parties as conduits to route soft money to legislators in return for a wide variety of actions on a relatively narrow set of issues.

At first glance, the effect of soft money on the numbers of Americans voting and on electoral competition seems rather unimpressive. Voter turnout, already low, continued its slow decline in the 1990s with the exception of 2000 when a slightly greater percentage of Americans cast ballots than had four years earlier. Even so, voter turnout at the end of the 1990s was actually slightly lower than it had been at the start.⁶¹ Similarly, electoral competition returned to historically low levels as soft money receipts rose. This was particularly true for the House of Representatives, the set of elections in which the lack of competition has been of greatest concern and which, because of their large numbers and equally-sized districts, offer analytical advantages. There the number of close contests has declined markedly since 1996 as spending has skyrocketed.⁶² Granted, parties

59. Federal Election Committee, *Campaign Finance Reports and Data*, at http://www.fec.gov/finance_reports.html.

60. See note 25.

61. See *Statistical Abstract of the United States*, 2002 edition. Estimated turnout in presidential elections was 55.1 percent of the voting age population in 1992, 49.1 percent in 1996, and 51.2 percent in 2000.

62. Competitiveness has been measured in a variety of ways both before elections when forecasters attempt to predict which races will be close and after when returns are available. One familiar measure is to count the number of "marginal" districts, races where the incumbent won less than 60 percent of the vote. The number of marginals declined since the use of soft money in House elections from 115 in 1992, 119 in 1994, and 120 in 1996 to 91 in 1998 and 76 in 2000. See Norman J. Ornstein, Thomas E. Mann, and Michael J. Malbin, *Vital Statistics on Congress, 2001-2* (Washington: American Enterprise Institute), 2002.

cannot be held completely responsible for these disappointments, but one of the main arguments for strengthening parties is for their ability to stimulate greater turnout and competition.

Our concern here, however, has less to do with byproducts of stronger parties than with the actual strength of these organizations. The \$1.2 billion raised and spent over the last decade suggests that today's parties should be more formidable than those in the recent past. Yet, there is much reason to doubt that assumption. To begin with, survey data show no real increase in the strength of partisan attachments. The National Election Studies asks respondents a series of questions about their identification with parties, from these building a seven-point scale that has been the academic measure of partisanship for 50 years. After a decade of lavish spending, however, the percentage of strong partisans, those with the greatest attachment to their party from whose ranks the most active citizens come, has shown virtually no advance.⁶³ In 1992, 29 percent of respondents identified themselves as strong Democrats or Republicans, compared to 31 percent in 2000.⁶⁴ These figures are near the historic low registered over the course of 50-year series of NES surveys, and this lack of enthusiasm for parties is echoed in responses to other questions about them that the NES asks.⁶⁵ The inference is obvious: whatever party-building the \$1.2 billion of soft money has funded over the past decade, it has done little or nothing to attract citizens to the party banners.⁶⁶

The most obvious explanation for these results is that parties have been remarkably restrained about proclaiming their virtues and only somewhat less shy about skewering their opponents. The chief way in which parties speak directly to citizens is through television advertisements.⁶⁷ Media-tracking data from the top 75 media markets show that parties were extremely active advertisers in both 1998 and 2000, sponsoring ads that appeared over 310,000 times.⁶⁸

63. See Angus Campbell, Philip E. Converse, Warren E. Miller, and Donald Stokes, *The American Voter* (Midway Reprint) Chicago: University of Chicago Press, 1960.

64. National Election Studies, at http://www.umich.edu/~nes/nesguide/taptable/tab2a_1.htm.

65. See National Election Studies, at http://www.umich.edu/~nes/nesguide/taptable/tab2b_1.htm and http://www.umich.edu/~nes/nesguide/taptable/tab2b_2.htm.

66. It is noteworthy that this time period has been regarded as one in which experts, influenced by parties' success raising funds, have pronounced them resurgent. One of the few scholars to question this conclusion has asked how it is possible for parties to prosper without followers. See John J. Coleman, "Resurgent or Just Busy? Party Organizations in Contemporary America," in *The State of the Parties: The Changing Role of Parties in American Parties* (2d ed., John C. Green and Daniel M. Shea eds., Lanham, MD: Rowman and Littlefield), 1996.

67. For example, see Ray La Raja and Elizabeth Jarvis-Shean, "Assessing the Impact of a Ban on Soft Money: Party Soft Money Spending in the 2000 Elections" (Berkeley, CA: Institute of Governmental Studies and Citizens' Research Foundation Policy Brief), 2001, also available at http://www.cfinst.org/parties/papers/laraja_softmoney.pdf, showing television advertising was (after expenses) the parties' largest expenditure of soft money. It is a trait that parties share with candidates who have long been noted for their reliance on paid television. Parties, however, cannot count on the same level of free media coverage of their activities that candidates enjoy.

68. See Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill" (*PS* 35, No. 2: 207-212), 2002.

But the parties' commercials in these years were distinguished most notably for their failure to mention either party by name. Viewers with sharp eyes might have spotted a disclaimer like "Paid for by the Democratic National Committee" near the end of an ad, but the words "Democrat" or "Republican" appear nowhere else in the vast majority of party ads run during 1998 (85 percent did not mention party) or 2000 (93 percent).⁶⁹

While parties are curiously absent from their own commercials, candidates are nearly ubiquitous; their names were mentioned in 95 percent of ads aired by parties in 1998 and 99 percent in 2000.⁷⁰ The clear implication is that parties dedicated their advertising dollars to promoting the fortunes of their candidates, not themselves. Muting their partisanship served the needs of candidates, who in their quest for swing voters, were eager to attract support from independents and crossovers. Thus parties mimicked candidates by rarely invoking partisan labels, instead focusing on the characteristics of the candidates. The candidates that parties focused on, moreover, were usually not their own but their opponents'. Party ads mentioned the opposing candidate in 51 percent of spots aired, their own candidate in 17 percent, and both candidates in 32 percent.⁷¹ It is no surprise, then, to discover that most of the spots parties aired were regarded as "attack" advertising by the coders who reviewed these ads.⁷² Candidates displayed the opposite pattern, using their commercials to proclaim their virtues. The reason candidates shy away from attack advertising is the fear that it will make them appear mean. The fact that parties are left to do the dirty work of campaigning cannot make them more appealing to the public.

The data on parties' television advertising also illustrate another aspect of party-building over the last few elections: its remarkably narrow focus. The top 75 media markets serve at least half of the households in more than 335 congressional districts. Yet in both 1998 and 2000, more than half of the

69. Just 15 percent of party ads in 1998 and 7 percent in 2000 mentioned either political party. See Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill" (*PS* 35, No. 2: 207–212), 2002.

70. Coders were asked separate questions about both candidates and coded references in the text and/or visuals. For results, see Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill" (*PS* 35, No. 2: 207–212), 2002. For information about the coding, see <http://www.polisci.wisc.edu/tvadvertising/Coding%20the%20Ads.htm>.

71. Calculated by the authors. The 1998 data set, the same one used to create *Buying Time: Television Advertising in the 1998 Congressional Elections*, is attached as an exhibit to this report. The calculation for 2000 makes use of a version of the 2000 data set from May 14, 2002. A later version of these data is provided with the Expert Report filed by Professor Goldstein.

72. The tone of a commercial was coded according to the following question: In your judgment, is the primary purpose of the ad to *promote* a specific candidate ("In his distinguished career, Senator Jones has brought millions of dollars home. We need Senator Jones."); to *attack* a candidate ("In his long years in Washington, Senator Jones has raised your taxes over and over. We can't afford 6 more years of Jones."); or to *contrast* the candidates ("While Senator Jones has been raising your taxes, Representative Smith has been cutting them.")? See Jonathan S. Krasno and Daniel Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections* (New York: Brennan Center, 2000).

advertisements that parties sponsored in these markets appeared in just a dozen races.⁷³ Clearly the parties were concentrating their resources on the contests where they judged their funds might be decisive, but in consequence the vast majority of Americans heard nothing from them about their candidates. There is clearly a tension between building parties everywhere—if their ads could somehow be construed to affect partisanship—and trying to win specific elections. We would not advocate that parties do only the first without regard to the second, but adopting the opposite strategy inevitably limits the amount of party building in which they engage.

Finally, there is the matter of formal party organizations. Here we are confronted with a dizzying array of organizations from the traditional state and local committees that have been such a large part of the scholarship on American democracy, to the newly-prominent LCCs and a variety of caucuses and offshoots affiliated with the parties or their leaders.⁷⁴ We focus on the former, the more locally based organizations that are closer to ordinary voters and historically have been the great source of grassroots political activity during campaigns. Indeed, even those political scientists who oppose restrictions on soft money argue mainly that soft money is worth saving for its effect on traditional party organizations.⁷⁵ We believe that close examination of the evidence suggests that soft money has had little lasting or positive impact on state and local organizations.

Our opinion is informed by two case studies we undertook for previous litigation, *Colorado II* and *Missouri Republican Party v. Lamb*.⁷⁶ In both instances, the plaintiffs argued that various restrictions on political parties would cripple their ability to act during and between campaigns. The facts, however, did not support these claims. The executive director of the Colorado Republican Party, for instance, at the time of this litigation was a resident of the Washington, D.C. area hired by the RNC. The Colorado party received most of its funds from the National Republican Senatorial Committee (RNSC), and other money was raised for it, with little involvement by state officials, at events featuring visiting members of Congress and the first Bush administration. Despite this infusion of resources, the party was not able to organize a phone bank for volunteers or print out mailing labels for its own members.⁷⁷

73. See Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill" (*PS* 35, No. 2: 207–212), 2002.

74. Among the last we would include organizations like the Democratic Leadership Council or Log Cabin Republicans.

75. E.g., Statement by Raymond La Raja, *CFI "Cyber-Forum": How would McCain-Feingold affect the parties?*, at http://www.cfinst.org/parties/mf_responses.html.

76. Frank J. Sorauf and Jonathan S. Krasno, "Political Party Committees and Coordinated Spending," prepared for the Federal Election Commission in *Colorado II*, 1997; Frank J. Sorauf and Jonathan S. Krasno, Statement prepared for *Missouri Republican Party v. Lamb*, 2000.

77. Frank J. Sorauf and Jonathan S. Krasno, "Political Party Committees and Coordinated Spending," prepared for the Federal Election Commission in *Colorado II*, 1997, p. 35–6.

The situation in Missouri, several years later, was nearly identical. Again, the apparatus of the state party proved unwilling or unable to undertake basic tasks such as phone banking or leafleting on its own. In addition, without any state limits on the size of the contributions it received, Missouri's Republican party relied heavily on large donors: 80 percent of its receipts came from just 36 donors (excluding the national parties) from a total list of contributors numbering approximately 1,000.⁷⁸ Like its counterpart in Colorado, the Missouri party's direct involvement in campaigns was limited largely to writing checks. Both committees paid outside vendors to run their phone banks and send their mailings; in addition they sent much larger checks to consultants for advertising. A highly specialized campaign industry allows parties to purchase campaign services, leaving them to raise money and choose from a menu of options. With the variety of paid alternatives available, the parties have fewer incentives to seek out citizen involvement in campaigns beyond their cash. The mass-based party organizations so highly esteemed by scholars seem to have been largely abandoned for a newer version relying on commercial services.

Other scholars echo these concerns. For example, in a recent "cyber-forum" on parties for a group of experts invited to comment on BCRA, a number of participants questioned whether soft money has had any lasting effect on parties. One explained:

Soft money does not appear actually to build party infrastructure. . . . Soft money funds the "coordinated campaign," but leaves very little behind in terms of permanent assets for the party once the campaign is over.⁷⁹

Another participant was blunter:

I would argue that soft money doesn't really make the parties strong; it makes the people who bring soft money to the party strong.⁸⁰

Impressions such as these reflect the extent to which parties have transformed themselves into organizations serving the immediate electoral needs of specific candidates. That was always the purely electoral life of the LCCs, but state and local parties—though also preoccupied by elections—had an enduring organization of their own, and their strength was always measured by their ability to recruit candidates, mobilize activists, organize party legislators, and debate party issues—as well as to manage the assorted tasks of delivering the party vote. All of that meant that they had a complex set of roles and tasks far beyond raising money and serving as conduits for national party funds.

78. Frank J. Sorauf and Jonathan S. Krasno, Statement prepared for *Missouri Republican*, 2000.

79. Statement by Professor John C. Green, *CFI "Cyber-Forum": How would McCain-Feingold affect the parties?*, at http://www.cfinst.org/parties/mf_responses.html.

80. Statement by Professor Robin Kolodny, *CFI "Cyber-Forum": How would McCain-Feingold affect the parties?*, at http://www.cfinst.org/parties/mf_responses.html.

Against this critique of the development of state parties in recent decades are two objections. The first is that a technological revolution has overtaken and transformed the old ways of campaigning. Thus, parties have had to adapt or risk irrelevance; a number of our colleagues take the emergence of these “service parties” as signs of parties’ inherent vitality and significance.⁸¹ There is no doubting that technological changes have occurred, but they have not rendered obsolete the old-fashioned personal campaigning by candidates and volunteers. Our enthusiasm for volunteerism rather than subcontracted campaigns is not nostalgic; it is pragmatic. Research shows that face-to-face campaigning is vastly more effective in stimulating turnout than the phone banks and direct mail that have replaced it.⁸² Even more fundamental, local activists bring energy and talent to the political sphere. They help educate citizens about politics and deepen their involvement in their communities. For parties, when the election is over and TV ads no longer aired, when the phone banks and direct mail vendors are abandoned, activists remain a durable asset that the parties can continue to count on. No one can help but be impressed by the vast amounts of money flowing through parties, but the money has passed through them without leaving behind any lasting benefit.

Other political scientists accept the traditional model of state and local parties but argue that soft money has done them some good.⁸³ None of these scholars claim that anything more than a small fraction of each dollar raised has been spent to the benefit of state parties. By one estimate the soft money that state parties devoted to “grassroots party building” from 1992 to 1998 amounted to just under \$20 million out of their total soft money expenditures of \$520 million during this period.⁸⁴ Adding some of the other expenditures to the party building category—a portion of overhead costs, for example—may bring the totals higher, but they remain a small portion of the soft money they spent. Indeed, these data point to one major reason for the organizational weakness of the state parties: a chronic lack of investment.

3. *Candidates v. parties*

That so little building of political parties, at least in a useful and lasting way, has occurred over the last decade does not mean that this trend will continue. Supporters of soft money place great stock in the possibility that the continued availability of vast sums of money will eventually work to the greater benefit of parties, even as they argue that some portion of these moneys are already spent

81. For example, see David Manafee-Libey, *The Triumph of Campaign-Centered Politics* (New York: Chatham House Publishers), 1999.

82. See p. 151.

83. See particularly comments of Ray La Raja, *CFI “Cyber-Forum”: How would McCain-Feingold affect the parties?*, at http://www.cfinst.org/parties/mf_responses.html.

84. Ray La Raja and Karen Pogoda, “Soft Money Spending by State Parties: Where does it really go?” (Berkeley, CA: Institute of Governmental Studies and Citizens’ Research Foundation Working Paper), 2000, p. 17.

in positive ways.⁸⁵ We are far less sanguine about the future, for we believe that party strategies over the last decade, far from being haphazard, are deliberate and well-considered responses to their need and desire to support candidates at all costs. As we noted above, that overwhelming concentration on the promotion of candidates conflicts with the building of parties.

One of the parties' greatest strengths is their breadth: parties encompass diverse constituencies. Democrats and Republicans contest elections in all corners in the country—sometimes with little success for long periods of time—and voters everywhere overwhelmingly identify with one of them. Thus, there is some sort of Democratic and Republican party in even the most inhospitable territory. With every presidential election we hear the plaintive appeals of Democrats and Republicans in various locales pleading for their national party to campaign more heavily in their areas. Victory, though seemingly impossible, is often argued to be within reach; moreover, local partisans hope to provide encouragement and resources to the other party candidates on the ballot. Indeed, according to press reports, California Republicans succeeded in convincing the RNC and Bush campaign to divert resources from several states including Florida in the final days of the 2000 campaign to avoid disheartening local partisans by seeming to abandon the state to the Democrats.

From the standpoint of Republicans in California, that decision surely made sense, but for the Bush campaign it might have been disastrous had the race in Florida turned out differently. Of course, other Republicans would also regret any allocation of funds that costs them the presidency. This shared interest in the White House is much less relevant for specific candidates for the House or Senate. Indeed, the competition for party resources among various congressional candidates is fierce, beginning with mandatory pilgrimages to Washington to seek the blessings of legislative campaign committees. Party operatives attempt to weed out the likely candidates from the hopeless so that the parties may invest wisely in those races where their help is most meaningful, a process often called "targeting."⁸⁶ But even if we assume that parties (or anyone) possess the prescience to predict which races might be close many months in advance, it is clear that the more parties are able to direct their funds to the small set of races thought to be teetering in either direction, the fewer Americans are affected by their efforts. As we noted earlier, the logic of targeting conflicts with the process of building stronger parties everywhere.

85. For example, see comments of Ray La Raja, *CFI "Cyber-Forum": How would McCain-Feingold affect the parties?*, at http://www.cfinst.org/parties/mf_responses.html.

86. Parties could always target with their hard money, but their ability to shift resources to favorite candidates was constrained by limits on their direct contributions and coordinated expenditures. One result of these limits is that the NRSC for a time routinely spent the maximum allowed for coordinated expenditures on almost all of its candidates. This pattern contributed to the decision by one candidate in 1988 to sue the committee for additional money it had decided not to use on his race. See Jeff Holyfield, "Riegle Expected To Win Big Over Dunn," *Associated Press Political Service*, November 8, 1988.

The more fundamental question, however, is why so little of the soft money spent within a state is used to help its party organizations in any meaningful and lasting way. Given their acknowledged goal of targeting a small number of candidates, the answer must involve the perceived needs of those candidates as Election Day approaches. Candidates, unlike parties, have no certain political life following an election loss. All of the resources they can muster are expended in the attempt to win office. Parties that primarily serve candidates follow the same rule. The problem is that developing a grassroots organization—identifying leaders, recruiting volunteers, providing training and creating opportunities to interact and work together—might take years of effort. Candidates would happily accept the help of legions of party workers; they just have no interest in diverting time and money to help build that network, especially if those efforts fully ripen in later elections.⁸⁷

Candidates have no reason to oppose stronger, more traditional party organizations, but they have even less reason to inconvenience themselves by helping build them. Incumbent public officials may have done much of the hard work of raising money for parties before a campaign, and even when they are not directly involved, specific candidates are often invoked in fundraising appeals by party officials. Furthermore, parties and party organizations are for the vast majority of donors of secondary importance to individual candidates. As a consequence, parties present themselves as allies of candidates, a natural inclination for party leaders who are eager supporters of their tickets. Even if a state or local party official hesitated to help an individual candidate, the financial power wielded by the LCCs in Washington, organizations explicitly controlled by federal officeholders, keeps state and local committees beholden to their wishes. The substantial financial transfers to states and the dependence of many state organizations on the federal committees leaves many of them as virtual agents of these committees.

The very notion that candidates and parties have separate interests may be surprising to those accustomed to seeing parties and candidates bound together by a common purpose. We would agree up to a point. We agree that control of government redounds to the benefit of all party members; few would advocate, for example, wasteful or foolhardy spending. Nonetheless, with respect to campaigns, parties' interests are clearly distinct from those of candidates, even presidential candidates trying to win a nationwide election. Because parties embrace innumerable candidates running for innumerable offices, there is, in effect, a need to be everywhere at once. Because parties are enduring institutions (or hope to be), they stand to benefit from long-term investments that candidates cannot undertake. Because parties seek loyal adherents while candidates welcome voters of all stripes, invoking partisan labels serves parties better than candidates.

87. It is worth noting that these volunteer efforts offer little or no profit for the campaign industry that provides services to parties and candidates.

What if we are wrong? What if parties were to choose sometime in the future to devote greater dollars to their own needs by trying to attract supporters, polish their public images, and rebuild local organizations? We would applaud these developments, but we doubt that banning soft money would hinder them. Even more noteworthy than the parties' soft money receipts during the 1990s was the hard money fundraising by the national committees alone: \$445 million (1991–2), \$384 million (1993–4), \$638 million (1995–6), \$445 million (1997–8), and \$705 million (1999–2000).⁸⁸ The total of \$2.6 billion over these ten years is clearly sufficient to maintain the current, paltry investment in party building (see note 84) or even a much more expansive program. The money is available; parties have lacked the incentive or the control to spend it on themselves.

Nor would a loss of soft money shrink parties to the point of being overshadowed by interest groups. The FEC reports that all PACs combined raised \$2.3 billion from 1991 to 2000 and contributed about \$1.1 billion to candidates.⁸⁹ Parties more than kept pace with hard money alone, helped by larger contribution limits and their roster of elected officials.⁹⁰ But this comparison overlooks the fact that much of the money flowing to parties is interested money, including contributions from PACs. More fundamentally, reducing the comparison between parties and interest groups solely to financial matters misses the crucial aspect of parties' nature, as well as the main advantages that they possess over interest groups. These advantages begin with the tens of millions of Americans who identify with the Democrats or Republicans, and the thousands of officeholders whose names are listed on ballots with their party affiliations. Interest groups—especially once the full array of organizations like 501s and 527s are included—may have more money than parties, but no combination of groups has constituencies outside or inside government that compare with the parties'.

Finally, no one should underestimate the parties' ingenuity and capacity for adaptation, skills they have successfully exercised for more than a century in meeting every change in American electoral politics. Certainly, BCRA's implementation will decrease the amount of money available to state and local party organizations in the short run, but that loss will stimulate them to broaden their base of contributors and raise more hard money. Belt tightening will also force them to use their money more efficiently and effectively; it may even lead to an era in which campaign budgets reflect some rational definition of need. Many parties will also substitute less expensive volunteer efforts for some of the high-priced services currently purchased with soft money. Rebuilding their

88. Federal Election Committee, *Campaign Finance Reports and Data*, at http://www.fec.gov/finance_reports.html.

89. *Ibid.*

90. Individuals may give up to \$20,000 yearly to parties and \$5,000 to PACs under FECA. The BCRA raises the annual limit on contributions to national parties to \$25,000.

cadres of activists and returning to a more mass-based form of campaigning would also help increase voter turnout and improve candidate recruitment. But most of all, these steps would reestablish the parties' ties to local electorates and restore one historic line of responsibility for the decisions they make. It would free the state parties from the "dole" and its accompanying interventions and control by national party committees. One may think of the soft money ban in BCRA as a form of "tough love," an affectionate rebuke likely to help state and local parties more than it hurts them.

C. Voter turnout

1. Turnout in the U.S.

Voting is, by far, the most common way that people participate in politics.⁹¹ It owes its popularity to the relative convenience of casting a ballot—a task usually requiring an hour or so every two to four years—and to the importance that people attach to it. Even nonvoters overwhelmingly agree that "voting in elections is extremely important in making someone a true American."⁹² Scholars place similar importance on voting and often characterize it as a chief means of exercising popular control of government. It is no exaggeration to claim that voting is an essential responsibility of democratic citizenship.

In the comparative perspective, the proportion of eligible citizens who cast ballots in the U.S. lags far behind the turnout rate in most other industrial democracies. Most of that gap can be ascribed to a variety of legal differences—from registration requirements to the scheduling of elections—that make voting in the U.S. more difficult than elsewhere.⁹³ As a result, a better comparison may be historical. Even here, however, today's turnout rates are well below those in past elections. In 1960, for example, 62.8 percent of eligible citizens voted in one of the closest elections in U.S. history; in 2000, just 51.2 percent cast ballots in an even closer contest.⁹⁴ This decline is part of a steady trend downward over the last four decades.⁹⁵

91. The National Election Studies asks respondents about a variety of activities: registration, voting, along with whether they tried to influence others, attended a political meeting, worked for a party or candidate, wore a button or put a bumper sticker on their car, and gave money to a campaign.

92. Survey item from the 1991 National Election Studies Pilot Study. The full question reads: "Is voting in elections extremely important, very (important), somewhat (important), or not at all (important) in making someone a true American?"

93. Among the legal arrangements increasing turnout rates in several other countries is mandatory voting whereby failure to cast a ballot is punishable by a fine. See David P. Glass, Peverill Squire, and Raymond E. Wolfinger, "Voter Turnout: An International Comparison" (*Public Opinion* 6: 49–55), 1984.

94. Turnout rates in state and local elections are generally much lower when they do not coincide with the presidential ballot.

95. This decline is especially vexing because it has occurred as blacks, always legally eligible to vote, were allowed to exercise the franchise in the South, and registration requirements were

The long-term decline in turnout has caused much consternation among policy-makers and scholars. For some of these observers, the low levels of voter turnout are an indication of a growing emergency in American politics in which citizens have grown disaffected or bored by their leaders and their government.⁹⁶ Others view these claims as overwrought and point to survey results showing that Americans typically report greater faith in their government and interest in campaigns than citizens in other countries. Regardless of how they interpret the decline in voting, there is widespread agreement that turnout rates merit close attention and that higher levels would be desirable. Parties, given their traditional emphasis on mobilizing their voters, could potentially play an important part in halting and reversing the shrinking percentage of Americans who vote.⁹⁷

As a result, one must be concerned about the argument in the debates over BCRA that the ban on soft money would hinder parties' efforts to mobilize voters and thus depress turnout. Congress attempted to soften the financial blow to parties' mobilization programs by passing the "Levin Amendment" allowing state and local parties to use limited amounts of soft money to conduct generic voter registration and turnout efforts. This concession will surely help make more funds available in these areas. The more basic issue, however, is whether the broader ban on soft money will hamper parties' ability to boost turnout. The answer reflects our argument about how parties have come to function primarily as purchasers of campaign services in their attempt to aid individual candidates. The data show that parties devote relatively meager amounts of soft money to promoting turnout, and further analysis reveals that they have spent most of this money in ways that minimizes even this limited impact.

We begin by citing a scholar on parties' use of soft money, Professor Ray La Raja, also an expert for the plaintiffs in this case. Working with a database of more than 500,000 separate expenditure entries reported to the FEC by federal, state, and local party committees in 1999–2000, Professor La Raja and his coauthor divided these items into six categories including the parties' spending on "mobilization."⁹⁸ Spending on mobilization by federal, state, and local party committees summed to \$49.6 million in 2000. From 1992 to 1998, state party

being eased throughout the nation. The 26th amendment giving 18 to 20 year-olds the right to vote, on the other hand, depressed turnout rates by adding millions of eligible voters from the age group with the lowest level of turnout.

96. For example, Walter Dean Burnham, *The Current Crisis in American Politics* (New York: Oxford University Press), 1983.

97. Steven J. Rosenstone and John Mark Hansen, *Mobilization, Participation, and Democracy in America* (New York: MacMillan Press), 1993.

98. Ray La Raja and Elizabeth Jarvis-Shean, "Assessing the Impact of a Ban on Soft Money: Party Soft Money Spending in the 2000 Elections" (Berkeley, CA: Institute of Governmental Studies and Citizens' Research Foundation Policy Brief), 2001, p. 3. Mobilization is defined as "costs of registering and contacting voters through direct mail, telephone banks, canvassing, and voter files." Note that this characterization includes activity that might be more geared to persuading voters than to reminding them to vote.

spending on mobilization slowly grew from \$8.6 million to \$22.6 million, reaching \$41.8 million in 2000.⁹⁹

The question is whether \$49.6 million is a lot or a little money. We are inclined toward the latter. In 2000, the parties' spending to promote turnout accounted for 10.4 percent of their \$478 million in soft money expenditures.¹⁰⁰ Granted, it is not realistic to expect the parties could spend all of their soft money on mobilization. Overhead and fundraising are costly, accounting for 47 percent of their soft money spending. Traditional grassroots activities like yard signs, bumper stickers, and rallies added up to another 2.6 percent of their expenditures. The remaining amount was spent on "media" (33.4 percent) and "other/unidentified" (6.6 percent).¹⁰¹ Thus, nearly half of all soft money went toward administrative or fundraising expenses, leaving parties with about fifty cents of every soft money dollar to spend on a variety of purposes including mobilization.

Moreover, turning out voters came in a very distant second to spending on media advertising. From our perspective, this allocation and the fact that the parties' media focused so heavily on specific candidates (see p. 141) are indicative of a broader trend toward service parties. Just as we argue above that party building is of little importance to candidates in the midst of their campaigns, we conclude here that mobilizing voters was a far lower priority than airing television ads and competing for undecided voters. Whether spending three times more on media than on turnout efforts made good political sense for parties or for candidates they support is an open question. The parties obviously thought so, a decision that severely limited the amount available to spend on mobilizing voters.

2. Mobilization expenditures in the 2000 election

Before dismissing the \$49.6 million spent by the parties in 2000 on voter mobilization, it is important to consider the impact of these funds. We attempted to do so by replicating Professor La Raja's coding of mobilization expenditures in the 2000 elections.¹⁰² Using the same FEC data, we identified 28,157 entries totaling \$40.4 million in soft money as relating to voter mobilization by searching the parties' descriptions of the purpose of their expenditures for a series of key words or phrases like "absentee" or "election day."¹⁰³ We are not able to

99. *Ibid.*, p. 3 & 6.

100. *Ibid.* Direct comparisons are available only for state parties in previous years. State parties' spending on mobilization ranged from 9 to 16 percent of their soft money expenditures during this period. In 2000, state parties devoted the most money to mobilization, \$41.8 of the \$49.6 million spent by parties at all levels.

101. *Ibid.* Media refers to cost of television, radio and print ads, including production costs. Other/unidentified are items whose purpose could not be determined, including consultants.

102. These data were compiled by Krasno with the help of Robert Biersack of the FEC, and further coded by Krasno.

103. The FEC asks filers to describe the purpose of their expenditure in their own words.

replicate exactly La Raja's painstaking coding, but we are satisfied that we capture all of the main components of spending that he describes as mobilization and that the resulting data set is reasonably close to his specification.¹⁰⁴ Given the analysis we undertake, they are sufficient for our purposes.

Our inquiry focused on two related questions. The first is the actual activities on which party mobilization funds were spent, such as mail, phone banks, or canvassing. The second is whether these expenditures were for services purchased from subcontractors or whether they pay for activities undertaken by the parties themselves. Both questions are inspired by a set of papers by Professors Alan Gerber and Donald Green measuring the impact of different activities on citizen turnout rates. Their studies used an experimental approach in which randomly assigned groups of respondents were exposed to reminders to vote delivered via mail, telephone, or in person. Their conclusions are an emphatic endorsement of the importance of face-to-face appeals. Regardless of the model estimated and the set of controls introduced, Gerber and Green found the impact of canvassing to be many times the effect of phone calls or mail. For example, in a large-scale experiment conducted during an election in New Haven, individuals who had been canvassed turned out to vote at a rate 8.7 percentage points higher than those in the control group.¹⁰⁵ By comparison, the impact of mail and phone calls was minimal, barely distinguishable from zero.¹⁰⁶ The authors have subsequently replicated this finding in a variety of other studies.¹⁰⁷

We divided turnout expenditures into these and several other categories by again searching for key words or phrases in the description of the purpose of each item. For instance, we listed as canvassing any entry that made reference to "canvass" (includes canvassing and canvasser), "field worker," "literature drop,"

The result is thousands of different descriptions, largely due to variations in describing the same activity. Following La Raja, we coded descriptions including the following key words or phrases as mobilization expenses, regardless of their timing: "GOTV" (acronym for "get-out-the-vote"), "voter," "absentee," and "election day." In addition, we also categorized entries containing the words "phone," "mail," "postage," "slate," "printing," "canvass," or "list" as related to turnout if they were made in the last two weeks of the campaign. The FEC file includes allocations of federal and nonfederal, or soft, money. In this discussion, we focus on only the latter.

104. One possible explanation for the disparity is our decision to limit certain mobilization expenditures to those occurring in the last two weeks of the campaign. La Raja is not clear about how to treat these items, but by focusing on late phone calls, direct mail and other outreach programs, we felt certain that we included only those activities whose impact on mobilization is most direct.

105. Alan S. Gerber and Donald P. Green, "The Effects of Canvassing, Telephone Calls and Direct Mail on Voter Turnout: A Field Experiment" (*American Political Science Review* 94: 653-663), 2000.

106. *Ibid.*, p. 659. Phone calls may be more effective if the caller is familiar, such as a college student calling another college student, the sort of circumstance that rarely occurs with the paid phone banks that predominate in campaigns. See Alan S. Gerber and Donald P. Green, "Do Phone Calls Increase Voter Turnout?: A Field Experiment" (*Public Opinion Quarterly* 65: 75-85), 2001.

107. These papers are available at Yale University Institute for Social and Policy Studies, *Voter Mobilization Experiments*, at <http://www.yale.edu/isps/publications/voter.html>.

“poll worker,” or “walker.” In the end, we identified seven distinct categories of expenditures: canvassing, mail, telephone, media, voter files, administration, and other/unspecified.¹⁰⁸ The results show that parties spent the largest amount of soft money on mail (\$14.9 million), telephone (\$10.8 million), and voter files (\$4 million).¹⁰⁹ Canvassing, the category of greatest interest and greatest impact, lagged well behind with just \$1.2 million invested. Most of the money for canvassing was used to pay people to go door to door.¹¹⁰ As a result, the average soft-money expenditure for canvassing was just \$168, compared to an average of \$16,100 for each outlay for mail. Entries relating to canvassing account for more than one fourth of the 28,157 cases in the data set, but these cases only comprise 3 percent of total spending.

It is possible that some of the \$8.4 million in the other/unspecified category should be attributed to canvassing.¹¹¹ Unfortunately, descriptions like “voter registration” or “generic GOTV” make it impossible to determine whether the activity involved was canvassing or telephone or mail or something else. Even if we were to include all payments apparently made to individuals as canvassing, it would add less than \$1 million to the total devoted to face-to-face contact.¹¹² Political parties in several states—led by the Democratic parties in Louisiana, Kentucky and New Jersey—did devote considerable resources to canvassing, but in other states such expenditures were minimal. Altogether, parties spent 20 times more soft money on phone calls and mail than they spent on canvassing.

The likeliest explanation for the neglect of canvassing is the organizational weakness of parties. Canvassing is not among the services routinely available from the campaign service industry, leaving parties to fend for themselves. But

108. Mail includes entries with the key words “mail,” “postage,” or “voter labels”; telephone includes “phone,” “call,” or “voter id”; media includes “ad,” “advertising,” “television,” “TV,” or “radio”; list includes “list,” “voter record/abstract/data/disk/history/info/file,” or “phone match.” Administration includes rents, payroll taxes and a variety of reimbursements. Other/unspecified, the largest category, is dominated by expenditures like “GOTV,” “Election Day worker,” or “absentee ballot program” that are most likely canvassing, mail, or telephone, but cannot be determined. Other/unspecified also includes almost \$1 million of spending on consulting unrelated to the other categories.

109. Voter files, a standard tool in modern campaigning, generally provide a list of registered voters in a locale. They may be purchased directly from jurisdictions or from list vendors who frequently add vital information like phone numbers or other contextual data to the file. These lists are particularly useful in guiding direct mail and phone banks so that campaigners may focus their efforts on citizens most likely to turn out on Election Day, or, in the case of the recently registered, on those eligible to vote. They are probably of less value to canvassers who tend to go to all of the doors in a neighborhood, not specific doors.

110. We reached this conclusion by observing the size of the expenditures and noting that the purpose of these expenditures—typified by entries like “Election Day canvasser” or “Poll worker”—appeared to refer to individuals hired. In addition, our analysis of a sample of disbursements described below confirmed that most entries were payments to individuals.

111. The same is true of the \$4 million spent on voter lists, although in this case it is likely that these lists served the parties’ phone banks and direct mail, not their door walkers.

112. This is accomplished by recoding all entries from the other/unspecified category where soft money expenditures were less than \$200, as canvassing.

organizing an extensive face-to-face campaign—recruiting workers, providing materials and maps, handling logistics—is a fairly labor-intensive enterprise, whether one uses volunteers or paid labor. This is the case, furthermore, whether the face-to-face persuasion takes place at a front door, the local mall, or a membership meeting. The fact that the three state parties named above accounted for the vast majority of spending on canvassing (80 percent) suggests that most other state committees either did not have the capacity to organize a canvassing effort or were unwilling to devote the resources.¹¹³ Gerber and Green speculate that “the long-term decay of civic and political organizations may have reached such a point that our society no longer has the infrastructure to conduct face-to-face canvassing on a large scale.”¹¹⁴

We tested this hypothesis by examining expenditures of individual parties to determine whether they were for subcontracted services or for activities that the parties performed themselves. The sheer number of separate expenditures in the data set made it impossible to check the recipient of each payment. Instead, we drew a random sample of 250 expenditures and used the optical records maintained by the FEC to determine whether payments were made to a company for services or not.¹¹⁵ Two hundred twenty-six of the items we scrutinized were payments to individuals or for services organized and conducted by the parties, while just 24 were disbursements to subcontractors. But the latter group included virtually all of the largest expenditures in our sample, so that total payments to subcontractors (\$340,280) greatly exceeded spending on the parties' own activities (\$78,957). This pattern is reflected in the larger data set as well. The 25 largest soft money expenditures accounted for over 15 percent of mobilization spending (\$6 million). All of these large payments were made to subcontractors, and almost all of them were for direct mail or phone banks. By comparison, there were more than 19,000 separate expenditures of \$50 or less that added up to just \$550,000 of spending. Judging from the data of our sample, we would surmise that nearly all of these small disbursements involved activities that parties undertook themselves.

113. It is possible that large expenditures for canvassing in several other states may have been overlooked because of different reporting conventions. For example, an activity described as “GOTV canvassing” in Louisiana or New Jersey might have been called “Generic GOTV” elsewhere, making it impossible to determine the activity involved. The total amount of money at stake, however, is relatively small because of the low cost of hiring canvassers. As we note above, the average disbursement for canvassing was \$168.

114. Alan S. Gerber and Donald P. Green, “The Effects of Canvassing, Telephone Calls and Direct Mail on Voter Turnout: A Field Experiment” (*American Political Science Review* 94: 653–63, 662), 2000.

115. Most of these calls were easy to make. Payments to individuals were obviously signs of party activity, as were expenditures for stamps (though large payments may have been made on behalf of direct mail vendors), or for food or catering. We also categorized several large payments to local party organizations as expenditures by the parties themselves, though we could not be sure this money was not passed on to one or more subcontractors.

In sum, the parties' efforts to mobilize voters in 2000 were much less impressive than they may at first seem. The amount of soft money devoted to turnout efforts was a relatively small portion of the total amount available, and just a third as much as the parties spent on media advertising for their candidates. Even worse, the soft money that the parties did spend on mobilization went overwhelmingly to vendors to pay for phone banks and direct mail. These activities have been promoted as staples of modern campaigning for years, but research shows that they have almost no impact on the likelihood of citizens' voting. Rather, experiments show that old-fashioned, face-to-face appeals are most effective in inspiring people to vote. This sort of canvassing was once the traditional focus of state and local party organizations, but in their dedication to serving candidates they are no longer interested in personal campaigning, and in their disrepair they may not be capable of mobilizing their voters.

There is no law requiring parties to spend wisely. The effectiveness of various strategies is difficult to test, especially during the heat of a campaign, and techniques that may appear to work well in one election can become outmoded later. Rather, we are responding to the concern that banning soft money will cause turnout to decline. We find that allegation to be groundless for the simple reason that the parties have done little to mobilize voters in recent years. The money has been there, but the commitment and the infrastructure necessary to organize an effective mobilization campaign have been missing. The parties have chosen to spend far more money to promote candidates than to turn out their vote, and they have chosen to hire others to send letters and make phone calls rather than organize their own, more personal effort to get people to the polls. There is more than enough hard money available to replace the soft money that parties have spent on mobilization, but it will be up to the parties to find ways to spend it usefully.

II. ISSUE ADVOCACY

A. Regulating issue advocacy

1. Candidate ads, candidate-oriented issue ads and pure issue ads

It took nearly twenty years for parties, interest groups, corporations, trade associations, unions and wealthy individuals to recognize that they could bypass FECA and still run thinly-veiled campaign ads by avoiding words that directly exhort viewers to vote for or against a candidate. These entities rely on the so-called "magic words" test to argue that their ads are not federal electioneering, but instead are speech about the issues of the day. For organizations and individuals who wish to aid their favorite candidates with television ads, the advantages of doing so in a way that avoids FECA's regulatory scheme are

profound. Avoiding FECA allows advertisers to collect any sum of money from any source they can. Avoiding FECA allows advertisers to conduct their operations without disclosing their activities to the public. Issue advocates may even rename themselves; so, in 2000 the Pharmaceutical Research and Manufacturers Association became “Citizens for Better Medicare” and two brothers from Texas became “Republicans for Clean Air,” organizations that sound more impressive and credible than their true sponsors.

The first candidate-oriented issue ads were aired by the DNC in 1995 to promote President Clinton and immediately inspired more sizable campaigns the next year as labor unions and pro-Republican business groups turned to issue advocacy to support congressional candidates. Soon the practice became widespread. The Annenberg Public Policy Center estimated spending on issue advocacy at \$135 million in 1996, and \$509 million just four years later.¹¹⁶ Using media-tracking data, other scholars estimated expenditures on airtime alone in the top 75 media markets at \$31 million in 1998 and \$260 million in 2000.¹¹⁷ The disparity between the Annenberg figures and the expenditures for airtime is actually smaller than it may appear once overhead, expenses, inflation, and other costs are factored in.¹¹⁸ By comparison, the same media-tracking data show candidates spent \$141 million on airtime in 1998 and, with the addition of a presidential race, \$334 million in 2000.¹¹⁹ Issue advocacy has come to rival, and in some cases outpace, advertising by federal candidates.

These issue ads, which appear overwhelmingly in the period just preceding Election Day, have had a great effect on campaigns and thus on elections. Especially in the most competitive districts—such as the Detroit media market where competitive presidential and senatorial races in 2000 prompted parties and groups to air almost 10,000 issue ads in just five weeks following September—viewers saw and frequently complained about a seemingly endless stream of political ads. At the same time, candidates struggled to regain control of their own campaigns in the aftermath of ads, and they also often confronted a shrinking supply of airtime for their own ads. The central regulatory question raised by this flood of issue ads never went away: should these ads be considered

116. Deborah Beck, Paul Taylor, Jeffrey Stanger, and Douglas Rivlin, “Issue Advocacy Advertising During the 1996 Campaign” (Annenberg Public Policy Center), 1997, p. 3; Kathleen Hall Jamieson, Lorie Slass, and Erika Falk, “Issue Advertising in the 1999–2000 Election Cycle,” (Annenberg Public Policy Center), 2000, p. 4.

117. See Jonathan Krasno and Kenneth Goldstein, “The Facts about Television Advertising and the McCain-Feingold Bill” (*PS* 35, No. 2: 207–212), 2002.

118. See Jonathan S. Krasno and Daniel Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections* (New York: Brennan Center), 2000, p. 197. The estimated cost of each ad is almost certainly low, especially for issue advertisers who are not able to take advantage of “lowest unit rate” occasionally available to candidates.

119. Since the presidential campaigns are limited to the size of their public subsidy the campaigns have turned to parties for any additional advertising on their behalf. Virtually all of the commercials run by parties in the presidential campaign were issue ads. In addition, the race for the White House attracted greater involvement by an assortment of groups sponsoring issue ads. See Expert Report of Kenneth Goldstein.

federal electioneering, “working for the election of a candidate or party,” as Webster’s dictionary defines it?¹²⁰ The answer is critical, for if these commercials are campaign ads they should certainly be treated in the same way that the law treats other campaign ads, but if they are genuine discussions of policy issues, there is no need to regulate them in the same manner.

The preponderance of evidence says that these ads are federal electioneering. Many of their sponsors have been frank about their intent to influence elections. For example, the AFL-CIO in the first issue ad campaign in House elections in 1996 acknowledged its intent to help Democratic candidates, and its results were measured accordingly.¹²¹ The Club for Growth, a conservative Republican group, bluntly discusses its electioneering activities on its website; they include direct contributions, bundled contributions, and issue ads.¹²² The goals of the parties, especially in presidential elections where candidates and their agents have been intimately involved in planning and paying for their parties’ ads, can hardly be doubted. Survey results show that citizens overwhelmingly view these advertisements as intended to influence their support for or opposition to particular federal candidates.¹²³

Whatever may have been the intention of the sponsors of these ads, none of them used magic words. Two questions emerge: Does the magic words test distinguish between pure issue advocacy and federal electioneering? If not, would the alternate standard in BCRA work better? These questions are, for some observers, ideological. We regard them as essentially empirical matters to be evaluated in light of advertising practices in the last two election cycles. We address the first question (about the magic words test) in this subsection and the second (about BCRA’s regulation) in the following subsection by examining media-tracking data from 1998 and 2000 for the nation’s 75 largest media markets.¹²⁴ Our analysis focuses on three types of ads: candidate ads, “candidate-oriented” issue ads and “pure” issue ads.¹²⁵ The first category represents the lion’s share of all mass communications treated as electioneering under FECA.¹²⁶ The second two categories represent the vital First Amendment

120. All references to electioneering should be taken as federal electioneering only.

121. See Kevin Galvin, “Sweeney Unveils Reform Blueprint for Labor Federation,” *Associated Press*, January 26, 1996.

122. The Club for Growth, *Election 2000 Wrap-up, What’s Next?*, at <http://www.clubforgrowth.org/news/wrapup.html>.

123. David B. Magleby, *Dictum Without Data: The Myth of Issue Advocacy and Party Building*, at <http://www.byu.edu/outsidemoney/dictum/index.html>.

124. We analyze a data set on television advertising compiled by a commercial tracking firm, the Campaign Media Analysis Group. Coding of these ads was supervised by Professor Kenneth Goldstein of the University of Wisconsin. These data are available for scholarly use going back to 1998. For more information, see Wisconsin Advertising Project, at <http://www.polisci.wisc.edu/tvadvertising> (last updated July 27, 2002).

125. These candidate-oriented issue ads are also referred to as “sham” or “electioneering” issue ads. “Pure” or “genuine” issue ads address a public policy matter without promoting the prospects of a federal political candidate.

126. Two other types of advertisements are also regulated by FECA: those which are either

question faced by the sponsors of BCRA as they attempted to create a means to objectively define candidate-oriented issue ads without unintentionally regulating pure issue ads.

The most direct way to evaluate the magic words test is to apply it to ads whose purpose—and origin—are clear. Commercials produced by candidates' campaigns are a perfect test group because their intent is self-evident, and they are regulated by FECA regardless of their language. Federal candidate ads appeared nearly 236,000 times in the top 75 media markets in 1998, and 430,000 times in 2000. In 1998, just 4 percent of these spots used verbs like "vote for," "elect," or "defeat"; in 2000, just 5 percent did. Including slogans like "Smith for Congress," 10 percent of the candidate ads aired in 2000 would qualify as electioneering using the magic words test. The remaining 90 percent could have been categorized as issue advocacy had a party or group sponsored them. In short, the magic words test improperly categorizes candidate ads 9 times out of 10.¹²⁷

One reason for this outcome may be that advertising practices have changed in the years since *Buckley*. No comparable data are available from that time period with which to test this hypothesis.¹²⁸ We believe, though, that the practices of political advertisers are not dissimilar from those of commercial advertisers. Car ads rarely exhort viewers to "buy" a Chevrolet, nor do soft drink ads urge people to "drink" their product. The most aggressive ads usually urge viewers to do no more than call or visit a website for information.¹²⁹ In fact, commercial advertising is often so subtle that the object of the commercial, though always present, is difficult to discern. This atmospheric approach to commercial advertising—where the product is presented in various desirable tableaux—has become increasingly popular. It serves the general strategy of advertisers to present viewers with a variety of reasons to choose their product, hoping that they will latch onto one. Too heavy-handed an approach might interfere with this process by raising viewers' defenses. Political ads seem to follow the same strategy, hoping that citizens will grow to prefer a candidate without being told to troop to the polls. That may or may not be an effective approach, but it is the one that advertisers use and that regulators and courts must reckon with.

coordinated expenditures or independent expenditures by parties and groups. Both are vastly outnumbered by candidate commercials.

127. Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill" (*PS* 35, No. 2: 207–212), 2002.

128. Krasno examined a videotape of 1976 advertisements for President Ford compiled by the Ford Presidential Library. Direct comparisons are impossible because there is no information about how often each of the separate commercials aired. Nonetheless, while the format and production values of these ads were noticeably different from today's, most of the individual spots did not use the language discussed in the paragraph accompanying note 127 above.

129. Shopping channels, other products only available directly from a warehouse or distributor, and public television fundraising drives are obvious exceptions.

If the magic words test fails to distinguish between candidate ads and either type of issue ads, what does? We separated candidate-oriented issue ads from pure issue ads with the help of undergraduate coders at the Universities of Arizona and Wisconsin who evaluated commercials by answering the following question:¹³⁰

In your opinion, is the purpose of the ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?¹³¹

Several points speak to the accuracy of the coding of this item. The degree of inter-coder reliability was extremely high, even though no training was provided.¹³² More reassuring, however, are several measures of criterion validity. Coders correctly regarded virtually all ads by candidates and parties as electioneering, while approximately half of the commercials sponsored by interest groups were rated as pure issue advocacy.¹³³ Moreover, the proportion of group ads categorized as electioneering increased sharply in the months immediately preceding the election.¹³⁴ That timing validates the coders' judgments.

The similarities between candidate and candidate-oriented issue ads, and the differences between these two types of commercials and pure issue ads do not end there. The most obvious characteristic shared by candidate ads and candidate-oriented issue ads is their emphasis on candidates. Candidate names appear in virtually all of these spots, with candidates most likely to identify themselves in their ads and candidate-oriented issue ads most likely to identify the opposing candidate (in some pejorative way). Pure issue ads, on the other hand, were much less likely to mention a candidate for federal office: candidates were featured in the text or video of just 6.4 percent of pure issue ads in 1998.¹³⁵

Candidate ads and candidate-oriented issue ads also tended to cover the same themes. For instance, the top five issues raised in candidate ads in 1998 and 2000 were education (mentioned in 30 percent of ads), health care (27 percent), taxes (27 percent), Social Security (24 percent) and the background of

130. Discussion of the media-tracking data relies on earlier work or additional analysis performed by Krasno.

131. For the full text of the coding protocol see Jonathan S. Krasno and Daniel Seltz, *Buying Time: Television Advertising the 1998 Congressional Elections* (New York: Brennan Center), 2000, p. 193-5.

132. The hope was to allow each student to assess the various ads using his or her own common sense rather than imposing a uniform standard. It is noteworthy that Professor Goldstein reports little confusion over this or any of the other items on the coding protocol.

133. We refer here and elsewhere to the number of times commercials aired, not the number of discrete spots produced and aired at least once.

134. The rise for pure issue ads was much less pronounced.

135. Ads were counted as identifying a federal candidate only when aired before the audience of his or her constituents. So, for example, a commercial about the McCain-Feingold bill only identifies candidates when it appears in the home states of Senators McCain and Feingold, not when it appears elsewhere. BCRA makes the same distinction.

the candidate (18 percent).¹³⁶ Candidate-oriented issue ads stressed virtually the same list of topics: health care (28 percent), Social Security (20 percent), taxes (20 percent), education (18 percent), and Medicare (17 percent). By contrast, pure issue ads stood out a bit for their content. The most popular themes in these spots, health care (29 percent) and Medicare (28 percent), are familiar, followed by a cluster of topics only one of which was the frequent focus of candidate-oriented issue ads: environment (9 percent), trade (9 percent), taxes (8 percent), and China (7 percent). It is clear that one of the arguments for issue advocacy—that it may introduce subjects ignored by the candidates—applies with greater validity to pure issue advocacy than to the candidate-oriented issue ads.

Moreover, candidate ads and candidate-oriented issue ads also touched on more themes in each spot (averaging 2.6 and 2.2 themes in each commercial aired) than did pure issue ads (average of 1.3).¹³⁷ This pattern is consistent with our earlier observation that commercial advertising routinely provides viewers with a variety of causes to choose their product. Pure issue ads, however, appear less concerned with selling a product than with expressing a particular point of view or urging action on a specific policy matter before Congress.¹³⁸

Finally, there is perhaps the most objective element of all: the timing of these ads. Candidate and candidate-oriented issue ads overwhelmingly appeared in the months before Election Day. Seventy-nine percent of the commercials aired by candidates in 1998 and 85 percent of candidate-oriented issue ads appeared after August. In 2000, the surge of advertising during the presidential primaries lowered the percentage of candidate ads aired during the last third of the year to 67 percent. Candidate-oriented ads followed suit with 74 percent appearing after August 31. By contrast, most of the pure issue ads aired in 1998 (59 percent) and almost all the pure issue ads aired in 2000 (81 percent) appeared *before* September.¹³⁹ These findings reflect the different purposes of these advertisements. Commercials sponsored by the candidates and candidate-oriented issue ads are geared to Election Day and appear with increasing frequency as November approaches. Furthermore, these ads are narrowly targeted to air in only the most closely contested elections. Pure issue ads are more

136. Ads were coded as having up to four themes. Coders chose from a list of approximately 60 issues in response to the following item: "Attached are a list of issues that frequently come up in the course of political commercials, such as education, the environment, and taxes. Please list the ones that come up in this ad in the order in which they appear." See Wisconsin Advertising Project, at <http://www.polisci.wisc.edu/tvadvertising> (last updated July 27, 2002).

137. This is the average number of themes identified by coders for each spot from the list provided.

138. Furthermore, pure issue ads are largely prospective in their emphasis, asking viewers either to lobby officeholders regarding a future action or to change their opinion on some matter. Candidate-oriented issue ads are overwhelmingly retrospective in that they look back in time to characterize candidates' previous actions, occasionally using these evaluations to speculate about their future behavior.

139. See the Expert Report of Professor Goldstein.

likely to respond to the congressional calendar or an advertising strategy unrelated to an election.¹⁴⁰

Our examination of advertising shows that there were two distinct types of issue ads broadcast in 1998 and 2000: candidate-oriented and pure issue ads. The first are similar to ads sponsored by candidates for their emphasis on individual candidates, their thematic content, and their timing, as well as viewers' perceptions of their intent. Pure issue ads differ from the candidate-oriented variety in all of these ways. They rarely mention federal candidates. They emphasize a somewhat different set of issues and focus more narrowly on a single topic. They air throughout the year. They appear to viewers to express a point of view unrelated to the upcoming election. The magic words test, however, does not distinguish between these two distinct types of issue ads; indeed it does not distinguish between ads sponsored by candidates and any type of issue ad, or even between political and commercial advertising. Whatever its utility might once have been, this standard is now irrelevant to how political ads are designed. We are left with a crucial distinction that no longer distinguishes, one that consequently created a loophole in FECA through which emerged a whole new form of unregulated campaigning in federal elections. The result has been to devastate the regulatory structure Congress established in 1974.

2. *BCRA's regulation of issue advocacy*

The BCRA contains several provisions that define electioneering communications. For state parties, the law redefines "federal election activity" as public communications that refer to a clearly identified federal candidate and promote, support, attack, or oppose that candidate.¹⁴¹ For interest groups, the standard is different: electioneering communications are those that refer to a clearly identified federal candidate (within the area in which they are running), and appear within 30 days of the primary or 60 days of the general election. By distinguishing between different sponsors of ads, Congress is merely following its own lead in FECA whereby all expenditures by candidates are treated as campaigning. Given parties' avowed purpose of winning elections, it makes sense to include their communications that mention a candidate within FECA, regardless of when those communications appear. Interest groups, however, may have a different set of goals, thus the risk of confusing their communications about issues with their electioneering is much greater. BCRA attempts to minimize this danger by taking a more permissive approach to their advertisements by using the calendar to limit the period in which their speech might

140. For a graphic representation of the timing of advertising and the congressional calendar, see Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill" (*PS* 35, No. 2: 207-12, 2002).

141. BCRA provides no special definition of issue advocacy for national parties but instead requires them to finance all of their activities with hard money.

be treated as electioneering to 90 days over a two-, four-, or six-year federal election cycle. We focus on that attempt here.

The logic of BCRA's approach for groups seems compelling. At a minimum, advertisements intended to aid the fortunes of a political candidate must identify that candidate or his opponent and appear proximate to the election. Any ad that fails to mention the favored candidate or his opponent would likely be too obscure to affect a public whose normal attention to politics is short, as would an ad appearing more than two months from Election Day. A third consideration, words that make a direct appeal for the viewer's vote, may also indicate electioneering. As we have noted, however, language expressly advocating the election or defeat of a particular candidate has rarely been a part of campaign ads. The same data show that mentioning or picturing a candidate in the weeks leading up to an election were central elements of electioneering communications. BCRA defines campaign advertising in a way that makes sense both logically and empirically.

Does this definition also inadvertently sweep an unacceptable amount of genuine issue speech into the electioneering category? We addressed this question by using the media-tracking data from 1998 and by referring to the Expert Report filed by Kenneth Goldstein about the 2000 data. In both years, the universe of genuine issue ads sponsored by parties is defined by coders' assessment of the purpose of these ads (see p. 158). Interest groups aired 11,785 pure issue ads in 1998, and almost four times that amount, 45,001, in 2000.¹⁴² But only a small fraction of these airings—6 percent in 1998 and 3 percent in 2000—appeared within 60 days of the general election and identified a federal candidate and, thus would have been regulated as federal electioneering.¹⁴³ These affected airings included nine separate commercials, three in 1998 and six in 2000, which aired 713 times in 1998 and 1,413 times in 2000.¹⁴⁴ While BCRA has very little effect on pure issue advocacy, its impact on candidate-oriented issue ads is striking. In 1998, 58 percent of candidate-oriented issue ads by groups identified candidates and appeared within 60 days of the election, and

142. These numbers differ slightly from those reported earlier by Krasno and Seltz and by Krasno and Goldstein because of additional coding performed for this litigation.

143. The 2000 edition of *Buying Time* estimates the impact of BCRA differently. Instead of calculating its effect on genuine issue advocacy by dividing the number of "false positives"—pure issue ads incorrectly treated as electioneering by BCRA—by the number of pure issue ads aired throughout the year, the 2000 volume divides the number of false positives by the total number of group ads in the last 60 days that mention a candidate. The last number combines the false positives with the "true positives"—the candidate-oriented issue ads that BCRA was intended to affect. As a result, it is enormously susceptible to fluctuations in the volume of candidate-oriented issue advocacy. Since the absence of a presidential campaign in 1998 dramatically reduced the number of these ads, applying the 2000 edition's formula to the 1998 data set yields a different result for BCRA's 1998 impact: 14.7 percent.

144. One spot was added to earlier reports about 1998: a commercial featuring Senator John Breaux praising the good work done on teen alcoholism by Century Council and the Boys and Girls Club, and providing a toll-free number. This spot appeared one time in New Orleans just before the 60-day general election period began and two times immediately afterward.

in 2000, 67 percent did. These, of course, are the spots that Congress intended to regulate. It is clear that BCRA does a good job hitting what it is aiming at (candidate-oriented issue ads) and missing what it is not (pure issue ads).

Critics will surely complain that this analysis depends on subjective judgments made by coders about the purpose of the commercials. We believe those assessments, however subjective, are supported by a variety of additional criteria (see p. 158–60). But the more important point is that these assessments correspond closely to the objective standards established by BCRA. BCRA's definition of electioneering is simple, concise, easily understood, and intuitively sensible.¹⁴⁵ The fact that it performs so well against the subjective impressions of individuals who examined the ads reassures us that this provision works as it was intended. The BCRA standards offer clear guidance to advertisers, and they separate candidate-oriented from pure issue ads quite effectively.

Critics will also question the impact of the 30-day period preceding primaries on our estimates of the percentage of pure issue ads affected by BCRA. The hodgepodge of different primary dates makes it difficult to factor this period into the analysis, but we are confident that it would have little effect on the proportion of pure issue ads incorrectly captured by BCRA for the simple reason that so few of these advertisements mention candidates at all (see p. 158). Indeed, our examination of 1998 shows this to be true: no pure issue ads would have been captured by the 30-day primary period.¹⁴⁶ In fact, we would argue that the percentages of issue ads affected by BCRA that we report are likely too high, perhaps much too high. The data from which these estimates are derived cover broadcasting only during the 1998 and 2000 calendar years, not the thirteen-plus months preceding them. Were we able to factor in the total number of pure issue ads that appeared between elections, the percentage of pure issue ads affected by BCRA would decline.¹⁴⁷ We have no data about how such spots aired during these missing time periods, but we have no reason to assume—given the lack of relationship between pure issue ads and the election—that these numbers were much higher or lower than we observed during 1998 and 2000. We do know, however, about those two years, when we combine them to simulate BCRA's effect on a longer four-year period, the results change slightly

145. Coders reported no problem determining whether a candidate was identified in any spot. Rather, the only source of confusion was whether an individual mentioned in an ad was a candidate or someone else. Advertisers may try to circumvent this criterion by seeking ways to refer to a candidate without clearly identifying him or her, but the more obscure these references become, the less certain their impact. In the end, we doubt many advertisers will adopt this approach.

146. This turned out to be fairly simple to calculate since only one additional advertisement—a spot by the National Federation of Independent Business touting its work with Congressman Sununu (R-NH) on tax simplification—identified a federal candidate in his or her district. This commercial appeared in Boston in January of 1998, long before New Hampshire's congressional primary.

147. Since BCRA's impact is properly measured over the full life of an election cycle, it is appropriate to include all the pure issue ads that appear during this period in the analysis.

and offer further reassurance about the legislation's small impact on genuine issue advocacy.¹⁴⁸ In short, BCRA is remarkably successful in differentiating between the vast majority of pure issue ads and candidate-oriented issue ads.

Nevertheless, the ACLU has demonstrated with a commercial about gay rights, aired in House Speaker Dennis Hastert's district last spring before the GOP primary, that it is possible to deliberately create a pure issue ad that runs afoul of BCRA. This episode deserves special scrutiny, and we would emphasize several points. It is telling, from our perspective as students of elections and campaigns, that the ACLU was forced to fabricate its own example of a pure issue ad that would be improperly categorized by BCRA. Given the huge number of issue ads broadcast in 1998 and 2000, if plaintiffs are correct in their dire predications about how BCRA would damage free speech rights, it should have been easy to find numerous real-life examples to illustrate the same point. In fact, very few pure issue ads would have been affected by BCRA. Even more telling, however, the ad that the ACLU ran was designed in a specific way to trigger BCRA. It need not have done so.

This point deserves amplification. Why did so few pure issue ads broadcast during 1998 and 2000 refer to a federal candidate and appear close to Election Day? Most were concerned only with issues, seeking to move public opinion on abortion or trade or unions. Candidates were irrelevant to these appeals; in fact, invoking them might unnecessarily politicize the underlying message of these ads and undermine their effectiveness. As for the ads attempting to lobby the government about a particular policy, some of these spots mentioned specific officeholders, like Hastert, but most of the examples we examined did not.¹⁴⁹ Rather, viewers were asked to contact their representatives or their senators, not specific individuals. This approach reflects the fact that media market boundaries are determined by the strength of their transmitters, not the boundaries of election districts. For example, the dominant media market in Hastert's district—Chicago—also reaches more than half the homes in thirteen other House districts. By focusing only on Hastert, more the 90 percent of the viewers, represented by other members of Congress were essentially excluded from the message of this ad. In the real world, an advertiser in the Chicago area

148. It is worth noting, for example, that all of the pure issue ads affected by BCRA in 1998 involved Senate candidates, suggesting a six-year analysis is appropriate. By combining the two years for which we have data, however, we find that BCRA would have affected 4 percent of pure issue ads aired. Using the *Buying Time 2000* formula produces an even lower estimate: 3 percent.

149. Our evidence is mainly impressionistic, since coders were not asked to record whether ads asked viewers to contact Congress or their (unnamed) senators or representatives. Nonetheless, we do note the pattern exhibited in ads sponsored by Citizens for Better Medicare, an industry group that was the largest sponsor of issue ads in 2000 (see Expert Report of Kenneth Goldstein). Coders rated a large majority of their commercials as pure issue ads. None of these spots named a specific member of Congress; rather they asked viewers to "call Congress." By contrast, CBM ads coded as electioneering in their intent did use candidate names. There is another clear distinguishing feature between these two sets of ads: the pure issue ads aired mainly before September, but the candidate-oriented ads aired exclusively after Labor Day.

would have little reason to target an appeal so narrowly since any pressure exerted on any member of Congress is likely to serve his or her cause, even if only to bolster its supporters.

The practices of issue advocates in 1998 and 2000 suggest several alternative approaches for the ACLU, had it wished to air its ad without crossing the line dividing issue advocacy from electioneering. It could have—like most spots seeking to lobby Congress—urged its audience to contact their representatives without identifying Hastert by name. Even if the Speaker was the only target of the ad, he could hardly have overlooked a surge of letters and phone calls reported by other Republicans (or even Democrats) in the Chicago area. Alternatively, the ACLU could have run its spot earlier or later to avoid the 30-day period before the primary. The fact that most pure issue ads did not appear proximate to Election Day suggests that this is a viable strategy.¹⁵⁰ Advertisers engaged in battles over specific votes go public when the congressional calendar demands; thus, commercials lobbying Congress often appear many months from any election. Certainly, legislators pay special attention to public opinion during their campaigns, but the evidence is overwhelming that they attend to their constituents' desires throughout their terms.¹⁵¹ If neither of these options was appealing, the ACLU could have run its ad with hard money and reported its expenditure to the FEC as an independent expenditure. Finally, the ACLU might simply have used mail, the Internet, print ads or phone banks to deliver its message.

In the end, it is clear that the sheer scope and volume of candidate-oriented issue advocacy since 1996 has been enormous. Initial reports suggest that the 2002 election is shaping up as more of the same and, without BCRA, we would expect the trend to continue. Candidate-oriented issue ads have accounted for hundreds of millions of dollars of unreported campaign spending, and in some races—starting with the presidential contest—have exceeded advertising expenditures by the candidates. The widespread use of candidate-oriented issue ads circumvents the will of Congress, one upheld repeatedly by the Supreme Court, to limit the source and amount of campaign contributions and to require public reporting of receipts and expenditures for federal election campaigns. Congress, thus, had substantial provocation to act to restore and protect the advances made under FECA.

In conclusion, we believe that the impact of BCRA is primarily an empirical question best evaluated with the extensive data on issue advocacy developed over the last half-dozen years. Advertising data show that there are two distinct types of issue ads: those that are basically candidate-oriented and electioneering in nature, and those that only present or urge action on an issue. The former are

150. There is a solid practical reason to avoid the crowded period right before an election, particularly a heavily contested one: the availability and price of airtime.

151. For example, see Anthony King, *Running Scared: Why Politicians Spend More Time Campaigning Than Governing* (New York: Simon & Schuster), 1998.

nearly identical in format, structure, and timing to ads produced by candidates, while the latter bear little or no resemblance to electioneering. These data also reveal that BCRA's definition of electioneering communications for interest groups distinguishes extremely well between these two sorts of issue ads, with the number of false positives—pure issue ads mistakenly categorized as electioneering—being but a very small fraction of the total ads of this type. Furthermore, the variety of formats in which pure issue ads appeared suggests that advertisers who wish only to address an issue can easily take one of several steps to avoid triggering BCRA. In short, the formula that Congress has developed is successful in realizing its own goal of regulating the great mass of candidate-oriented issue ads while affecting very few pure issue ads. Naturally, we wish that no pure issue ads would be inadvertently touched by BCRA, but the chaotic world of advertising is not so easily managed. We are satisfied that BCRA has a minimal effect on genuine issue advocacy, offers advertisers clear guidance and an array of options that serve nonpartisan purposes, and is, in short, a reasonable response to a serious threat against the existing campaign finance system.

B. The corruptive potential of issue advocacy

1. Defining corruption

In our earlier discussion of soft money we argued that corruption encompassed bribery, undue influence and the more extreme forms of privileged access. We stand by that definition here, as we turn to issue advocacy. The following subsection (B2) provides an analysis similar to our evaluation of the corruptive potential of soft money, showing how issue ads may influence policy-makers to grant favors and access to those who purchase them.

The use of candidate-oriented issue ads for electioneering by an array of established interest groups, freshly minted “organizations,” and parties in the last several election cycles has also created a broader set of problems about elections that we will address in this subsection. Our decision to place this discussion here is inspired in part by the Supreme Court's earlier concern for the “integrity of the electoral process,” the controlling interest in campaign-finance and related jurisprudence before *Buckley*.¹⁵² Indeed, by previous standards—and from our own perspective as long-time students of elections—we regard the recent use of issue ads as inimical to the integrity of the electoral system and, in that respect, corrupting.

152. This includes two of the main precedents cited by the *Buckley v. Valeo*, 425 U.S. 946 (1976), court, *Burroughs v. United States*, 290 U.S. 534 (1934), and *Ex parte Yarbrough*, 110 U.S. 651 (1884). See Frank J. Sorauf, “Caught in a Political Thicket: The Supreme Court and Campaign Finance” (*Constitutional Commentary* 3:1), 1986; Frank J. Sorauf, “Politics, Experience, and the First Amendment: The Case of American Campaign Finance” (*New York: Columbia Law Review* 94:2), 1994.

We would judge the health of the electoral system by a few simple criteria. The first is choice: elections should offer voters an alternative between two or more candidates with a reasonable chance of winning. As desirable as it would be for voters to like their choices, it is even more essential that more than one of the names on their ballot have some possibility of election. This suspense, of course, raises the stakes of voting for citizens and spurs turnout. It also provides the chief means for popular control of elected officials; legislators for whom defeat is unthinkable have much less incentive to heed or serve their constituents than officials whose careers are even slightly precarious. Obviously, practical considerations like the underlying partisanship of many jurisdictions and the popularity of many incumbents shrink the odds of truly competitive elections in most states and districts. Even taking these considerations into account, however, the number of contested races, particularly for the House of Representatives, has sunk to dangerously low levels: as of August 6, non-partisan observers believe that just 39 House districts out of 435 are "in play" in the 2002 elections, a phenomenally small number in a redistricting year and one that leaves more than 90 percent of Americans living in districts written off this November.¹⁵³

Second, we would point to the importance of citizen participation. Voting is the main form of participation, but not the only one. Citizens may also participate in politics by becoming candidates for office, an enormous but vital commitment. Scholars are largely agreed that the difficulty in recruiting candidates is a principal reason for the lack of competition in elections.¹⁵⁴ We should also not forget another group of participants: the shrinking percentage of Americans who volunteer on election campaigns or partisan endeavors.¹⁵⁵ These activists have always been a small minority of the population, but their energy and commitment are vitally important to the system. On a practical level, we know that personal face-to-face contact is the most effective way to increase voting. But our interest in volunteerism is broader, for we would argue that politics—and political careers—begin with local associations, local issues, and local organizations. Replacing that activity with a system driven by cadres of professionals, mainly in Washington, threatens to turn citizens into passive consumers of politics instead of active participants.¹⁵⁶

Finally, there is accountability, a term we used earlier with reference to parties. In this case, however, we refer not just to voters' ability to hold groups of officials responsible for the actions of government, but their ability to assess

153. Adam Nagourney, "Economy Stirs G.O.P. Worry In House Races," *New York Times*, August 6, 2002.

154. For example, see Gary C. Jacobson and Samuel Kernell, *Strategy and Choice in Congressional Elections* (New Haven: Yale University Press), 1984.

155. Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster), 2000, chapter 2.

156. For a broader discussion of the larger issue, see Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster), 2000.

individual candidates on their own actions and words. Much as we might like to see more informative and perhaps higher-minded campaigns, we know of no easily applicable standards to judge them or means to achieve them. Instead, we do insist on the simpler idea that it be relatively uncomplicated for voters to associate candidates with the ideals they actually espouse, the programs they actually propose, and the tactics they actually use. Transparency, a main goal of both FECA and BCRA, is indispensable for informing vote choice and influencing candidates' behavior in addition to its value as a deterrent to influence peddling.

The explosion of candidate-oriented issue ads undermines all of these goals. To begin with, issue advocacy has radically escalated the financial arms race for candidates and all other participants in elections. The average spending by winning House candidates has nearly tripled over the last twenty years with almost half of that increase coming after the first widespread use of issue ads in 1996.¹⁵⁷ Astonishing as the average expenditures of 2000's winners—over \$850,000—may seem, this number is actually misleading because the vast majority of incumbents faced little more than token opposition. Candidates in the most competitive races averaged closer to \$1.5 million.¹⁵⁸ Issue ads have helped drive these expenditures up by forcing candidates to consider not only what their opponents may do with hard money but also what outside groups do with soft money. Candidates have responded by raising more, spending more, and saving more; FEC reports show candidates with considerably more cash on hand following the 1998 and 2000 elections than previously.¹⁵⁹ And parties, given the opportunity to avoid limits on coordinated expenditures that encouraged them to allocate their resources over many states and districts, have spent most of their issue advocacy dollars on just a handful of the best-funded House and Senate candidates, further raising costs in these races.¹⁶⁰

This increased spending raises the fundraising bar for candidates and potential candidates. For individuals contemplating a run for federal office, the question that they have long been confronted with—"how much money can you raise?"—has taken on new urgency and new dimensions as the price of viability

157. Federal Election Commission, *FEC Reports on Congressional Financial Activity for 2000*, at <http://www.fec.gov/press/051501congfinact/051501congfinact.html> (May 15, 2001).

158. The Campaign Finance Institute, at <http://www.cfinst.org/studies/vital/3-3.htm>.

159. For House figures see Federal Election Commission, *Financial Activity of General Election U.S. House of Representatives Candidates—1988–2000*, at <http://www.fec.gov/press/051501congfinact/tables/gehouse.html> (May 15, 2001). For Senate figures, see Federal Election Commission, *Financial Activity of General Election Senate Candidates—1988–2000*, at <http://www.fec.gov/press/051501congfinact/tables/gesenate.html> (May 15, 2001).

160. This reflects the parties' efforts to choose races where their involvement might tip the balance. But with parties and many interest groups all trying to do the same thing, outside involvement is concentrated in relatively few districts. Because of diminishing marginal returns, it is unclear whether this spending has any appreciable impact on the vote. See Jonathan S. Krasno, "The Electoral Impact of 'Issue Advocacy' in 1998 and 2000 House Races," in *The Medium and The Message* (Kenneth Goldstein and Patricia Strach, eds., Upper Saddle River, NJ: Prentice-Hall), 2003.

goes up and up.¹⁶¹ It is obvious that the rising costs likely price some potential candidates out of the market, affecting both the nature of choices in many races (due to the effort to recruit rich candidates able to finance their own campaigns) and its existence in others (where potentially viable candidates choose not to run).¹⁶² For the candidates who do run, the constant attention to their fundraising becomes another hurdle as parties and groups who run issue ads try to “target” their efforts in races where their spending might tip the balance. Thus a challenger who has raised \$1 million (no longer such an impressive amount) and is a half-dozen points back in the polls is seen as a less fruitful investment than one who has raised \$2 million and is only three points behind, even though victory seems solidly in reach for both of them. The result is that standards of viability rise steadily, leaving fewer races that seem winnable or worth investing in. Put another way, we find it highly unlikely that just 39 House seats are “in play” this November¹⁶³ in the sense that victory is an all but foregone conclusion for one of the candidates, especially in early August when most campaigns have barely begun to contact the public.

The emphasis on financial resources also leaves non-financial resources undervalued. One sign is that candidates with potentially strong bases of support or formidable organizational capacity are often overlooked in favor of those with healthy bank accounts. Another is something we discussed earlier in reference to party-building: the failure of the parties to invest resources in their organizational structures. Their approach has been driven by demands to provide direct aid to candidates, particularly television advertisements. The result is that state and local parties have been used to move money around and to purchase advertising, not to build strong organizations, recruit activists, or engage in grassroots campaigning. Many interest groups play a similar game, focusing on advertising to the apparent exclusion of almost everything else.¹⁶⁴ Citizens are left as passive consumers of political campaigns conducted for their benefit by trained professionals rather than as participants in the struggle to lead the nation. Granted, technological change has played the major role in this transformation, but the growth of issue advertising has accelerated the process, leaving the grassroots to wither.

Finally, the impact of issue advocacy on accountability is unmistakably disastrous. The Annenberg Public Policy Center keeps tabs on over 100 groups

161. On the number of challengers raising various amounts of money, see Federal Election Commission, *at* http://www.fec.gov/press/051501congfinact/tables/number_of_house_nonincumbents.html.

162. The fact that the number of competitive House races (including 1998 and 2000) has fallen to its lowest point in several decades during a period in which party and interest group spending on issue ads was plentiful and matched by a rise in candidate receipts suggests, contrary to the conventional wisdom, that inadequate overall funding is not a main reason for the shortage of hard-fought campaigns.

163. Adam Nagourney, “Economy Stirs G.O.P. Worry In House Races,” *New York Times*, August 6, 2002.

164. The AFL-CIO, NAACP and Christian Coalition are notable exceptions.

(excluding parties) that sponsored issue ads in 2000. Some were familiar, but many others—"Voters for Campaign Truth," "Aretino Industries," "Montanans for Common Sense Mining Laws," "American Seniors, Inc."—were organizations about which literally nothing was publicly known, including information about their sponsors, their finances, and the extent of their activities.¹⁶⁵ Others, of course, turned out to be fronts for trade associations, labor unions, and even wealthy individuals, but these revelations came courtesy of reporters or, in some cases, the groups themselves. By creating organizations with names like "Citizens for Better Medicare" (Pharmaceutical Research and Manufacturers Association) or "American Family Voices" (American Federation of State, Local and Municipal Employees), the sponsors added credibility to their appeals and offered anonymity to their donors, but these advantages were realized only by withholding information from the public.¹⁶⁶ By comparison to all other players in campaigns—candidates, parties, and PACs—these organizations were enigmas.

Beyond the true identities of many issue advocates, there is also their relationship to the candidates' campaigns. In many instances, the degree of synchronization between the issue advocates and the candidates' campaigns belie the notion that issue ads are truly independent. For example, candidate ads in 1998 and 2000 were overwhelmingly positive in their tone, commercials whose primary purpose according to the coders was to "promote" a specific candidate. Issue ads, by contrast, were rarely positive; instead they usually concentrated on attacking the opponent or, somewhat less frequently, on drawing contrasts between pairs of candidates. Even ads that contrast candidates often have a critical edge to them, making them similar to pure attack ads. This pattern suggests a division of labor in campaigns where candidates take the high road and issue advocates are left to do the dirty work of bloodying the other side.¹⁶⁷ We are skeptical that viewers even noticed this division of labor, yet its existence illustrates the difficulty voters face in determining who bears responsibility for the commercials they see.

2. *The corruptive potential of issue advocacy*

Issue advocacy, being in part a style of advertising, presents a somewhat different set of challenges to the integrity of the electoral system than does soft money. Those challenges, however, include many of the same concerns relevant to our earlier discussion of soft money and corruption. In particular, we believe

165. Issue Ads @ APPC, *Club for Growth*, at <http://www.appcpenn.org/issueads/gindex.htm> (last modified January 2001).

166. Sometimes the benefits of a particular name are subtle. We found identical ads aired against two Republican incumbents by separate interest groups, FAIR and Coalition for the Future American Worker.

167. This situation is similar to earlier allegations that the Bush campaign of 1988 quietly encouraged "Americans for Bush," an independent group, to air an ad that used Willie Horton's mug shot, allowing the campaign to disclaim any responsibility for this commercial.

that issue advocacy also produces special avenues of legislative influence for their sponsors and funders. The structure of the campaign finance system and the interests of the players within it make issue advocacy an attractive tool for those seeking to influence public officials. In this section, we return to the same definition of corruption we used earlier in conjunction with soft money to address the corruptive potential of issue advocacy.

Our analysis begins with the secrecy surrounding issue ads. Earlier we noted the nearly complete lack of disclosure of receipts and expenditures for issue advocacy, and how it reduces citizens' ability to discern the source of many of the communications they witness during a campaign. Secrecy is one of the outstanding characteristics of issue ads, especially those financed by interest groups. As a result, we—and regulators—are hampered by a remarkable paucity of information about them. The media-tracking data we have referred to throughout our report fill in some of the blanks, but many key factual questions remain unanswered or may only be answered after painstaking investigation. Nonetheless, the dangers of issue advocacy are plain to see.

This secrecy, by itself, creates enormous opportunities for wrongdoing—for favors to be exchanged between issue advocates and public officials. Disclosure, of course, is a main accomplishment of FECA; it was seen by its sponsors and by the Court as an essential element—along with limits on contributions to candidates—in Congress's system to guard against various forms of corruption. In fact, disclosure has been a central feature in reforms long predating FECA and in most states, and courts across the land have repeatedly affirmed attempts to make campaigns report their financial transactions.¹⁶⁸ Among its various advantages, disclosure is thought to combat corruption by illuminating the dark corners in which undue influence may be exerted far from public view. The idea is that politicians eager for popularity and votes will be loath to enter into situations that cast doubt on their probity; thus, the more these situations are revealed, the stronger the politician's impulse to avoid them.

One of the ironies of this litigation is that many of BCRA's opponents are otherwise champions of disclosure. A serious argument advanced, primarily by conservatives, holds that campaign financing ought to be deregulated and disclosed, since transparency alone is sufficient to insure against corruption. We remain thoroughly skeptical about the full sweep of these claims, yet we share the same desire to shed light on the financial transactions of campaigning. The public's interest in revealing these transactions is countered by the private interests of many groups and donors to keep them secret. Thus, the ability to route money to groups for candidate-oriented issue ads without disclosure has attracted an increasing amount of money to this activity. In the growing

168. Indeed the first precedent on campaign financing noted by the *Buckley* court, *Burroughs v. U.S.*, involved the constitutionality of disclosure requirements. See Frank J. Sorauf, "Caught in a Political Thicket: The Supreme Court and Campaign Finance" (*Constitutional Commentary* 3:1), 1986.

opaqueness of campaign financing, the opportunity for donors and officeholders to forge close relationships or strike deals without risk of detection increases too.

Among the mysterious groups sponsoring issue ads or the mysterious donors funding various organizations—all without making information known to the public—the example of “Republicans for Clean Air” stands out. This group sponsored ads praising then-Governor Bush and criticizing Senator McCain before the 2000 Republican presidential primaries in three states. Eventually, after the first of these primaries (South Carolina’s) reporters uncovered that “Republicans for Clean Air” consisted of two brothers, Charles and Sam Wyly, long-time friends and supporters of Governor Bush. Charles Wyly, in fact, was an authorized fundraiser for the Bush campaign.

One remarkable aspect of this situation is that the pivotal South Carolina primary came and went without voters there discovering who was responsible for these ads. At the same time, it is impossible to imagine that officials of the Bush campaign were in the dark about “Republicans for Clean Air.” According to press estimates, the Wyllys spent \$25 million on their ads for Governor Bush.¹⁶⁹ We find it inconceivable that an expenditure of that magnitude could remain unknown to the small circle of financial leaders close to both the Bush campaign and the Wyllys (including Charles Wyly himself) or the even smaller circle of Republican media consultants. When the Wyllys’ involvement was later uncovered during the New York primary, the news qualified as a small bombshell and led to a wave of publicity critical of the brothers and the Bush campaign, which in turn distanced itself from “Republicans for Clean Air.”¹⁷⁰ After the election, knowledge of the Wyllys’ activities during the primaries inspired reporters to pay particular attention to the brothers’ role in advising the Vice President in connection with his energy task force.¹⁷¹ In sum, we have a major campaign conducted in secrecy during a key part of the 2000 Republican primary campaign, and a marked change in the level of scrutiny once its sponsors became known. Much as we applaud the ingenuity of the reporters who eventually broke the story, we strongly believe that there is a compelling governmental interest in making these facts known to all from the start. BCRA would accomplish this.

Finally, issue advocacy, like soft money, allows funds from corporate and union treasuries to return to the electoral sphere after decades of absence. The purpose of the long-standing bans on these funds is multifaceted, but we focus on their potential to corrupt. That potential is largely determined by the sheer size of the financial resources available to corporations and unions. We do not pretend that wealthy individuals like the Wyllys cannot mobilize enormous sums of money, but corporate and union assets dwarf all but the largest personal

169. The \$25 million figure comes from the Annenberg Public Policy Center.

170. T. Christian Miller and Janet Wilson, “Campaign 2000: McCain Blasts Pro-Bush TV Ad Campaign Financed by Texans,” *Los Angeles Times*, March 4, 2000, p. A16.

171. Craig Gordon, “The Fight for Computer Associates,” *Newsday*, July 2, 2001, p. A3.

fortunes. Congressional fears of the potential impact of these funds both on elections and on legislative processes were a main reason for prohibiting them. We see the dangers as no less real today, especially as the technology of campaigning has changed and the emphasis on money has increased enormously along with the willingness of many corporate and unions leaders to participate in the electoral arena. For legislators to defy the wishes of Bill Gates or the executives of Microsoft is one thing; to defy Microsoft itself—should the company choose to dedicate a substantial part of its treasury to federal electioneering—remains quite another. It is difficult to point to specific examples of corporate influence felt through issue advocacy because of the newness of the phenomenon and the lack of disclosure. But the potential for legislators to perceive greatly higher stakes, to cite one example, in the lobbying they receive from the pharmaceutical industry because of the millions of corporate funds spent on candidate-oriented issue ads by Citizens for Better Medicare seems real enough.

3. *Appearances*

Assessing public perceptions of candidate-oriented issue ads and their impact on public opinion is difficult because of the sheer complexity of the subject. Few people are aware of the distinction between express and issue advocacy, let alone the enormous consequences for behavior that flow from it. But because citizens are the intended audience for these ads, it is fair to ask what they think of them. The best answer to this question comes from “Dictum Without Data” by Professor David Magleby. Magleby conducted a survey using interactive television to show combinations of eight different issue ads aired in 2000 to a sample of 2,035 respondents.¹⁷² All of the ads—a pair of spots from the presidential campaigns, from the parties’ national committees, and from interest groups (one favoring Bush and the other favoring Gore), as well as two “pure” issue ads that mentioned no candidates—are entirely typical of the different types of commercials that aired in 2000.¹⁷³ Respondents were shown a random selection of three of the eight ads, eliminating concerns about ordering effects. Several of their perceptions are relevant here.

When asked to assess the “*primary* objective or purpose of the ad” (emphasis in the original), at least 85 percent of respondents found that the four issue ads by parties and interest groups were intended to persuade them to vote for or (much more often) against a candidate and only as many as 11 percent thought one of these ads was concerned mainly with presenting an issue. In contrast, viewers were less likely to interpret the candidates’ ads as electioneering (the results ranged between 64 and 74 percent) and more likely to see them as issue-

172. David B. Magleby, *Dictum Without Data: The Myth of Issue Advocacy and Party Building*, at <http://www.byu.edu/outsidemoney/dictum/index.html>.

173. The two interest group ads were American Family Voices, which attacked Governor Bush as beholden to special interests, and the Republican Leader Coalition, which criticized Vice President Gore for his stands on Medicare and Social Security.

oriented (20 and 30 percent).¹⁷⁴ These conclusions held for both the pro-Bush and pro-Gore ads in each category. It is likely that the issue ads seemed more partisan than those sponsored by the candidates because parties and groups criticized the opposing candidate while the Bush and Gore ads featured them speaking on camera about their plans without mentioning the other. This pattern is familiar; the overwhelming majority of candidate ads are positive in tone, while parties and groups emphasize attacks or commercials that contrast the candidates.¹⁷⁵ Respondents did draw an enormous distinction between these spots and the pure issue ads: at least 70 percent felt the primary objective of these latter ads was to present an issue and just 13 percent perceived any electoral purpose. In short, respondents' perceptions of the intent of the ads were remarkably accurate.

The respondents were less accurate, however, in determining who was responsible for a commercial.¹⁷⁶ In response to the question asking who paid for an ad, just over 60 percent of survey participants correctly attributed the candidate ads and the pure issue ads to their actual sponsors. Identification of the sponsors of the candidate-oriented issue ads was much more scattered, with most people (38 to 48 percent) assuming in each case that they came from candidates and fewest (9 to 18 percent) assuming that they were paid for by an interest group. These results, of course, suggest that the disclaimers that appear on these ads are almost completely ineffective. We applaud the section of BCRA mandating that they be made more prominent. But even if they were easier to read, we suspect that viewers would judge the ads on their underlying message, not the accompanying attribution. The confusion over sponsorship also illustrates the problem of accountability created by these advertisements, for one would need a fair amount of expertise, sharp eyes, and perhaps research skills to determine who was behind many of the commercials on television in an election year.

Ultimately, do these candidate-oriented issue ads, however confusing, appear corrupting to citizens? From our perspective there is no doubt that they do. The combination of findings above—candidate-oriented ads are seen as electioneering and they are frequently assumed to come from the candidate—show that the distinction between the actions of candidates and those of parties and interest groups is largely lost. By itself, the conflation of candidates with other, self-interested actors is disturbing and gives the appearance of impropriety. It also indicates that efforts to keep these actors separate from one another have little impact on public opinion. Citizens have the opportunity to view the results

174. We discuss twin sets of numbers because two ads were shown in each category, one favorable to Bush and one to Gore.

175. Jonathan Krasno and Kenneth Goldstein, "The Facts About Television Advertising and the McCain-Feingold Bill" (*PS* 35, No. 2: 207-12), 2002.

176. All the results discussed in this paragraph are summarized in David B. Magleby, *Dictum Without Data: The Myth of Issue Advocacy and Party Building*, at <http://www.byu.edu/outside-money/dictum/index.html>.

of decisions that candidates, parties, interest groups and their legions of consultants make, but they are in no position to see how these decisions get made or whether deals are made and understandings reached. From the perspective of the nation's living rooms, most of the ads by parties and interest groups are no different than those by the candidates, nor do citizens have any reason, aside from blind faith, to assume that allies are not working in concert.

We conclude by recalling that campaign finance law is intended to increase public confidence in elections and campaigns. Yet the campaign finance system, without BCRA, asks citizens to disregard what they see, hear, and think—that the issue ads on their television sets are clearly designed to help or hurt a candidate—and believe that they are watching a rational, nonpartisan discussion of issues. No confidence can be built on a public reaction that either their senses are deceiving them or that their government is. We would argue that campaign finance law must have “integrity,” so that undermining that integrity is neither good for the perception of the law nor for the government that makes it. The rise of candidate-oriented issue ads in recent elections has made a mockery of FECA, diminishing the transparency of its regime and demeaning its reasonable limits on contributions. Many Americans see those ads as no different than those run by candidates except that they are generally meaner and more aggressive. Pretending they are not campaigning generates further cynicism about the law and damages public confidence that government has the will and means to restore its integrity.

III.

THE RELATIONSHIP BETWEEN SOFT MONEY AND ISSUE ADVOCACY

A. The hydraulics of campaign finance

Scholars and journalists have long used hydraulic metaphors to describe the campaign finance system. Cash flows like water with pressure behind it. Thus, if a point of exit or entry is closed off, the money will seek another route. Decades of experience with FECA show that political actors strive to locate and exploit the most vulnerable points in the system. For FECA's critics, the hydraulic metaphors suggest the folly of campaign finance laws, especially the impossibility of controlling virtually uncontrollable behavior. Since any attempt to regulate campaign financing beyond the most general or egregious behavior is bound to fail, why bother?

This perspective ignores the obvious fact that hydraulic systems—including the infamous leaky garden hose—do manage to control and direct the flow of water. We would argue that these metaphors really demonstrate the need for attentiveness to the condition of campaign finance regulation and flexibility in responding to new developments. Practices change and Congress, courts, and regulators need to adapt to new realities lest the entire system be overtaken with leaks and decay. No one expects any hydraulic system to last forever; just as

plumbing and garden hoses are patched and repaired, so must be FECA. It is evident from the Congressional Record that fixing the holes that had developed in its structure, especially in the last half-dozen years, is precisely what the sponsors of BCRA had in mind. Their goal was not to break new ground but to return to the status quo circa 1988 (in the case of soft money) or 1995 (in the case of issue advocacy).¹⁷⁷

The hydraulic metaphors also illustrate another aspect of campaign financing: the degree to which the various components are interrelated. Pressure at one point may affect the entire system, just as a leak may cause all the nearby money to go rushing toward it. The most basic sort of relationship in the hydraulics of campaign financing is between money flowing in and money flowing out. The demand for funds leads politicians, parties, and groups to seek new ways to raise money, and the availability of funds sends these actors searching for ways to spend them. This symbiosis is clearly evident in the relationship between soft money and issue advocacy. Soft money came first, but expenditures were limited to a fairly narrow set of purposes. The Dukakis campaign in 1988 managed to find ways to use these monies to fund substantial parts of their efforts. Those activities, however, required what seems in retrospect to be relatively modest amounts of money. The invention of issue advocacy, or, more accurately, the realization that issue ads could be used to promote specific candidates, came next with the purported success of the DNC ads supporting President Clinton in 1995. Once advertisers understood the ramifications of this development—that they could use soft money to pay for television commercials, the most basic and expensive staple of electioneering—the demand for soft money surged. The dramatic growth in soft money and issue advocacy in recent election cycles are thus connected, and they are not easily decoupled.

The history of campaign financing is a story of evolution as participants have sought out and exploited weaknesses in the system, with each new innovation quickly adopted by others. This dynamic has led to a series of “unanticipated consequences” stemming from FECA or from subsequent administrative or judicial actions. This record provides a cautionary note about any attempt to predict, especially in the long range, the impact of BCRA. Nonetheless, our experience as students of campaigns and campaign financing, and our knowledge of the goals of contributors and political committees, make it possible to discern the broad contours of the likely consequences for options facing the courts.

No crystal ball is necessary to see the future should the courts overturn both the provisions on soft money and issue advocacy in BCRA. The steep growth in soft money and issue advocacy since 1996—including the run-up to the 2002 elections—will continue with some inevitable leveling off. Our forecast is predicated on the very real advantages that soft money and issue advocacy offer

177. Others may date the start of soft money from its first appearance; in this report we date it from its first widespread use in campaigns.

practitioners. Soft money is, especially compared to the small-dollar donations required by FECA, a quick, efficient, and lucrative means of raising large amounts of money. Not only is it easier for the parties or candidates to find a single \$100,000 donor than one thousand \$1,000 contributors, but also the fundraising costs associated with the first are generally much lower, leaving a greater net profit from soft money donations. Under those circumstances, it is no surprise to find, as we did in Missouri, that parties may become largely or entirely dependent on large donations (see page 142). For donors, soft money and issue advocacy allow corporations and unions to avoid old prohibitions on the use of their treasuries for political purposes. They also let the well-heeled elude the contribution limits in FECA, and in some cases its disclosure requirements. In short, the myriad practical advantages of soft money and issue advocacy, particularly when used in concert with one another, are so profound that their growth would be certain.

This growth would have a variety of ramifications for politics. Several of the trends we noted earlier are certain to continue, including the rising cost of campaigns (as the parties and interest groups weigh in), along with the increasing centralization of funding in the hands of national organizations and the professionalization of campaign services. Citizens and political organizations will feel the effects of these trends in several ways. First, the low levels of electoral competition and voter turnout of the last half-dozen years are likely to persist. The cost of campaigns will affect potential candidates' decision to run or not, and the ability of national organizations to lavish funds on targeted races will focus resources on the favored few leaving many candidates unable to run serious campaigns. Many Americans will find themselves in states and districts where their votes are hardly sought. For others, attempts to encourage voting will be largely confined to phone calls and direct mail purchased through sub-contractors. The parties will be even richer than they are now, but there is no reason to expect those riches to translate into greater citizen activity in them. Rather, we expect the parties to continue to function mainly as fundraising vehicles to augment and occasionally overshadow the efforts of individual candidates. Political decisions and strategy will be set from the top, and citizens will be viewed as consumers of political propaganda, not as participants in party governance or in campaigning.

The potential for actual and perceived corruption in such a system will be proportional to the great sums of money moving through it. Earlier we addressed the corruptive potential of soft money and issue advocacy separately. Taken together, the problems are multiplied. The race to raise increasingly large sums of soft money is fueled by the demand for candidate-oriented issue ads. That demand insures more aggressive tactics by the parties and by interest groups to solicit large donations. Once the money comes into the system, it is laundered by cycling it through state parties or through interest groups to create maximum flexibility and minimum transparency to the public. Indeed, it is the attractiveness of an unregulated system of campaigning that makes soft money

and issue advocacy so irresistible to those seeking to influence voters or public officials. These advantages will lure larger sums into the unregulated world of soft money and issue advocacy. In response, citizens will react with continued suspicion of their elected officials and their government, particularly when scandals give special resonance to allegations that donors might have received preferential treatment.¹⁷⁸

In short, we expect the future without BCRA to be more of the same sort of campaign politics we have seen over the last half-dozen years, with the emphasis on more. If we were to offer one deviation from this vision of an extended status quo, it would be an increasing diversion of party funds to groups under their control or that of trusted allies. There is already some sign of this development in the establishment of 527 groups affiliated with party leaders and in the parties' donations to interest groups.¹⁷⁹ We suspect the desire to avoid any disclosure of receipts and expenditures and to circumvent the allocation formulas that require parties to combine their soft money with some hard money will lead the parties to play a larger role in interest group politics, either in creating their own or in sending funds to their allies.¹⁸⁰ The coordination with groups will not be achieved by having the chairs of the DNC and RNC serve on the boards of various groups. Rather, the coordination will be managed through networks of donors and party functionaries, and through the omnipresent offices of campaign consultants who help run both the parties' and interest groups' issue advocacy campaigns.

What if BCRA survives court challenges? This is, of course, the outcome we favor in light of our analysis of its effect on politics, the parties, and the public. Again, a fairly straightforward model of the post-BCRA world exists in the period prior to 1995.¹⁸¹ Many complaints might be lodged against that system—and many were, starting with concern about the power of PACs—but by comparison to today, the sums of money moving through it were smaller and the fears of corruption then seem almost quaint.¹⁸² Electoral competition as

178. We note again that perceptions of corruption are likely to vary depending on a variety of factors including public satisfaction with the performance of government and the presence of a galvanizing event, like the Enron scandal, to focus attention on political donations.

179. See Public Citizen Reform, *Congressional Leaders' Soft Money Accounts Show Need for Campaign Finance Reform Bills* (Feb. 2002). Also from the same source, see *Déjà Vu Soft Money* (Apr. 2002); *Off to the Races*, at http://www.citizen.org/documents/1stQ2002_527Report.pdf. In addition, the Annenberg Center reports that a group affiliated with House Majority Whip Tom DeLay (R-TX), "Americans for Economic Growth," ran issue ads against five Democrats during the 2000 campaign that closely resembled spots aired earlier by the NRCC. See Issue Ads @ APPC, *Club for Growth*, at <http://www.appcpenn.org/issueads/American's%20for%20Economic%20Growth.htm> (last modified Jan. 2001).

180. Donations to some of these groups may be tax deductible, another benefit for donors.

181. Soft money existed earlier, but we date the beginning of the current system to 1995 when candidate-oriented issue ads make their appearance.

182. Most attention was focused on the role of PACs, limited by law to donating up to \$10,000 to a federal candidate (\$5,000 in both the primary and general election). Even aggregating all the PACs in a single industry, for example, rarely resulted in donations rivaling the amounts of

measured by the number of close races for the House of Representatives was higher than it is now, although not particularly high.¹⁸³ Voter turnout, too, was higher than currently, but again not particularly high.¹⁸⁴ Whatever the strengths or weaknesses of that supplanted system, one obvious point stands out: the absence of large-scale soft money receipts by the parties (at least by today's standards) and of candidate-oriented issue ads by parties or groups. The parties and interest groups—not to mention candidates and citizens—still managed to thrive in those days, leading us to conclude they would thrive once BCRA goes into effect. There is simply no reason to think otherwise.

The situation in 2003, should BCRA be upheld, will be different in one important respect from earlier times: the sheer amount of money in the parties' coffers. The hard money receipts of the parties are several times larger than they were a decade ago. The largest part of this money (after expenses) has gone to candidate-oriented issue advocacy in the past two election cycles. With that option off the table, parties will face intense pressure to find useful ways to spend their hard money. Our hope is that some of it may go toward a real program of grassroots party building. That investment will, naturally, have to compete with the parties' other priorities, notably their desire to provide immediate, direct aid to candidates. The resources, even without soft money, are available to sustain a healthy level of investment in state and local organizations. The fact that the parties, in the absence of soft money, will be forced again to rely on small and medium donations for their funding will encourage them to expand their outreach efforts and may make party building more attractive. These changes in the hydraulics of how parties raise and spend money have led some congressional supporters and scholars to argue that BCRA will encourage stronger parties.¹⁸⁵ We are cautiously optimistic that they are right.

B. An historical perspective

Soft money and issue advocacy come together in one more crucial way—in their challenge to the integrity of Congress's regulation of campaign finance. Both are successful exploitations of loopholes in the 1974 legislation by political parties and other groups that have left its regulatory apparatus in disarray. Neither existed in 1974, and neither could have been anticipated then. Both reached their new importance in the 1990s, and both were clearly major stimuli to the Bipartisan Campaign Reform Act of 2002. Congress and the American people saw the logic of extending a transparent regulatory system to include new practices and their practitioners. Both the raising and spending of big soft

soft money given from a single source.

183. The Campaign Finance Institute, at <http://www.cfinst.org>.

184. See Norman J. Ornstein, Thomas E. Mann, and Michael J. Malbin, *Vital Statistics on Congress, 2001–2* (Washington: American Enterprise Institute), 2002.

185. See, for instance, Anthony Corrado, "Party Finance in the 2000 Elections: The Federal Role of Soft Money Financing" (Tempe: *Arizona State Law Review*), forthcoming.

money contributions and the media “campaigning” in the guise of discussing public policy had made the FECA an object of scorn and despair. In both instances they had grown so quickly simply because they were largely unregulated.

The American political parties, never mentioned in the text of the U.S. Constitution, have assumed an informal “constitutional” role in institutionalizing and organizing the emergence of a mass electorate and popular democracy in the nineteenth century. For more than 150 years they have continued that role by structuring political debate and alternatives, by recruiting and nominating candidates for public office, by mobilizing voters, and by organizing legislative chambers. Their visibility as the most salient labels and symbols of our politics makes them virtually synonymous with politics itself. All of that has assured parties a special and preferred status among political organizations. Having so important a position in American electoral politics, the parties also became lightning rods for the reform of those politics. Sometimes they were themselves the objects of reform—in the mandating of party conventions and layers of party organizations in the states, and in the creation of direct primaries, all in response to the unrestrained power of local party machines and their autocratic bosses. Sometimes, as in the last two Congressional reforms of campaign finance, party reform was a secondary consideration. In both cases governmental action added to the web of regulation affecting the parties; in both it also reflected a legislative commitment throughout the country to protect the integrity of electoral and representational processes.

So, while the two major parties have enjoyed a duopoly over the organizing of electoral choice, candidates for office, and public officeholders for well over a century, they have also been the object of major state and federal regulation. And yet, they have long enjoyed many legislated benefits. In most states party money is only modestly regulated, and in some of them parties receive various public subsidies.¹⁸⁶ Congress has not hesitated to treat their campaigning more severely than the states, but it subsidizes, very generously, the parties’ national conventions and their presidential candidates. The resulting, somewhat contradictory status under American law—the combination of favor and disfavor—has, as we have noted, led one leading scholar of the parties to view them as a form of public utility, replete with the combination of privilege and restraint that governs a local electric company.¹⁸⁷

Interest groups, on the other hand, were historically not greatly regulated, except for the general but toothless requirements that they register their lobbying with Congress and state legislatures. Because they long stayed out of electoral politics, they were caught up in very few legislative attempts to protect the electoral process. Corporations and labor unions were prohibited from contri-

186. We include both the public funding of party organizations and their nominees, and tax credits or rebates for contributions for parties.

187. *See* note 56.

buting to federal candidates in the first half of the twentieth century, but only with the development of PACs just before mid-century did groups, including unions and corporations, enter electoral politics and begin funding candidates.¹⁸⁸ Consequently, PACs of corporations, unions and associations fell under the comprehensive regulation of all contributors in the FECA of 1974. Finally, with groups and organizations of all kinds making soft money contributions and buying issue ads in very noticeable quantities, they were folded into the existing regulatory regime with BCRA. The division of labor by which parties were the political organizations of electoral politics and groups lobbied in legislative-executive politics had clearly disappeared.

So, regulatory cycles continued to repeat themselves—legislation, adaptation, then legislative repair, and then another round of adaptation, ad infinitum. Organizations as powerful and important as political parties and groups are formidable regulatees. They are capable of mustering substantial resources and political and legal expertise, and their defenses are buttressed always by nationwide organizations, contacts with many members of Congress, and support in many sectors of the American electorate. Moreover, their capacity for adaptation is maximized by the medium of influence they employ. Money is by nature easily transferable, completely mobile, and exchangeable for most other resources. Its fluidity quickly validates the old adage that in any transactional nexus activity flows from the more regulated portions to the less regulated ones. Thus, independent spending in campaigns gave way in the 1990s to unregulated issue advocacy, both by party committees and interest groups.

Adaptations to the regulatory regime that leave significant parts of it unregulated obviously threaten the regulatory regime and, more generally, the public sector of which it is a part. Successful avoidance leads to citizen cynicism not only about the specific regulation but also about the efficacy of the entire political system. It also generates questions about the fairness and evenhandedness of public policy. As regulatory effectiveness declines, moreover, so does the will and commitment of other actors in the system to comply with the regulations. The loss of trust and confidence is a corrosive agent that no regulatory regime can long endure. Active enforcement is effective only as a supplement to the reliable self-enforcement we call compliance.

The stakes in a periodic “re-regulation” to reflect changes in activity and actors—in legislation like BCRA, that is—are very high indeed. At issue is not only the integrity of the regulation of campaign finance in federal elections and subsequent sessions of Congress, but also citizen trust and confidence in the elected officials of the United States government and in that government itself. While a Congress and a president will be legitimately concerned about the

188. The CIO's Political Action Committee began operation in 1943. PACs must raise money only for political purposes, and they must keep it separate from the assets of the corporations, unions, or associations that sponsor them; hence the PACs of corporations and unions are legal, while the use of their parents' treasuries for electoral purposes is not.

corrupting power of campaign money and its threats to the processes by which a representative democracy works, they must also be able to consider the very integrity and credibility of the institutions of government. Above all, they must consider the effects—both from authenticated realities and from inferences and appearances—of an inability to bring about the changes that popular majorities clearly want (see p.122–35). To break the democratic bargain with the electorate threatens more than their reelection campaigns—it threatens the very institutions of democracy itself.

The challenge in any new regulation of political parties is to reform them without crippling them. We believe that BCRA meets that challenge. The parties have proved once again in recent years that they are resilient and flexible organizations. We hope indeed that the reforms of BCRA will induce them to revitalize local and state party organizations by recruiting new activists, by developing new and local sources of funding, and by increasing the role of party activists in the discussion of party issues. That hope springs from our belief that a reinvigoration of the broader American electorate depends first on recruiting and reinvigorating local party activists and leaders.

Similarly, the challenge of drawing a dividing line between genuine issue advocacy and electioneering is to do so without significantly reducing the ability of parties and interest groups to address policy matters of concern to them. We believe that BCRA avoids this pitfall. Examination of the actual ads sponsored by issue advocates in the last two election cycles shows that very few genuine discussions of policy matters would have been affected by BCRA, and reveals that they may steer clear of regulation without diminishing the effect of their appeals. We are less concerned about the health of interest groups than we are about the parties' health, but our hope for them is virtually identical: that they rededicate themselves to developing membership rolls and publicizing their agendas, freed from the need to transform themselves into campaign organizations every two years. BCRA is a reasonable first step to help parties and groups achieve these goals. By bringing both organizations' ability to sponsor campaign ads for candidates within FECA's system, reform may nudge them back toward their historical emphasis on mobilizing citizens and activists. By restricting soft money, legislators force political organizations to reach out to a broad base of contributors to fund their electioneering, and reduce the massive contributions that create such huge ethical concerns.¹⁸⁹ The end result for parties and interest groups is a return to more traditional activities and away from their dedication of the last half-dozen years to purchasing television commercials. We are confident this transformation will benefit political organizations and the public alike.

189. Soft money is banned for political parties, and others may not use corporate or union funds to finance activities treated as electioneering communications by FECA as amended by BCRA.

