

Mismatching Funds

How small-donor democracy can save campaign finance reform.

Ten years ago, the United States held its first billion-dollar election—that was roughly the amount spent by all candidates for Congress and the presidency put together. The same year brought the first large-scale campaign finance scandal since Watergate, best remembered for the almost accurate metaphor of President Bill Clinton selling overnights in the Lincoln Bedroom in exchange for large contributions to the Democratic Party. And both took place at a time when Americans were deeply disconnected from politics; the 1996 election was the only presidential election since 1960 in which turnout of the voting-age population fell below 50 percent.

In reaction to this dual landmark, the modern campaign finance reform movement was born. It wasn't the first time Washington had tried to bring the influence of money on our democracy under control. Campaign finance reform had been a live issue since at least the time of Watergate, in the mid-1970s. But

MARK SCHMITT *is a senior fellow at the New America Foundation and a columnist for the American Prospect.*

since the radical changes of the 1974 Campaign Finance Act, it had been an insiders' game, with little effort to build a grassroots movement or do more than sand down the rough edges of the system. In the early 1990s, the greatest concern was political action committees (PACs), through which lobbyists and their clients channeled their influence in donations.

But the rise of "soft money" in the mid-1990s—unlimited contributions, often directly from corporations, which had been barred from politics since 1907—made the old worry about PACs seem quaint. In response, a new generation of reformers aimed to make campaign finance reform a public priority. With support from across the political landscape—the editorial boards of almost every major newspaper; a handful of older good-government organizations like Common Cause, Public Citizen, and the League of Women Voters; and newer groups like Public Campaign and the Brennan Center for Justice—elected officials, most notably Senator John McCain, took up the charge.

And a lot of liberal activists turned from other issues to these questions of process. I was one of them. After several years on Capitol Hill working on education, urban development, welfare reform, and taxes, I became convinced that we were spinning our wheels on these narrow substantive issues when it was really democracy itself that was broken. As reformers like to say, campaign finance would be the reform that made all other reforms possible. So when I left Capitol Hill, I went to work for one of the major foundations that was supporting the movement.

Reformers moved in two general directions, which split the movement into roughly two factions. One, Washington-based and incremental, found a fierce ally in McCain and his Democratic counterpart Senator Russell Feingold and set out to ban soft money from federal elections. The other, more ambitious and usually tied (as I was) to other progressive causes, turned away from Washington and toward the states, setting out to stir up popular interest in an idea that long had been dismissed as impractical at the federal level: generous public financing for all candidates.

A decade has now passed, and it's time to ask some critical questions about campaign finance reform. Has it been worth the money and effort? Has the reformers' analysis of politics circa 1996 been borne out by events? Have their solutions been plausible—politically, constitutionally, or as policy? Have they broadened the movement beyond the good-government core of public radio listeners and editorial writers? Is economic inequality still reflected in and reinforced by the political process? Is the politics of 2007 improved in any measurable way over the politics of 1996? And if not, is that because real campaign finance reform didn't happen or because what was passed into law didn't work?

Steps Forward and Back

Each of the two main factions had some undeniable successes in the decade of reform. The passage of the McCain-Feingold Bipartisan Campaign Reform Act (BCRA) in 2002 was a victory for the cause, and its vindication in the Supreme Court was seen by legal scholars as a significant step toward the Court giving greater deference to legislatures on regulation of money in politics. The public-financing faction had notable victories as well, winning ballot initiatives in the late 1990s to create fully public systems (sometimes called “clean money”) in Maine, Arizona, and Massachusetts (although the latter was never implemented and later repealed).

Nevertheless, judged by the most visible results on promises like getting big money out of politics or cleaning up politics, campaign finance reform has been, to put it mildly, a disappointment. Ten years after the first billion-dollar election, the United States is headed into an election in which over a billion dollars is likely to be spent by the candidates for a single office: the presidency. Politics has gotten more expensive at other levels as well. The average amount spent by a congressional candidate in 2006 was \$1.3 million, and many states have begun to see million-dollar campaigns for seats in the state legislature.

As for corruption, recent congressional scandals make the banal cash-for-access deal of the Lincoln Bedroom episode seem insignificant. The scandals involving Jack Abramoff and other lobbyists and contractors have ensnared a House majority leader, the chair of the House Rules Committee, the chair of the House Administration Committee, and a key member of the Defense Appropriations Subcommittee, and involve hundreds of millions of dollars of public spending. Major policy initiatives, from the Medicare prescription drug program to the 2004 energy bill, appear to have been wildly distorted by the influence of campaign donors and their lobbyists. During the vote on the Medicare bill, one member of Congress said he was offered \$100,000 for his son’s congressional campaign if he would change his vote. Similar examples of direct *quid pro quo* exchanges abound.

What’s more, the obsolete system of partial public financing for presidential campaigns has slowly collapsed. George W. Bush chose not to participate in 2000, both major party candidates opted out in 2004, and in 2008 it is likely that no major candidate will accept the voluntary spending limits that go with public money in either the nominating or general election campaigns. As for BCRA, that great triumph? The Federal Election Commission (FEC) weakened it through regulations, while election lawyers found its seams and loopholes, so that what’s left resembles the last tattered patch of a toddler’s well-worn baby blanket, just enough to provide a memory of comfort and optimism but

not enough to provide any real warmth or protection. And the Supreme Court has now agreed to revisit one of the most controversial aspects of its decision upholding the law, namely the provision requiring TV ads that mention a candidate to be paid for with regulated funds. If that provision falls, all that would be left is a prohibition on candidates themselves raising soft money, a modest accomplishment.

Given this lurching pace, it's no surprise that elite supporters of campaign finance reform have drifted away. The foundations that had supported the movement, such as the Pew Charitable Trusts, the Ford Foundation, and George Soros's Open Society Institute (where I worked from 1997 to 2004 and which was a key supporter of public financing), have either had second thoughts or turned to other issues of political reform. The new progressive activists of the "netroots" are mostly either indifferent

to reform or, as with Daily Kos founder Markos Moulitsas Zuniga, openly oppose it. And African-American and Latino activists remain unmoved by the insistence of the white, affluent campaign finance reformers that they should see the issue as more important

than traditional agenda items like voting rights or policies to improve their economic prospects. Even McCain, whose reputation for free thinking and integrity was based on this issue and without whom the modest achievement on federal reform would have been impossible, has left the field.

The difficulties of campaign finance reform and the waning of its institutional support point to an uncomfortable fact: All along, there had been doubt among even progressives and Democrats about its value. Even as they marched in lockstep support of BCRA, many admitted that they thought it would hurt their party, which was more dependent than Republicans on soft money because the Democratic Party did not have as reliable a base of individual hard-money donors. (Those who can, after BCRA, give up to \$2,000—now \$2,300—per election cycle, usually do not hail from the Democrats' poor or middle-class base.) Their fears were never realized, if only because other channels for large contributions emerged and the Democrats finally developed their own base of individual donors. But as the arc of politics has begun to swing back toward the left, many progressives have begun to think that process reforms, such as campaign finance, might not be so important after all. Real progress would require enormous political effort and luck, they reason, and if we had the energy and were blessed with those political circumstances, why not use it to enact something

All along, there had been doubt among even progressives and Democrats about the value of campaign finance reform.

like universal health care? This is the old “reform that makes all others possible” argument turned on its head—if reform were possible, wouldn’t everything else be possible as well? Given that political capital is finite, why spend it on pure process reforms? Unsurprisingly, while they moved quickly to pass ethics and lobbying reform, campaign finance reform was barely on the new Democratic majority’s agenda (although recently a number of Democratic governors have indicated support for public financing).

Ironically, there have been some tremendously positive developments in our politics. The political culture of 2006 is not merely a more expensive and more corrupt version of 1996. While the policies are much worse, the public is engaged with politics as never before; voter turnout has increased; and—perhaps because of the stark choices created by the apocalyptic politics of the current administration—politics is significantly more substantive. Moreover, the Internet and new technologies—from cell phones to powerful database and mapping programs—have fundamentally changed how politics is practiced. The 72-hour program, Karl Rove’s massive neighbor-to-neighbor effort to identify and turn out voters, has been emulated by the Democrats, a healthy development that would have been difficult to execute a decade ago. In addition to this return of retail, face-to-face politics, we have seen the emergence of a true small-donor fund-raising base in both parties, a base driven more by ideas and passion about the direction of the country than by a desire for access to promote a particular interest.

This, in turn, has affected who can run and which voices are heard. It still takes a lot of money to run for Congress. But in the past, if you wanted to run, you would have to go to, say, the Democratic Congressional Campaign Committee (DCCC) and ask for help. The committee would reply, in effect, “call us when you have \$150,000.” But where would you get \$150,000? Very few people are connected enough to get that start. The netroots, however, have given candidates an alternative, and while many successful candidates in 2006 were recruited directly by the DCCC, there are some who were able to go to the party from a position of strength because they had met the viability threshold through raising money from a small-donor base. As a result, they could be more outspoken on issues and more independent of the party’s consultants, as well as independent of lobbyist money.

Thus, we stand at a critical point in the history of campaign finance reform: A movement that has so far largely failed to change the system, at least on the terms promised, has witnessed the system change around it and now has the chance to effect a lasting transformation. But first it must revisit the principles on which it was founded.

Questioning the Assumptions

Where should reform go now? Before attempting to answer that question, let's first note that there are two groups to whom the questions about the effectiveness of campaign finance reform would be of no interest. The first are reformers themselves, particularly the BCRA advocates. To many of them, the solutions are evergreen, and failure is the inevitable result of trying to convince politicians to fix politics. All elected officials, they reason, are beneficiaries of the existing rules and resist changing them. Skeptics in the netroots, the Democratic establishment, and minority groups are written off by reformers as just looking for ways to gain influence.

This attitude has two effects on the movement. First, it makes it impervious to criticism, as any skeptic can be dismissed as a self-interested agent. Second, it renders the movement oddly complacent about its own ineffectiveness. Failure reinforces the underlying assumption that all politicians are corrupt, instead of leading reformers to reexamine their assumptions.

In reality, elected officials have been the best friends reform has ever had, and “the people” the worst. Reformers in the mid-1990s dreamed of going over the heads of legislators to pass reform through ballot initiatives. Yet no statewide ballot initiative for reform has passed since 1998, and quite a few have failed spectacularly, including in Oregon and Missouri in 2000, Ohio in 2005, and California in 2006. (To be sure, several cities have embraced public financing by voter initiative, including Portland, Oregon.) Meanwhile, the only significant progress toward reform has come from elected legislatures, even if they often acted reluctantly. Besides passage of the BCRA at the federal level, there is the recent enactment of full public financing by Connecticut's legislature, an experiment with public financing in a few legislative districts in New Jersey, and legislative improvement of older systems in Minnesota and several localities.

The other group that takes failure for granted are skeptics of reform, who contend that campaign finance reform was a fool's errand from the start because nothing at all can be done about money in politics. This might be called the “hydraulic” argument, after a 1999 article in the *Texas Law Review* by Pamela Karlan and Samuel Issacharoff titled “The Hydraulics of Campaign Finance Reform.” Karlan and Issacharoff argued, essentially, that money in politics was like water, governed by physical laws that make any efforts to restrict its flow not just futile but counterproductive. But even water can be diverted, redirected, and put to uses either productive or destructive. Similarly, rules governing campaign spending and contributions can have all sorts of effects, for good or for ill. Regulations can reorder incentives, change how candidates and parties seek money, strengthen or weaken parties or interest groups, enhance the role of

small donors, force candidates to spend all their time raising money, or lift that burden from them entirely. Regulations can encourage campaigns to bombard swing voters with negative ads or to use grassroots efforts to mobilize people who haven't voted before.

And, in fact, regulations do all these things. The politics of 2007 is qualitatively different from the politics of 1996, largely because of changes in the regulation of money in politics. Thanks in part to BCRA, much more money moves through channels that are not controlled by or coordinated with candidates or parties, for example, which means—in theory—that it is less corrupting than money raised directly by elected officials. But it also means that this outside money is more unaccountable. It can fuel more negative attacks and innuendo, such as 2004's Swift Boat Veterans for Truth ads aimed at Sen. John Kerry. At the same time, because the parties and candidates are out of the business of raising soft money, the money that does come in tends to be more ideologically driven. A large portion of the major soft-money funders of the mid-1990s tended to be corporations that gave to both parties and were interested mainly in access; the major funders of the 527 organizations (independent political groups that can spend freely) that have emerged in their place are liberals like Soros or conservatives like Mallory Factor, whose main objective is to elect people who share their worldview. That makes a big difference in the tone of our politics and the potential for corruption. In some ways it is better because ideologues are less likely to be angling for pure influence, but in other ways it is worse, in that the leverage of the very few people who have the capacity to organize and fund 527s is greatly enhanced, specifically because other avenues are closed off.

Yet instead of thinking of politics as a system, with incentives and disincentives, behavior that can be changed or improved, limits-based reformers have tended to take a wildly literal approach: Money is a bad thing that should be kept out of politics. "Big money" is worse. "Private money" is bad, "public money" is good. Instead of asking, "How can we encourage the kind of things we think are healthy for democracy?" their own literalism steers them straight into the hydraulic argument. They see the money move to another stream, and they try to dam that stream, then the next and the next.

How to Revive Campaign Finance Reform

Campaign finance reform has fallen short of its promises not because politicians are evil or because money will always find a way into the political system, but because the movement has failed to challenge or refine its own assumptions. Yet in a world in which economic inequality has become so extreme, it is more necessary than ever and certainly of greater value than any other pure process

reform. (There are also substantive policies that would counter the power of economic inequality, such as tax reform or making it easier to organize unions.) The most urgent cause in our democracy is to prevent the profound inequalities of our economic system from being echoed, reinforced, and exacerbated in the political system. The movement desperately needs a fresh start, a reality that both factions—the proponents of limits and the advocates for public financing—must recognize.

What are some of the principles that might breathe some new life into the campaign finance reform movement?

Encourage the healthier developments in politics, don't fight them. Nothing has been more disheartening to me than watching the campaign finance reformers take up arms against the bloggers and the netroots. Reformers look at the blogs and all they see are loopholes. Most of 2005 at the FEC was spent in a lengthy fight over the rules for political use of the Internet. In theory, of course, if the Internet is exempt from regulation, there is a way for big donors to use that as a loophole to get back into the soft money game. But on balance, the good that the netroots have done for the political process—bringing in small donors, making it easier for candidates to get started, and allowing a more substantive political conversation—far outweighs the danger of a hypothetical loophole. Fortunately, the eventual resolution at the FEC was quite reasonable, although it leaves the loophole mostly intact. But the spectacle of reformers going after the healthiest development in politics alienated an important constituency for reform and showed the narrowness of the reform vision.

Political organization is good. Going back to the fight against PACs, reformers have often seemed confused over whether they were fighting money or organized money. Even now, partly for legal reasons, the focus is on incorporated groups, such as 527 committees, while disorganized individuals are constitutionally free to do the same things, without limits. From fighting organized money, it is a short step to fighting political organization itself. Underlying the reform movement seems to be a vision of unmediated political communication that writes organization out. Yet political organizations—parties, interest and affinity groups, community organizations, non-profits, even blogs and other media—can help people find and sort through their shifting and conflicting policy preferences, and, by organizing, can help give power to people who are not economically powerful on their own. Political organization is an alternative to money. Unmediated politics—TV-ad politics—is one in which money matters much more, not less.

The campaign reform movement should first stop fighting organization itself. During the battle over regulation of 527 committees last year, a number of reformers noticed that non-profits could serve a similar purpose as a channel

for big money, and that regulations might have to be considered—to which the answer, as with blogs, is not to exempt nonprofits, but to consider how you got on a path that made such a regulation plausible and turn back. Reform should, instead, strengthen those forms of political organization that help give people power in the system, as citizens, voters, and even contributors. Indeed, some systems of reform could strengthen political parties and other organizations, making them more than just banks for large contributions. Small-donor PACs, for example—an idea that was briefly floated in California a decade ago—is one such innovation, as are matching-fund systems.

Don't overtax the "corruption" rationale. The smartest recent insight into campaign reform has come from Judge Guido Calabresi of the Second Circuit. Reform efforts, Calabresi said, in a concurring opinion on a decision regarding Vermont's mandatory spending limits, were "constrained" by trying to push too much into the "impoverished" rationale of reducing "corruption and the appearance of corruption." They were actually trying to achieve other goals—such as political equality and greater opportunity for candidates to run and be heard—but trying to justify those goals in terms of corruption. "Efforts to tailor all campaign finance regulation to corruption," Calabresi wrote, "surely have constrained possibilities for creative proposals that may not fit comfortably into the proffered box."

The other problem with "corruption and the appearance of corruption" is that, while "corruption" is a well-defined concept but too narrow, "appearance of corruption" is the opposite—a vague, boundary-free concept. This past January, the *Washington Post* used the appearance of corruption to justify a story about the financial dealings of someone to whom former Senator John Edwards had sold his house, even though he had no dealings with them beyond that single, arms-length transaction. Lobbying reform is also twisted by this overly literal attempt to legislate on the concept of "appearance of corruption." For example, Jack Abramoff entertained the lawmakers who were in his pocket at his restaurant; therefore ban members and staffers from accepting meals. Abramoff took members on golfing trips to Scotland; therefore ban trips to Scotland.

But you can't legislate integrity simply by banning things that have the same external form as things corrupt people do. Instead of going at things so literally, change the incentives so that members of Congress are accountable to voters. Many of the legislators caught up in the recent scandals were defeated in 2006, but they had been virtually unopposed in previous elections, which created a breeding ground for an attitude of moral impunity. Making sure that there is a viable, adequately funded competitor in every election is the best way to encourage integrity.

Accept that there is a place for private money in politics. Elsewhere in his marvelous concurring opinion, Calabresi wrote that making political contributions is not something to be discouraged but a reasonable means of expressing “intensity of desire” for a political outcome. Indeed. We all have one vote, but we have preferences of varying intensity, which politics should reflect. And we must choose among a finite number of candidates, which money helps sort out. That’s not unreasonable. What made the 2004 Senate candidacy of Barack Obama (who entered the race for the Democratic nomination as the underdog against one fabulously wealthy candidate and one backed by the party machine) possible, for example, was the fact that a small but significant number of people who knew him believed so strongly in his leadership that they were willing to do much more than just vote for him. It’s not a perfect way to sort out candidates, but we lack a better one that adequately reflects intensity. Imagine a hypothetical campaign financing system that gave every candidate who qualified for the ballot by signature an exactly equal amount of funds and prohibited private funds; it would be chaotic and unrepresentative because it would strip this element of intensity of desire from the system.

The obvious problem, as Calabresi wrote, is “that, given the unequal distribution of wealth, money does not measure intensity of desire equally for rich and poor;” and reform should allow “both poor and rich to give financial expression to the relative intensity of their desires.” The closest thing to such a balance has been achieved by matching fund systems such as New York City’s four-to-one match on small contributions, created by a fortuitous political compromise in the late 1980s. Under this system, the \$50 contribution of a poor person is worth \$250 to the candidate, while large contributions aren’t matched at all. Because the system is open-ended, almost all candidates participate; there is very little spent by outside groups; and there have been hotly contested, multiple-candidate races for many city council seats. Although a self-financed billionaire won the mayoralty twice, the system gave Michael Bloomberg’s 2001 and 2005 opponents more than enough to be heard, \$17 million and \$9.2 million, respectively.

Don’t dismiss the libertarian arguments. For every argument in favor of campaign reform, there is a libertarian counter-argument. If a reformer says, “We don’t want big corporate donors spending money on ads that support a candidate,”

The political culture of 2007 is not merely a more expensive and corrupt version of 1996. While the policies are much worse, the public is engaged with politics as never before.

the libertarian responds, “You’re going to have a government agency decide that one kind of speech is permitted, because it’s about an issue or a product, and another is regulated, because it might influence the election?” Both are legitimate points. Campaign reformers often dismiss these dilemmas on the grounds that “money isn’t speech.” But, needless to say, if you prohibit money from being spent on speech, you are restricting the speech itself.

The issue that the Supreme Court has agreed to take up this term—whether TV ads that mention a candidate during the period before an election should be treated as campaign ads for purposes of regulation—goes to the heart of this dilemma. Some pure political speech unrelated to campaigns, such as an ad urging people to call a senator to vote a certain way on a bill, is going to get caught in this web. Perhaps, as empirical studies have shown, it would only be a

tiny percentage. But will that always be the case? And what level of accidental restrictions on pure political speech—the kind of speech most vigorously protected under any interpretation of the First Amendment—do we accept as the price for getting a potential loophole under control? The fact that the

Reform should strengthen those forms of political organization that help give people power in the system.

Court has taken the case, after earlier upholding that provision of BCRA, suggests that the justices are likely to take the libertarian argument here seriously. But reformers should too. It should always be a painful choice to limit political speech, never something to be done lightly. If a campaign finance arrangement forces one into a position where you can only make it work if you can limit these ads, then it’s time to rethink that approach.

Some libertarians, incidentally, would argue at this point that the only regulation needed is a requirement for instant disclosure of all contributions. Disclosure is, to be sure, better than non-disclosure, and “sunlight is the best disinfectant,” as Justice Louis Brandeis famously said. But the idea that disclosure is by itself an alternative to regulation is one deeply rooted in the “appearance of corruption” fallacy. Much malfeasance hides in the fog of too much information. Simply knowing that some individual contributed to some politician is not enough information to fully understand what’s going on, and whether it should be a matter of concern. Even in the Abramoff case, where not only was all information about his Native American-tribe clients’ contributions publicly available, but so were many years’ worth of his e-mails, it has proved impossible to determine with any certainty whether his clients’ contributions to certain Democrats were made as part of his wheeling and dealing or for other reasons. Disclosure does very

little to reduce real corruption and nothing at all to promote political equality or greater opportunity for candidates or ideas to be heard.

Expand, don't restrict. The singular focus on corruption tends to lead reformers toward policies primarily intended to restrict the amounts and sources of money. Restrictions have the effect of increasing the power of those who are unrestricted. In other words, if you can't close every loophole, the person or entity who controls the loophole that remains open will be significantly more powerful. If every channel of political communication except the Internet were regulated, the people who have the greatest ability to be gatekeepers of Internet access—which might be a blog or might be Time Warner—will have a greatly enhanced level of power.

And even if you could restrict every avenue, would you want to? The goal of political reform should be to expand the range of choices and voices in the system. It should be easier to run for office, easier to be heard, easier to find alternatives to the potentially corrupting corporate funding. Such alternatives change the incentives for candidates and parties.

Small-Donor Democracy

What sort of approach to reform would these principles produce? A tempting, risky approach might be what the American Civil Liberties Union used to call “floors without ceilings”: public funding that was not tied to limits on spending and that did not attempt to shut down all sources of outside money. In the past, this always seemed, to me at least, a crazy strategy, in effect throwing good money after bad. But compared with the path we've been on, it makes sense. It would open up the system, help strengthen real political organizations, and increase political equality and voice without a frontal test of the First Amendment.

But we needn't go that far, and perhaps we shouldn't. An approach similar to the New York City matching system, or a system like Minnesota's (which combines a tax credit for small contributions with a matching system), is another way of meeting most of these principles. Yale Law Professor Bruce Ackerman's proposal to give every American “Patriot Dollars”—vouchers with which they can make a contribution to the campaign or organization of their choice—serve a similar purpose, as do arrangements like Arizona's “clean money” system.

Such systems might fall under the general rubric of “small-donor democracy”: Give small donors the same opportunity to express the intensity of their preferences as large donors. Don't build complex systems that put government in the position of trying to equalize all resources or ban all contributions. Instead, let voters shape the process through their own preferences, through organizing to enhance their power, and by using public funds to echo and enhance the

MARK SCHMITT

preferences of ordinary citizens. Avenues by which large contributions influence politics will remain, whether they take the form of PACs, 527 committees, other nonprofits, or blogs. The best we can do is to offset their influence by broadening the range of voices that can be heard, as opposed to enhancing their influence by closing off other channels of money.

The general rule that reformers should follow, if they have any hope of salvaging their efforts, is to think of politics as if it were an organic system. Every intervention has multiple effects, and every intervention can help create either a vicious or a virtuous cycle. In 1996, politics was caught in a vicious cycle—the public was detached, it was more and more costly to run for office, big contributors controlled who could run, and the party soft money loophole empowered those large donors, who in turn limited the scope of what politics could be about, leaving the public more alienated. Today we have the makings of a virtuous circle—voters are more engaged, small donors have returned, and the most corrupt members of Congress have been held accountable. Reformers should ask: What are the modest, non-restrictive interventions that would help push this virtuous cycle in the right direction? If they begin to approach the question in that way, the next decade of reform might be more productive than the last. ■