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HAS THE U.S. CAMPAIGN FINANCE SYSTEM COLLAPSED?

Political Equality, the Internet, and Campaign Finance Regulation

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Abstract

Despite signs from the 2004 presidential election contest pointing to a larger role for "big money" in the 2008 season, the indicia so far suggest that there is much for egalitarians to cheer. Egalitarians believe that unequal distribution of wealth should play less of a role in determining presidential election outcomes and/or the policies of the president once elected. At this point in the 2008 election season, it appears that big money is beginning to matter less, rather than more, thanks in large part to the enhanced role of the Internet in campaigning and fundraising, and especially thanks to the viability of campaigns funded substantially by small donors. Such a shift is especially important given that the United States Supreme Court has grown increasingly hostile to campaign finance regulation. The promise of small donors, rather than regulation, stands the best chance of countering the role of big money in future presidential elections.

KEYWORDS: campaign finance, presidential election, public financing

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By all accounts, the 2008 presidential election was shaping up to be a loser from the point of view of political equality. Egalitarians believe that unequal distribution of wealth should play less of a role in determining presidential election outcomes and/or the policies of the president once elected (Foley 2004; Hasen 1996). Signs from the 2004 election suggested that wealthy donors and spenders—what I will call "big money" for shorthand—would play a more important role than ever in the presidential contests.

Yet at this point in the 2008 election season, my initial impression is that big money is beginning to matter less, rather than more, thanks in large part to the enhanced role of the Internet in campaigning and fundraising, and especially thanks to the viability of campaigns funded substantially by small donors. This is a hopeful sign for egalitarians as the United States appears to enter the more deregulated environment for campaign finance created by the Supreme Court. Even for those who reject political equality as a good or legitimate criterion for evaluating political campaigns, the changes in the role of wealth in presidential elections are worth noting.

Signs from 2004: Wealthy Donors and Spenders to Matter More

Under the Federal Election Campaign Act's (FECA) 1974 amendments, in place until 2002, individuals could give presidential candidates no more than $1,000 for the primary season and another $1,000 for the general election. The Bipartisan Campaign Reform Act of 2002 (BCRA, more commonly known as McCain-Feingold) raised the FECA limits to $2,000 for each election, and the figure is $2,300 per election for 2008, thanks to an adjustment mechanism for inflation built into BCRA.

This rise in the individual contribution limit has increased the value for presidential campaigns of donors who could afford to give four-figure donations. Especially valuable, given BCRA's concomitant ban on the collection of party soft-money (which itself was intended to break the connection between big money and the political parties) are campaign finance "bundlers" who facilitate the collection of maximum contributions from a large number of relatively wealthy individuals (Green 2006: 104).

George W. Bush's 2000 and 2004 election campaigns showed other campaigns that there were plenty of people eager to gain access to the candidate and his or her inner circle by working as bundlers. With the help of bundlers, Bush raised $258 million in contributions and his rival John Kerry raised $241 million during the primary season in 2003-2004 (Green 2006: 100). Bush raised between 29 percent and 40 percent of his contributions (or at least $76.5 million) through bundlers. Kerry raised between 16 percent and 21 percent of his contributions (or at least $41.5 million) through bundlers (Public Citizen 2004).

The increased ability of presidential candidates to raise large sums through increased limits on individual (and sometimes bundled) contributions has put perhaps insurmountable pressure on FECA's voluntary system of presidential public financing, which provides matching funds for participating candidates in the primary (up to the first $250 donated per contributor), provided that the candidate accepts spending limits. In the general election, participating major party candidates receive a flat grant ($74.6 million in the 2004 election, and expected to be about $85 million in the 2008 election) provided they agree to raise no funds (except up to $20 million for administrative and legal expenses) in the general election.

In the 2004 election, Bush declared early that he was going to opt out of the public financing system for the primary period. Had Kerry accepted partial public financing during that period, he would have been bound by a $50.4 million spending limit in the primary season (Green 2004: 95)—not to mention additional, though more easily circumvented, state spending limits—thereby allowing Bush, running uncontested, to spend vast sums against him until the general election period, after the party convention in the summer. Unsurprisingly, Kerry too abandoned the public financing system.

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

The collapse of the public financing system, at least during the primaries, has made big money appear more important than ever. Indeed, despite McCain-Feingold's soft-money ban, the parties themselves raked in five-figure contributions of hard money, collecting more in "hard money" contributions in 2004 than the combination of hard and soft money in the 2000 election (Corrado 2006: 26). In 2004, the closing of the soft money spigot to parties also led big money to independent political organizations (many of which were the so-called 527 organizations), with less accountability than the political parties. Wealthy donors such as George Soros gave millions to pro-Democratic 527s in an effort to counter Bush's unprecedented fundraising (Weissman and Hassan 2006).

Though the FEC fined some of these groups a few years after the election for exceeding limits on contributions to political committees (Federal Election Commission 2007), there still appears ample room for similar groups to adopt a similar strategy in 2008. Indeed, the 2008 election season promises not only more of the same independent spending, with Republican-oriented "Freedom's Watch" and the Democratic-oriented "Fund for America" poised to spend over $200 million each in the general election campaign (Farnam and Mullins 2008). New groups, pushing the envelope of campaign finance law, have taken the position that they can engage in similar independent activity *without revealing their donors*, by organizing under section 501(c)(4) rather than 527 of the Internal Revenue Code (Mullins 2008).

The Early Look at 2008: Big Money Matters Less

All of the factors described in the last section suggested that wealthy donors and spenders would be a major factor in the 2008 presidential election contest. And they still may be for the 2008 general election. But so far, from the point of view of political equality, the signs from the 2008 nominating contests are encouraging. Consider the following facts:

- Mitt Romney, the candidate who gave himself/loaned himself the most money of any of the presidential candidates ($42.3 million through January 2008) (Campaign Finance Institute 2008b: Table 3) did not win any major party primaries or caucuses, and eventually dropped out of the race because of poor performance. It did not seem to help him that he outspent his primary competitors on advertisements in some states. In New Hampshire, for example, Romney spent double the amount spent by McCain, and more than all of his competitors combined (ABCNews 2008).

- Both Mike Huckabee and John McCain have garnered substantial voter support in Republican primaries despite having financial difficulties. McCain, whose campaign was written off for dead last summer, was able to win a series of important primaries and caucuses in early 2008, despite having raised only $9.6 million in contributions in the last quarter of 2007 (not counting a $5 million loan McCain secured to keep his campaign going) (Campaign Finance Institute 2008a: Summary Table).

- Accelerating a trend begun in 2004, small donors have played an increasingly important role, as candidates have needed funds to ratchet up their campaigns. Barack Obama's candidacy for the Democratic nomination perhaps best illustrates the trend in the 2008 election. Almost half (47%) of the $23 million that Obama took in during the last quarter of 2007 came from donors giving $200 or less (Campaign Finance Institute 2008a: Table 1). Obama "brought in $28 million online, with 90 percent of those transactions coming from people who donated $100 or less, and 40 percent from donors who gave $25 or less, suggesting that these contributors could be tapped for more" (Luo 2008).

Since then, Obama has self-reported more than one million donors to his campaign through February 2008. Though final numbers are not yet available, Clinton's small-donor fundraising, which was a relatively small portion of her fundraising in 2007 (16% in the last quarter of 2007, according to Campaign Finance Institute 2008a: Table 1), rose dramatically at the beginning of 2008, to 35% of her donors in January 2008 (Campaign Finance Institute 2008b: Table 1).

- Small donors also boosted the campaigns of long-odds candidates, such as Dennis Kucinich (79% of 2007 4^{th} quarter contributions) and Ron Paul (69% of 2007 4^{th} quarter contributions), allowing them to get their message out and participate credibly at the beginning of the nomination process (Campaign Finance Institute 2008a: Table 1).

- Voter turnout is up and voter interest in the election is up. Half the 2008 "Super Tuesday" states set voter turnout records (Sanner 2008).

- In the end, the 2008 presidential nominating process is just not going to be determined by who can spend the most money or by which candidate is backed by the biggest big donors. Republicans appear poised to nominate John McCain, whose campaign "ran on fumes" for many months. As of this writing, Democrats appear about equally likely to nominate Obama, who has relied heavily on small donations, or Clinton. While her reliance on small donations is relatively recent, if Clinton ultimately wins, political observers are now very unlikely to chalk that outcome up to any advantage caused by her fundraising strategy.

- Given that the leading presidential candidates have depended less than might be expected on large donors and spenders, the amount of access to candidates being sold in this election season to bundlers is probably also considerably less than what we saw 'sold' in the 2004 election season.

The Internet as a Possible Reason Big Money Has Mattered Less in the 2008 Primary Election Season

All in all, the equality picture from the 2008 primary season is rather heartening, especially given that the season has already broken some fundraising records: presidential candidates raised a combined $552 million in 2007 for the 2008 primaries, more than doubling the 2003 record for the 2004 primaries (Campaign Finance Institute 2008: Table 3). What explains why big money has mattered less so far in this 2008 presidential election?

One set of explanations is election-specific. For example, Romney may have failed to gain traction in the Republican nominating contest despite his heavy spending because he was a "low quality" candidate (Fineman 2008). Conversely, Obama may have been an unusually inspirational candidate, one able to attract many small donors. An early dispute over a Clinton bundler, Norman Hsu, who turned out to be a fugitive committing fraud, may have dampened campaign enthusiasm for aggressive bundling by unknown volunteers (Kirkpatrick 2007b).[1] Or perhaps there is something about the current nature of the electorate's polarization that explains different fundraising patterns. Though I will leave that last possibility for more methodologically-inclined political scientists to try and tease out causation after the election season ends, let me suggest that the Internet may well be a major factor causing a systemic shift away from a dominant role for big money in the presidential election process. The 2008 election is not the first in which the Internet played an important role in campaign communications and fundraising. This activity already was important in the 2004 election (Magleby and Patterson 2006: 169; Corrado 2006: 28-29). But its use appears to be accelerating.

The rise of "cheap" political speech (Volokh 1991) has increased the ability of voters to exchange political messages via email, instant messaging, amateur videos (YouTube), and, more frequently, social networking sites such as "My Space" and "Facebook" (Pew Research Center 2008). The changes in modes of political communication may be allowing candidates written off by the mainstream media to continue to garner significant amounts of attention, votes and, in the case of McCain, even to rise to the top for his party's nomination.

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[1] Because disclosure of bundling activity (besides bundling activity by lobbyists) is unregulated, it is difficult to measure whether bundling activity has decreased in the current presidential election cycle. An interim report by the Campaign Finance Institute and Public Citizen shows significant bundling activity by Obama and Clinton (at least $32 million for Obama and $31 million for Clinton through December 2007), though it does not appear to be yet at the level of Bush or Kerry in 2004 (Campaign Finance Institute 2007). But further data collection will be necessary to make the comparison between last election and this election.

The Internet has also changed the nature of fundraising. The $2,300-per-plate dinner may already be fading in importance, replaced by the direct solicitation (via speech, email, or otherwise) of small donations. Many small donors appear ready to give multiple small donations over time to candidates. One donor interviewed by the *Los Angeles Times*, for example, gave $700 to Obama over a period of months in $25 increments (Morain 2008).

It is not that the $2,300-per-plate dinner has disappeared, or that small-donor fundraising will overtake independent spending any time soon. But small-donor fundraising is already a viable alternative to big money. Small-donor fundraising as a percentage of total presidential fundraising has risen from an average 22% of total funds raised in the 2004 election to an average of 28% so far in the 2008 season—and the percentage will likely rise as the 2008 election cycle continues (Campaign Finance Institute 2008a: Summary Table; Campaign Finance Institute 2008b: Table 2). For certain candidates, small-donor fundraising has become a cornerstone of their campaign finance.

The success of small-donor fundraising means that a candidate with broad appeal (such as Obama or McCain) or a candidate with narrow but intense appeal (such as Paul or Kucinich) can raise enough money from people with modest means to get out the message and make the candidate credible if there is some popular support for the candidate's ideas. Thus it becomes harder for big money to "drown out" the voices of the many. This possibility of viable candidacies being funded through small donors encourages political equality that "levels up" political competition (rather than achieving political equality through a "leveling down" with spending limits) (Fleishman and McCorkle 1984).

Indeed, the rise in the level of small donations promotes a kind of equality that I have termed "barometer equality" (Hasen 2003: 111). Under this view, laws should be created so that campaign spending roughly mirrors public support for the candidate's political ideas. The matching fund program for presidential public financing in the primaries follows the barometer equality model to some extent by matching the first $250 of each campaign contribution received by a candidate. The rise of small donors similarly promotes barometer equality. The more small donors support a candidate and the more intensely they do so, the greater the share of funding that reflects the candidate's public support. Indeed, by 2008, it appears that small donors have replaced the public financing system as the main vehicle for promoting political equality in presidential nominating contests.[2]

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[2] To be sure, the continued role of big money in presidential elections assures that full barometer equality (leveling up and leveling down) will not be realized in the 2008 election or in any election run under rules allowing unlimited uncoordinated spending.

Rising Political Equality as a Bulwark Against Campaign Finance Deregulation?

With the departure of Justice Sandra Day O'Connor from the United States Supreme Court and her replacement with Justice Samuel Alito, the Supreme Court's jurisprudence has shifted from deference to the campaign finance regulation passed by Congress or state legislatures to a strong skepticism of such regulation based on a First Amendment commitment to unfettered political speech and spending (Hasen 2007, 2008). The new Roberts Court thus far has considered two campaign finance cases, and in both it has sided with those challenging regulation. The Court struck down Vermont's campaign contribution limits as too low to allow for effective political competition, and it vastly undermined a key provision of BCRA limiting the ability of corporations and unions to run election-related advertising paid for with corporate or union treasury funds.

Given this trend, it is a fair bet that by the time the 2012 or 2016 presidential elections roll around, the Supreme Court will have eviscerated the remaining restrictions on the spending of corporate and union treasury funds to influence the outcome of presidential elections. Such a ruling would no doubt make the campaign finance system less egalitarian. As the Court itself noted in the 1990 case, *Austin v. Michigan Chamber of Commerce*, corporate limits may be justified on egalitarian grounds: the government has an interest in limiting corporate campaign contributions to prevent corporate spending disproportionate to the support that the corporation's position represents in society. Unlimited corporate spending threatens to drown out other speech and may buy the corporation greater access to presidential candidates.

The effects of an expected deregulatory move by the Supreme Court, however, are somewhat blunted by the rise of the Internet, both as a means for the exchange of political information and for small-donor fundraising. It is now much harder for any single source of spending, corporate or otherwise, to "drown out" or otherwise monopolize political speech. Any candidate with a broad enough base of support or a smaller base of intense support will have the ability to take his or her message to the public for a reasonable airing. With multiple levels of support from a large number of small donors, candidates become less dependent on bundlers or other big spenders in the electoral process.

In short, though big money will continue to grow in presidential elections, it will be countered by small money and cheap speech, even if Congress fails to revive the system of presidential public financing and the Supreme Court strikes down more campaign finance laws. The emerging system is not as egalitarian as full voucher-based public financing of presidential campaigns, but it could create more political equality than we have seen in past presidential elections.

References

ABC News (2008). "Romney Outspending Rivals Combined in New Hampshire. Political Radar Blog, Jan. 5, *available at*: http://blogs.abcnews.com/politicalradar/2008/01/romney-outspend.html.

Campaign Finance Institute (2007). CFI Release, "Fundraising Central: Majority of Presidential Bundlers and Other Fundraisers Hail from Only Five U.S. Industries: Lawyers and Law Firms, Three Finance Industries, and Real Estate." Dec. 20, *available at*: http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=176.

---. (2008a). CFI Release, "Presidential Fundraising in 2007 Doubles 2003." Feb. 11, *available at*: http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=179.

---. (2008b). CFI Release, "Newly Released January 2008 Reports Highlight Obama's Dominance in Fundraising." Feb. 21, *available at*: http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=183.

Corrado, Anthony (2006). Michael Malbin, ed. "Party Finance in the Wake of BCRA: An Overview." In *The Election After Reform: Money, Politics and the Bipartisan Campaign Reform* Act 19. Rowman & Littlefield Publishers, Inc. 4501 Forbes Boulevard, Suite 200, Lanham, Maryland 20706.

Farnam, T.W. and Brody Mullins (2008). "Interest-Group Campaign Spending Nears Record." *The Wall Street Journal*, Feb. 5, p. A13. http://online.wsj.com/public/article_print/SB120217685410343083.html.

Federal Election Commission (2007). Press Release, "FEC To Collect $775,000 Civil Penalty From America Coming Together," Aug. 29. http://www.fec.gov/press/press2007/20070829act.shtml.

Fineman, Howard (2008). "Burying Mitt." *Newsweek* Online. Feb. 7. http://www.newsweek.com/id/108793/output/print.

Fleishman, Joel L. and Pope McCorkle (1984). Level-Up Rather than Level-Down: Toward a New Theory of Campaign Finance Reform. 1 *Journal of Law and Politics* 211.

Foley, Edward B. (1994). Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance. 94 *Columbia Law Review* 1204.

Green, John C. (2006). David B. Magleby, Antony Corrado and Kelly D. Patterson, eds. "Financing the 2004 Presidential Nomination Campaigns." In *Financing the 2004 Elections* 93. The Brookings Institution, 1775 Massachusetts Avenue, N.W., Washington, D.C. 20036

Hasen, Richard L. (1996). Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers. 84 California Law Review 1.

--- (2003). The Supreme Court and Election Law: Judging Equality from *Baker v. Carr* to *Bush v. Gore*. NYU Press.

--- (2007). The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After *Randall v. Sorrell*. 68 *Ohio State Law Journal* 849.

--- (2008). Beyond Incoherence: The Roberts Court's Deregulatory Turn in *FEC v. Wisconsin Right to Life*, (forthcoming), *draft available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003922. 92 Minnesota Law Review

Kirkpatrick, David. D. (2007a). "Edwards Embrace of Public Money May Be Limited," *New York Times*, Sept. 29. http://www.nytimes.com/2007/09/29/us/politics/29edwards.html.

--- (2007b). "Use of Bundlers Raises New Risks for Campaigns." New York Times, Aug. 31. http://www.nytimes.com/2007/08/31/us/31bundlers.html.

Luo, Michael (2008). "Small Online Contributions Add Up to Huge Fund-Raising Edge for Obama." *New York Times*, Feb. 20. http://www.nytimes.com/2008/02/20/us/politics/20obama.html?_r=2&hp=&adxnnl=1&oref=slogin&adxnnlx=1203706902-8ixs5XqdHyrjzmDF4jPcqw

Magleby, David B. and Kelly D. Patterson (2006). Michael Malbin, ed. "Stepping Out of the Shadows? Ground-War Activity in 2004." In *The Election After Reform: Money, Politics and the Bipartisan Campaign Reform Act* 161.

Rowman & Littlefield Publishers, Inc. 4501 Forbes Boulevard, Suite 200, Lanham, Maryland 20706.

Morain, Dan (2008). "From Small Donors Come Big Rewards." *Los Angeles Times*, Feb. 14. http://www.latimes.com/news/politics/la-na-money14feb14,0,5629421,full.story.

Mosk, Matthew (2008). "McCain Got Loan By Pledging to Seek Public Funds," *Washington Pos*t, Feb. 16, A10. http://www.washingtonpost.com/wp-dyn/content/article/2008/02/15/AR2008021503639.html.

Mullins, Brody (2008). "Stealthy Groups Shake up Races." *The Wall Street Journal*, Feb. 4, 2008, A12. http://online.wsj.com/public/article/SB120208699551139387-KseZqu0UlxUStRXKueXXeKTg5s4_20080305.html?mod=tff_main_tff_top.

Pew Research Center for People and the Press (2008). "Internet's Broader Role in Campaign 2008; Social Networking and Online Videos Take Off." Jan. 11. http://people-press.org/reports/display.php3?ReportID=384.

Public Citizen (2004). "Final Analysis of Bush-Kerry Fundraising Shows Heavy Reliance on Small Number of People Who Bundle Contributions." Dec. 2. http://www.citizen.org/pressroom/release.cfm?ID=1835.

Sanner, Ann (2008). AP, "Report: Voter Turnout Records Broken." Feb. 6. http://www.examiner.com/a-1204781~Report__Voter_Turnout_Records_Broken.html

Weissman, Stephen R. and Ruth Hassan (2006). Michael Malbin, ed. "BRCA and the 527 Groups." In *The Election After Reform: Money, Politics and the Bipartisan Campaign Reform Act* 79. Rowman & Littlefield Publishers, Inc. 4501 Forbes Boulevard, Suite 200, Lanham, Maryland 20706.

Volokh, Eugene (1991). "Cheap Speech and What It Will Do." 104 *Yale Law Journal* 1805.