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Making the World Safer for Incumbents
The Consequences of McCain-Feingold-Cochran

by John Samples

Executive Summary

Sens. John McCain (R-Ariz.) and Russell Feingold (D-Wis.), joined by Sen. Thad Cochran (R-Miss.), have introduced legislation adding new regulations on campaign finance. Their proposed law bans "soft money" going to political parties, restricts advertising by for-profit corporations and labor unions, and greatly increases the ambit of federal election law.

Soft money contributions to campaigns grew out of efforts by Congress and the Federal Election Commission to enhance political parties and federalism. Soft money accounts for only 15 percent of all campaign spending.

McCain says the new regulations will prevent corruption in Washington, but he has not shown that soft money corrupts legislators or elections. The debate over "corruption" seems to really be a difference of opinion about the meaning of good representation.

Expert opinion indicates that McCain-Feingold-Cochran would reduce electoral competition significantly and decrease turnout on Election Day by 2 percent.

McCain-Feingold-Cochran will not drive soft money out of politics. Such funding is likely to turn up in future elections as independent expenditures by interest groups. McCain's bill seeks to limit such spending by labor unions, for-profit corporations, and even many nonprofit corporations. Senator McCain has also indicated that he hopes to regulate advertising by advocacy groups like the NAACP. The proposed restrictions are a direct and scandalous effort to protect incumbents from criticism during elections. McCain's ad ban will be found unconstitutional under the First Amendment.

McCain argues that his bill will prevent special interests from influencing government. In fact, three special interests—incumbents, the media, and interest groups in general—will benefit from McCain-Feingold-Cochran. Ironically, McCain's bill would generally enhance interest group influence at the cost of political parties and candidates.

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Banning soft money would have consequences that campaign finance "reformers" would not want.

We're told that Americans are spending more and more money on elections. In 2000 candidates, parties, and outside groups spent about $4 billion on all elections.[1] David Broder of the *Washington Post* noted that soft money—funds raised and spent outside the strictures of federal campaign finance law—increased to $410 million in 2000, a 40 percent increase since 1996.[2]

That increase in spending nettles activists seeking new restrictions on campaign fundraising and spending. Senators McCain, Feingold, and Cochran have introduced legislation to prohibit solicitation of soft money for political parties. The bill also bans election advertising by unions and corporations within 60 days of an election.[3] Some observers believe that the legislation may pass and become the first major revision of federal campaign finance law in almost three decades.

McCain-Feingold-Cochran assumes, wrongly, that soft money corrupts American politics. Banning soft money would have consequences for the nation that campaign finance "reformers" themselves would not want. The prohibition of advertising by labor unions and corporations protects incumbents from attacks and unconstitutionally restricts political speech. Instead of introducing new restrictions, Congress should focus on liberating American elections from current restrictions on speech.

The Origins of Soft Money

The term "soft money" denotes essentially all political contributions not given directly to candidates or their campaigns. Soft money is largely unregulated by federal election law. McCain-Feingold-Cochran takes aim initially at soft money raised and spent by the nation's two major political parties. The three senators and their allies argue that soft money constitutes a giant loophole in the campaign finance laws, a nefarious way around good regulations. The regulatory and legal origins of soft money suggest another story.

The Federal Election Campaign Act imposed strict limits on money in politics.[4] It imposed ceilings on contributions accepted by candidates from individuals and from political action committees (PACs) and continued existing prohibitions on federal election contributions from corporations and labor unions. The law also put constraints on the sums parties could spend directly supporting candidates. For the first eight years of FECA (1971–79), only "hard money" in national elections was governed by federal law.

State regulation of campaign finance (then and now) is generally less restrictive than FECA. Often states have few, if any, limits on contributions or expenditures. Of course, most people assumed in the 1970s that the ambit of state regulations on campaign finance was severely limited since they applied only to state and local elections. Until the late 1970s, the relative liberality of state rules seemed irrelevant beside the massive reach and strict constraints of FECA.

Congress and the Federal Election Commission made state regulations matter. In 1978 the FEC ruled that the Republican State Committee of Kansas could use corporate and union contributions, which were legal under state law, to conduct a voter turnout effort that helped both federal and nonfederal candidates. That FEC ruling meant that both national and state party committees could spend and raise money partially under the authority of state law and thus partially outside the limits set by FECA.

In 1979 Congress amended FECA and loosened certain expenditure ceilings on "grassroots" activities. The new amendments allowed party organizations to spend unlimited sums on voter registration, some campaign materials, and voter turnout programs. Inevitably, such spending aided both national and state election campaigns. Congress loosened the limits to permit party-building activities and to get citizens involved in politics. Those two decisions by Congress and the FEC are the legal origins of soft money.[5]

In 1991 the FEC issued new regulations concerning soft money. Those rules both required disclosure of the sources and disbursements of soft money and established

complex formulas for allocating those funds between state and national purposes. The new regulations did not impose ceilings on soft money contributions or expenditures.

Contrary to the claims made by Senator McCain and his allies, soft money is not an evil force working to undermine the purity of American politics. It is not a quasi-legal "loophole" in the campaign finance laws. Soft money came into existence because the FEC honored the federal nature of American politics and because Congress tried to encourage state and local political activities. Most Americans would support both goals.

Soft Money by the Numbers

Debates about soft money necessarily concern large sums that are often labeled "obscene" by those seeking new regulations. The total soft money raised in the 2000 election—$410 million—is indeed a large sum in anyone's book. Yet absolute numbers rarely provide useful insights. For example, we should think about campaign spending against the background of government expenditures; after all, we have elections to guide the actions of government. Campaign spending in general, and that of soft money specifically, pales beside the $2.5 trillion spent by federal, state, and local governments annually. We should also keep in mind that the soft money total for 2000 is less than $3 per eligible voter. Americans are not spending a large part of their wealth on election campaigns.

Other figures also need to be put in context. Advocates of further regulation point out that total receipts of soft money by both parties increased more than fourfold from 1992 through 2000. One problem with that calculation is that FEC methods exaggerate the soft money totals through double counting.[6] In any case, increases notwithstanding, soft money is only 15 percent of all money spent on campaigns.[7]

Soft money is often considered a Republican strength; if so, Democrats might have good reason to ban soft money as a way of weakening their opponents. Indeed, from 1992 to 1998, Republicans got about 55 percent of all soft money raised by the two parties.[8] However, in 2000 the Democrats all but caught up with the Republicans in raising and spending soft money.[9]

Soft money contributions to the political parties have grown in absolute terms in recent years. Yet, compared to government outlays or overall campaign spending, soft money is a relatively small sum. Moreover, neither party any longer enjoys a significant edge in raising soft money. For those reasons, the lavish attention given soft money seems misplaced.

Advocates of new campaign finance regulations might argue that their real concern is not the numbers but how soft money affects politics and policy. They might point to the numerous scandals and suggestions of impropriety that haunted President Clinton and Vice President Gore from 1995 on.[10] The advocates believe that soft money corrupts American politics.

The Question of Corruption

Political corruption is more than just an effective slogan for campaign finance regulators. Corruption or the appearance of corruption is the legal foundation for regulating campaign fundraising. In its landmark decision in *Buckley v. Valeo,* the U.S. Supreme Court recognized that in modern society political speech and money are inherently tied together. Regulating campaign finance thus encroaches on essential First Amendment freedoms. The only legitimate reason to limit such freedoms, the Court said, would be to prevent "corruption or the appearance of corruption."[11] Such corruption, however, is more asserted than proved.

To assess the idea that campaign finance fosters corruption, we might begin by categorizing possible types of corruption.[12] First, there is direct bribery. Public officials are certainly corrupt when they provide political favors in exchange for bribes. This kind of corruption of American national politics is rare if

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we judge by the relatively few indictments and convictions of sitting members of Congress.

A second type of corruption might be called indirect bribery. Legislators may be deemed corrupt if they cast their votes in Congress to advance the interests of their contributors. Such influence is difficult to prove. After all, most contributors give to candidates whose policy views they share. We can hardly conclude that contributors corrupt a legislator who would have voted the same way on an issue in the absence of the contribution.[13] In any case, political scientists have found that campaign contributions have little effect on legislative votes.[14]

Perhaps Senator McCain believes that soft money leads to the indirect bribery of legislators. Yet soft money accounts for only 15 percent of total national campaign funds raised. Moreover, individual legislators do not depend directly on soft money. Because it goes to the political parties, soft money has at most an indirect influence on legislators.[15]

The idea of indirect bribery is based on the false premise that the need for campaign funds is the most important influence on legislators. In contrast, political scientists assume that officeholders give primacy to being reelected.[16] Being reelected requires a majority of votes, not the greatest success in fundraising. Gaining election is the end to which fundraising is the means. Providing favors to contributors might well threaten the goal of being elected. Accordingly, we should expect that legislators would not sell their votes to contributors if doing so would jeopardize success at the polls.

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If corruption is defined as direct or indirect bribery, the case for regulating core First Amendment activities such as making campaign contributions seems weak. Even advocates of new regulations do not contend that much direct bribery exists. We also have little reason to think that indirect bribery is a big problem.

Advocates of new campaign finance regulations equate corruption with what they see as the "undue influence" of contributors. They argue that large contributions "distort" the legislative process and prevent representatives from acting in the true interests of their constituents. Absent money, members of Congress would attend to those interests and probably support "progressive" causes.[17] Let us consider each of those claims.

All political participation, including the making of campaign contributions, tries to influence policy choices. The Constitution does not contain a metric enabling us to distinguish "proper" and "improper" influence.[18] In fact, restricting fundamental freedoms to achieve equality of influence is not permitted by the Constitution. As the Supreme Court noted in *Buckley*, "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[19]

Assertions of "distortion" assume too much. Saying that contributions distort legislating implies movement away from an ideal or a proper state of being. In this case, advocates seem to assume that money corrupts the judgment of an ideal representative who but for contributions would act on the true interests of her constituents.

The American political tradition does not have one agreed-on concept of representation; in fact, at least three different conceptions inform our politics and political theory. *Pluralists* see American politics as a struggle in which ambitious and self-interested citizens seek influence through effective organizing and vigorous advocacy.[20] Representatives make policy in response to those efforts by individuals and groups. In contrast, *Burkeans* argue that elected officials should act as trustees for their constituents and deliberate impartially about the public good.[21] *Populists* suggest that lawmakers should eschew the views of contributors and vote only on the basis of the preferences of their constituents.[22]

Looked at this way, McCain-Feingold-Cochran attempts to enforce a "better" (perhaps a Burkean or a populist) conception of representation. Yet arguments about which concept of representation is better are the stuff of contemporary political debates.

Having a "better" conception of representation is not a legitimate justification for limiting speech.[23] This is especially true when evidence of direct and indirect bribery is lacking.

Finally, we turn to the question of policy outcomes. Some advocates of new regulations believe that the relative freedom to make campaign contributions has blocked the realization of the "progressive" agenda.[24] That is certainly self-delusion. The allegedly egalitarian and "progressive" political project of the left has never enjoyed the enduring favor of the average American voter. American political culture, not campaign contributions, seems to be the barrier to social democracy in the United States.[25] In any case, we should hardly restrict freedom of speech because advocates of restrictions believe they have better policies and a superior notion of the public good. The political process should be kept free and open precisely because no one person or group has a monopoly on truth and a corresponding mandate to rule.

Consequences of a Soft Money Ban

The history of campaign finance regulation is filled with unintended consequences. Congress enacted contribution limits in FECA to get average Americans involved in politics, but those limits reinforced the power of established groups and encouraged the candidacies of wealthy individuals. Trade unions fought hard to make sure PACs had special status under federal election law only to discover that the PAC strategy worked almost as well for their opponents as it did for them. Low contribution limits aimed at freeing officials from special interests ended up forcing legislators to spend much of their time raising money.[26]

Many advocates of new campaign finance regulations believe American politics should have more competition and participation. Political scientists and activists have long complained about incumbents in Congress: their high reelection rates, their increasing vote shares, and their advantages in fundraising. Others note that turnout on Election Day in the United States is lower than in European democracies. The McCain-Feingold-Cochran ban on soft money would worsen both electoral competition and turnout.

Scholars have estimated that in 1998 a McCain-Feingold-Cochran ban on party soft money would have cost state and local parties $150 million.[27] In the 2000 election, state and local parties would have forgone more than $300 million. The potential costs in the future would no doubt rise since total soft money expenditures by both parties have increased in recent years.[28] What would happen if this money were taken from the parties?

Vitiating the fundraising capacities of parties would make American elections less competitive. Parties direct soft money to close races, thereby making elections more competitive. A recent analysis shows that PACs tend to donate to incumbents while parties concentrate equally on vulnerable incumbents and credible challengers.[29] In close races, banning soft money would make the life of a challenger marginally more difficult than it already is. In general, banning soft money would tip the scales toward incumbents.[30]

Banning party soft money would also reduce turnout on Election Day. Soft money goes to state and local party organizations. By banning soft money, McCain-Feingold-Cochran would seriously reduce party treasuries in many states.[31] Political scientists Stephen Ansolabehere and James Snyder Jr. found that eliminating party soft money would significantly reduce the campaign activities of state and local party organizations. Those authors note that soft money supports numerous activities, including get-out-the-vote drives, broadcast advertising, and day-to-day operations of the organizations. Cutting federal transfers to the state party organizations would likely reduce grassroots campaign activities and produce lower voter turnout as a result.[32] On the basis of their analysis of how state and local parties use soft money, they

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argue that a regulation like McCain-Feingold-Cochran would force parties to cut direct campaign expenditures by 20 percent. Given that it costs $15–$20 to get every new voter to the polls, Ansolabehere and Snyder conclude that cutting soft money to the parties would reduce turnout by about 2 percent.[33]

The consequences of McCain-Feingold-Cochran are not hard to foresee. We will have fewer competitive elections. Our campaigns will involve fewer people, both in grassroots activities and in voting. Those who urge a soft money ban on the nation do not seek those outcomes, which may contravene their deepest convictions. The absence of malice does not mean that the fruit of McCain-Feingold-Cochran will be any less bitter.

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The Hydraulics of Campaign Finance

McCain-Feingold-Cochran will not drive soft money out of American politics. To understand why, we need to see money in politics less as a struggle between good and evil and more as a result of powerful forces that underlie politics and the economy. We must try to understand the "hydraulics of campaign spending," the pressures affecting contributions, so that we can predict the consequences of new regulations.[34] In particular, we should try to understand the dynamics of campaign finance, which suggests that McCain-Feingold-Cochran will not drive soft money out of politics. Instead, such money will find new channels.

The underlying force driving campaign spending is the growth of government itself. John R. Lott Jr. argues that individuals give to political campaigns in hopes of obtaining pecuniary or psychological rewards. Successful candidates in turn can hold out the possibility of concrete benefits to their supporters. Winners might help supporters avoid redistributive taxes or unfavorable regulations.[35] The more government grows, the more favors it has to grant. We would also expect that political participants would spend more money to try to influence the distribution of those favors. As government grows, so grow campaign spending and other efforts to influence the distribution of government largesse. Lott's analysis confirms that the growth of government is the best explanation of the increase in expenditures on campaigns.[36]

Lott's analysis indicates that the only way to reduce campaign spending (and fundraising) would be to reduce the ambit of the federal government.[37] Anything other than that will not affect the underlying cause of spending on elections. Different measures, however, might have unexpected consequences for the nation. We can begin to understand those consequences through a brief foray into the field of economic regulation.

Contribution bans or limits are similar to price controls in economic policy. Governments often impose controls to limit the price of a good or service. The United States once imposed restrictive price controls on energy. Those regulations did not reduce consumer competition for gasoline, nor did they change the cost of the product, as measured by direct cash outlays and queuing. People were able to buy gas at a lower price, but they had to wait in long lines to fill their tanks, which merely changed the manner in which they paid to get a scarce resource. Similarly, rent control imposes a ceiling on the rent for an apartment, but one might still have to pay "key money" for the right to move into the place.[38] Price controls do not suppress consumer demand for products; in fact, they increase the amount demanded and change the way demand is expressed, sometimes in odd and unexpected ways.

The history of campaign finance regulation is similar. Bans and limits have not suppressed the demand for favors created by the growth of government but have instead led to substitutes for direct giving to candidates. Thus, FECA set up "hard" limits on direct campaign contributions and spending. Realists predicted that those limits would not stem the tide of more campaign spending created by the growth of government. The realists have been proven correct. Soft

money contributions and spending have provided a substitute for the hard money constrained by law.[39]

Soft money itself is not completely free of regulation. It must be disclosed, and rules govern how it can be spent.[40] Those restraints led campaign fundraisers recently to seek a substitute for soft money, which they found in section 527 of the tax code, a regulation initially intended to exempt political party fundraising from taxation. The Internal Revenue Service interpreted this section of the tax code in such a way that fundraisers could set up independent political groups that could raise and spend money without limits or regulation (including disclosure of contributors). Congress eventually required disclosure of contributors to section 527 groups, setting off a search for new ways to contribute money to elections without submitting to government scrutiny.[41]

The underlying dynamics of politics shows that more government leads to more campaign spending. This relationship suggests that efforts to restrict campaign spending will not reduce the overall level of spending; contributions will flow into other channels with unknown effects for the nation. Our experience with campaign finance regulation supports this general idea about campaign expenditures. Regulations do not really limit campaign spending. They simply force it into new forms that may or may not be desirable for the nation. If McCain-Feingold-Cochran passes, where will the money go?

The Ban on Political Speech

Other things being equal, the soft money McCain would deny to state and local parties would probably show up as spending by independent groups. Interest groups and other organizations independent of a candidate for office have every right to raise and spend money to inform the public about their views on various candidates and issues. The traditional analogy of a balloon is helpful: McCain-Feingold-Cochran would squeeze the balloon in one place (party soft money) causing another part (independent expenditures) to expand.

Senators McCain and Feingold are aware of this possibility and try to partially prevent the migration of party soft money. Their bill bans issue advocacy by for-profit corporations and labor unions if an ad mentions a candidate for office within 60 days of an election. Such ads have discomfited incumbent members of Congress over the last two election cycles. For that reason, this prohibition on political speech is perhaps the worst aspect of a bad bill. To understand how bad the prohibition is, we need to begin with some legal distinctions.

In *Buckley* the Supreme Court distinguished "express advocacy" and "issue advocacy" in elections. The former is direct advocacy of the election or defeat of an identified candidate; such advocacy contains phrases like "vote for," "elect," or "vote against" and other so-called magic words. The latter sets forth a position on an issue. Express advocacy may be regulated by the government; issue advocacy may not.[42] Express advocacy is both the rationale for government regulation and a limit on it. Government may regulate only electoral communications that contain the "magic words." McCain-Feingold-Cochran seeks to break through the "magic words" barrier and subject additional speech to government control.

First, McCain-Feingold-Cochran prohibits "electioneering communications" paid for by for-profit corporations and labor unions. The bill defines "electioneering communications" as radio or TV ads that refer to clearly identified candidates for federal office and that appear within 60 days of a general election or 30 days of a primary. McCain's office notes that this prohibition "addresses the explosion of thinly-veiled campaign advertising funded by corporate and union treasuries."[43] The words "thinly-veiled" are revealing. What had previously been constitutionally protected speech will become prohibited if a "clearly identified candidate"

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appears in an advertisement that is run 60 days before a general election.

This part of the bill seems to respond to recent unpleasant experiences of members of Congress. In 1996, for example, the AFL-CIO carried out a $35 million television advertising campaign that ran in dozens of congressional districts with vulnerable Republican incumbents. The ads attacked the incumbents' voting records on such issues as Social Security, Medicare, and education. The ads did not expressly advocate the election or defeat of any Republican incumbent; instead, they ended by telling viewers to "call your representative to tell him to stop cutting Medicare" or with a policy message. They were thus issue ads not regulated by the federal election laws.[44] Labor unions undertook similar ad campaigns in the election of 2000. Rep. Clay Shaw, a Republican from Florida, was targeted by union issue ads last year. He drew a revealing lesson from his experience: "After you've been a victim of soft money, you realize the magnitude of the problem. I'm determined to address this problem when we come back. It's really ripping at the fabric of our nation's political structure."[45] The McCain-Feingold-Cochran prohibition on corporate and union ads is intended to protect incumbent members of Congress from ad campaigns launched by their political opponents. If McCain-Feingold-Cochran passes, the Clay Shaws on Capitol Hill will never again be "victims of soft money."

We should ask two questions about the proposed ban on the political speech of labor unions and corporations. First, is it constitutional? Second, even if it is constitutional, does it serve the interests of the nation?

On the constitutional question, the Court said in *Buckley,* "As long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views."[46] The Court has also defined "express advocacy" by the so-called magic words mentioned earlier. McCain-Feingold-Cochran bans speech that merely refers to a candidate, rather than speech that expressly advocates his or her election or defeat. The ban on radio and TV ads is unconstitutional on its face.

Will a ban on such advertising be good for the nation? We should pause a moment and let the magnitude of what is being considered sink in. McCain-Feingold-Cochran proposes that the government prohibit political speech by labor unions and corporations if it takes places 60 or fewer days before an election. As we saw earlier, the government can restrict speech only to prevent "corruption or the appearance of corruption." How did the ads run by labor unions in 1996 corrupt Democratic members of Congress? Did any members change their votes to favor unions in return for the ads? In fact, Democratic members of Congress were likely to support union causes whether the ads ran or not. The assumption that corporate or union ads could influence members of Congress remains unproven. Without proof, such a severe measure as banning speech is unlikely to pass constitutional muster.

Even if the ban were to be approved by the Supreme Court, Americans should be skeptical of this prohibition. The real purpose of the ban is to protect incumbents from criticism during campaigns.[47] Some members of Congress thus expect that banning union and corporate ads will make their lives easier and their reelection more likely. However, making the lives of incumbent members of Congress easier is not a good reason to ban political speech. In fact, it is the worst reason to do so. The ban on the political speech of unions and corporations will constrain the vigorous debate essential to a free and democratic society.

The Irony of Reform

Senator McCain believes that new restrictions on campaign finance are necessary because special interests dominate American government and public policy. As he told television commentator Chris Matthews,

"This is a system that has become dominated by the special interests, and the average American citizen is no longer represented, and everybody knows it's got to be fixed."[48] Similarly, House Democratic leader Richard Gephardt (D-Mo.) said: "Democrats believe the time has come to give our democracy back to the people. We need to reduce the power of special interests and money in the political process."[49] Ironically, McCain-Feingold-Cochran will enhance the power of several special interests and, more generally, will ensure that interest groups play a larger role in American elections. Judged on its own terms, McCain-Feingold-Cochran will be a failure. Let's look at the special interests that will benefit from this legislation.

Incumbents

We have already seen how McCain-Feingold-Cochran plans to protect incumbents from criticism during elections by banning many forms of advocacy. The bill also protects the special interests of incumbents in other ways.

Those who hold office enjoy tremendous advantages in electoral struggles. Members of Congress supply themselves at public cost with significant resources to pursue reelection. Those include salary, travel, office, staff, and communication allowances that are estimated to be worth $1 million annually to House members and several times that to senators. In particular, taxpayers now support unlimited trips by House members back to their districts.[50] In 1999 members of Congress had 11,488 full-time staffers, many of whom focused on helping constituents with their problems, thereby generating support in the home district.[51] Members also have the franking privilege, which allows them to send mail to constituents free of charge. They use the privilege with gusto; members send out hundreds of millions of pieces of mail annually.[52] By the time an election rolls around, incumbents have much higher name recognition among voters than do challengers. Such advantages of office are not governed or limited by FECA.

Incumbents thus begin with a huge head start over potential challengers. Not surprisingly, the reelection rate for House members has been above 90 percent in every year except one since 1976; the reelection rate for senators has varied more, but since 1986 the average has been 90 percent.[53] This is not inevitable: from 1976 to 1980, the reelection rate for senators was only 60 percent.

To overcome an incumbent's advantage, a challenger must raise significant sums of money. In 1996 and 1998, for example, challengers who defeated House incumbents raised, on average, well over $1 million; in Senate races, successful challengers raised many times that sum.[54]

McCain-Feingold-Cochran makes it harder for challengers to get their hands on the money needed to take on an incumbent. For example, the bill bans the soft money that parties now use to strengthen challengers running against vulnerable incumbents. The bill's ban on "electioneering communications" by unions and corporations also helps incumbents by protecting them from criticism and attacks from well-organized opponents. In contrast, the bill does nothing to limit PAC money, which goes overwhelmingly to incumbents.[55]

If robust electoral competition is in the public interest—and it is—we can conclude that the most powerful special interest benefiting from McCain-Feingold-Cochran will be incumbents who will be challenged less and reelected more.

The Media

The media have a large conflict of interest in reporting on campaign finance regulation. As the Supreme Court said in *Buckley,* speech and money are tied together in modern American society. In particular, fighting election campaigns depends on access to the mass media, which costs money. Any regulation that restricts contributions to or expenditures on election campaigns makes it harder to gain access to the public square.

Such restrictions, however, serve the interests of the established powers that are already

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positioned to make their voices heard. The existing media—conservative, liberal, and in between—already have a platform from which to speak out on public issues. McCain-Feingold-Cochran will restrict competition to the existing media in the public square. The bill flatly bans media access for labor unions and corporations if they plan to talk about a candidate for office within 60 days of an election. State political parties lose most of the resources they would use to speak out in favor of their candidates. Even interest groups trying to speak out with issue ads may find themselves pulled under the restrictions of FECA by the newly legislated definition of "coordinated activity," about which more in a moment. Clearly, if McCain-Feingold-Cochran passes, fewer voices will be heard in the public square, and the voices that now dominate—the existing media—will be all the louder.

Interest Groups Generally

As things now stand, soft money goes to and thereby strengthens political parties. McCain-Feingold-Cochran deprives parties of soft money, but the funds will not leave politics as we noted earlier. Instead, the erstwhile party soft money will be used for independent expenditures and issue advocacy by interest groups. By adopting McCain-Feingold-Cochran, in other words, Congress will choose at the margins to give the United States more "elections informed by interest groups" and fewer "elections informed by parties."[56]

McCain-Feingold-Cochran will encourage precisely what it purports to end: government by interest groups.

Why should that matter? Interest groups generally live up to their name: they pursue (and have every right to pursue) the interests of their members, whether the group is a trade union, an ethnic group, a business association, a profession, or any of the numerous other groups in which people associate politically. Such groups, of course, try to influence the electorate and policymakers to favor the interests of their members.

Parties, in contrast, bring together coalitions of interests and put forth general platforms designed to attract a majority of voters. Parties are obliged to put forth platforms of coherent policies to convince voters of their merits and to represent a broad coalition of interests. Parties come closer than interest groups to articulating general interests.

By banning party soft money, McCain-Feingold-Cochran will tip the balance in American political institutions toward interest group advocacy and away from political parties. Yet the balance we have now is worth preserving: groups pursue their particular agendas while parties fight election campaigns on platforms for governing that are intended to appeal to broad coalitions of interests. Parties provide more general counterweights to the particular interests pursued by groups. In contrast, McCain-Feingold-Cochran will encourage precisely what it purports to end: government by interest groups.

The Threat to Political Advocacy

Senator McCain and his allies are aware that their proposed ban on soft money will expand funding for interest group participation in elections. They also know that the Constitution forbids the federal government to regulate express advocacy in elections by groups (other than unions and for-profit corporations) independent of a candidate's campaign. On its face, McCain-Feingold-Cochran does not try to prohibit or limit issue advocacy by those independent groups. Partisans of free speech may feel some relief that the bill does not restrict the rights of other groups. If so, that feeling is misplaced.

McCain-Feingold-Cochran spends several pages elaborately defining "coordinate activities," which are activities not independent of a candidate's campaign and thus subject to federal election law. This convoluted section of the bill aims at expanding the ambit of federal election restrictions and reducing the area of free speech for independent groups. Expenditures that are deemed to be coordinated will be treated as direct contributions for purposes of applying FECA's limitations and prohibitions. The definition of "coordinated activity" in the

bill is complex. For that reason, the concrete consequences of the bill's expansive notion of coordination are not self-evident: it's hard to say that the new definition of coordinated activities will muzzle one group and leave another group free of regulation.

However, the intentions of the main sponsor of the legislation are clear. Appearing on *Hardball with Chris Matthews,* Senator McCain cited the independent ad campaign by the NAACP against President Bush as a problem his legislation would remedy.[57] Clearly, Senator McCain believes that his legislation would treat that independent expenditure by the NAACP as a "coordinated activity" that could be regulated under FECA. McCain-Feingold-Cochran thus aims to go well beyond its stated intention of regulating ads by unions and corporations. Senator McCain hopes to vastly expand the regulatory reach of FECA. If the NAACP's electoral activities were subject to federal restrictions, there would be few limits on FECA's control over independent groups and issue advocacy.[58]

The fact that Senator McCain and his colleagues are going after independent groups exercising their freedom of speech should come as no surprise. The political incentives to do so are overwhelming. Banning party soft money will push those funds toward independent expenditures and issue advocacy by independent groups. The targets of many such ads will be incumbent members of Congress. Being a target is never easy to bear, especially when you might have the power to stop hostile criticism. The broad definition of "coordinated activities" is one of the tools McCain and others have chosen to stop hostile criticism.

Conclusion

Some Washington observers believe that McCain-Feingold-Cochran's campaign finance restrictions stand a good chance of becoming law. All the rhetoric notwithstanding, the three senators have not made the case that soft money corrupts American politics or that political speech should be constrained or even, in some forms, prohibited by new regulations. Other people have shown that the public cares little about new regulations on campaign finance and that spending on elections has little effect on public trust in government.[59] Advocates lack a legitimate rationale for new restrictions on political speech.

Beyond the specifics, the tone of McCain-Feingold-Cochran is disturbing to anyone who thinks a democratic republic should have robust and competitive elections. McCain-Feingold-Cochran is a command-and-control approach to political speech and is deeply antagonistic to political participation in elections. There is talk of testimony under oath and perjury if a person takes part in a campaign in the wrong way. There are paperwork to be filled out and certifications to be obtained if American citizens want to express their political views in an election season.[60] The section on coordinated activity will inevitably lead to investigations of the political associations and activities of individuals; people will be required to swear under oath about the nature of private conversations and meetings.

In sum, McCain-Feingold-Cochran assumes that elections belong to the government, which has the right to decide who participates and on what terms. In the United States, however, elections belong to the people, who elect a government that should be their servant. McCain-Feingold-Cochran is a profound mistake that deeply offends the spirit of the American republic.

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Notes

1. Ruth Marcus, "Costliest Race in U.S. History Nears End," *Washington Post,* November 6, 2000, p. A1.

2. David Broder, "Sizing Up Soft Money," *Washington Post,* December 3, 2000, p. B7. Federal Election Commission reports show more soft money than actually exists. Funds moving between federal and nonfederal accounts are either double counted or misidentified. See Stephen Ansolabehere and James M. Snyder Jr. "Soft Money, Hard Money, Strong Parties," *Columbia Law Review* 100 (April 2000): 605.

FECinfo.com reported on December 19, 2000, that 57 individuals and organizations gave at least $250,000 to the national party soft money accounts in the preelection period: 30 individuals gave $11.3 million, 6 unions $6.6 million, 18 corporations $5.9 million, and 3 trial lawyer organizations $1.2 million for a total of $25 million.

3. See Staff Working Draft of McCain-Feingold-Cochran bill, January 22, 2001, http://mccain.senate.gov/acrobat/kampain.pdf.

4. Congress passed the Federal Election Campaign Act in 1971 and amended it in 1974 and 1979.

5. See Anthony Corrado, "Party Soft Money," in *Campaign Finance Reform: A Sourcebook,* ed. Anthony Corrado et al. (Washington: Brookings Institution Press, 1997), pp. 171–72.

6. "Twelve percent of soft money in 1994 and ten percent of the soft money in 1998 came from other accounts of the national parties. This indicates that the FEC reports suggest that there is more soft money than there actually is. Funds transferred from one non-federal account to another are simply double counted." Ansolabehere and Snyder, "Soft Money," p. 605.

7. Ibid., p. 606.

8. Marianne Holt, "The Surge in Party Money in Competitive 1998 Congressional Elections," in *Outside Money: Soft Money and Issue Advocacy in the 1998 Congressional Elections,* ed. David B. Magleby (Lanham, Md.: Rowman & Littlefield, 2000), Table 2.3, p. 32.

9. Peter H. Stone, "Soft Money Curbs, Revisited," *National Journal,* December 9, 2000, p. 3822. Soft money now accounts for 53 percent of Democrats' overall campaign revenues. See also Broder.

10. For a brief account of Clinton's efforts to raise soft money, see Steven M. Gillon, *"That's Not What We Meant to Do": Reform and Its Unintended Consequences in Twentieth-Century America* (New York: W. W. Norton, 2000), pp. 225–27.

11. *Buckley v. Valeo* 424 U.S. 1, 26 (1976).

12. Thomas F. Burke, "The Concept of Corruption in Campaign Finance Law," *Constitutional Commentary* 14 (Spring 1997): 127. Burke identifies three types of corruption: quid pro quo, monetary influence, and distortion. Quid pro quo corruption and monetary influence correspond to direct and indirect bribery as used in this paper.

13. Frank J. Sorauf, *Inside Campaign Finance: Myths and Realities* (New Haven, Conn.: Yale University Press, 1992), pp. 165–66 ; and Bradley A. Smith, *Unfree Speech: The Folly of Campaign Finance Reform* (Princeton, N.J.: Princeton University Press, 2001), pp. 51–63.

14. Sorauf, p. 167.

15. Ansolabehere and Snyder, "Soft Money," p. 618.

16. David Mayhew, *Congress: The Electoral Connection* (New Haven, Conn.: Yale University Press, 1974).

17. Stone, p. 3823.

18. "People who favor increased regulation indulge in a rhetorical strategy that implicitly equates big money with corruption and undue influence. It is thus important to recall that seeking to influence policy is what political activity—and free speech—is all about. We have no metric to tell us when influence is undue. And the Court has squarely held that only activities that create a danger of quid pro quo corruption can be constitutionally regulated." Lilian Bevier, "Campaign Finance 'Reform' Proposals: A First Amendment Analysis," Cato Institute Policy Analysis no. 282, September 4, 1997, p. 16 n. 28.

19. *Buckley* at 49–50.

20. Kathleen M. Sullivan, "Political Money and Freedom of Speech," *University of California–Davis Law Review* 30 (Spring 1997): 681.

21. Smith, p. 63.

22. Sullivan, "Political Money," p. 681.

23. Ibid., p. 682.

24. Scott Harshbarger, president of Common Cause, has said that "many of the national progressive grass-roots groups see that their substantive agendas are being blocked by the present campaign finance system." Quoted in Stone, p. 3823.

25. On American political culture, see Seymour Martin Lipset and Gary Marks, *It Didn't Happen Here: Why Socialism Failed in the United States* (New York: W. W. Norton, 2000). Ironically, the left has enjoyed some success playing the political game "inside the Beltway." See Jeffrey M. Berry, *The New Liberalism: The Rising Power of Citizen Groups* (Washington: Brookings Institution Press, 1999).

26. On why low contribution limits benefit existing political groups, see Thomas Gais, *Improper Influence: Campaign Finance Law, Political Interest*

Groups, and the Problem of Equality (Ann Arbor: University of Michigan Press, 1996). On the other unintended consequences, see Gillon, pp. 212–21.

27. Ansolabehere and Snyder, "Soft Money," p. 618. The authors estimate that slightly more than 20 percent of soft money contributions in 1998 could have been raised within existing hard contribution limits. Ibid., 607.

28. For soft money giving since 1992, see Holt, p. 32, Table 2.3. Generally, soft money expenditures are smaller in years lacking a presidential election. The exception was 1998 when Republicans spent about as much soft money as they did in the presidential year of 1996.

29. Ansolabehere and Snyder, "Soft Money," p. 610.

30. Roger Pilon of the Cato Institute notes that writing campaign finance laws inevitably involves self-dealing: there is always the temptation to produce rules that favor the current winners. See his "Campaign Finance, Corruption, and the Oath of Office," in *Cato Handbook for Congress, 107th Congress* (Washington: Cato Institute, 2001), p. 120.

31. A ban on soft money is much like an unfunded mandate. All the costs of the regulation fall on state and local entities while all the benefits go to national policymakers. See Paul Posner, *The Politics of Unfunded Mandates* (Washington: Georgetown University Press, 1998). Congress has recognized the unfairness of unfunded mandates in other areas of regulation but has not yet broached the issue of the intergovernmental inequity of a soft money ban.

32. Ansolabehere and Snyder, "Soft Money," p. 613.

33. Ibid., p. 617. The estimated cost of getting each marginal vote to the polls comes from research done by Donald Green and Alan Gerber. See ibid., p. 617 n. 84. The 2 percent estimate applies to the three representative states studied closely by Ansolabehere and Snyder, "Soft Money," p. 617.

34. Samuel Issacharoff and Pamela S. Karlan, "The Hydraulics of Campaign Finance Reform," *Texas Law Review* 77 (June 1999): 1705.

35. John R. Lott Jr., "A Simple Explanation for Why Campaign Expenditures Are Increasing: The Government Is Getting Bigger," *Journal of Law & Economics* 43 (October 2000): 363–64. On campaign spending to avoid negative outcomes, see Fred S. McChesney Jr., *Money for Nothing: Politicians, Rent Extraction, and Political Extortion* (Cambridge, Mass.: Harvard University Press, 1997).

36. Lott, p. 383, finds that between 1976 and 1994 real per capita increases in federal budget expenditures explained 87 percent of the real increases in per capita spending on federal legislative campaigns.

37. For this reason, growth in government increases the possibilities of corruption. See Pilon, pp. 129–30.

38. See Lott, p. 362. For a study of the politics of price controls on energy, see Peter M. VanDoren, *Politics, Markets, and Congressional Policy Choices* (Ann Arbor: University of Michigan Press, 1991). On rent control, see William Tucker, *The Excluded Americans: Homelessness and Housing Policies* (Washington: Regnery Gateway, 1990).

39. Kathleen Sullivan, "Against Campaign Finance Reform," *Utah Law Review* 1998 (1998): 312.

40. Corrado, p. 174.

41. Frances R. Hill, "Probing the Limits of Section 527 to Design a New Campaign Finance Vehicle," *Tax Notes,* January 17, 2000, pp. 387–402. As it happens, a liberal activist discovered a possible section 527 substitute.

42. *Buckley* at 40–44. See also *Federal Election Commission v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 249–50 (1986). The definition of "express advocacy" used by the Federal Election Commission at 11 C.F.R. § 100.22 (1997) is rather less liberal.

43. Office of Sen. John McCain, "The McCain-Feingold-Cochran Campaign Reform Bill," Press release, January 23, 2001.

44. Trevor Potter, "Where Are We Now? The Current State of Campaign Finance Law," in *Campaign Finance Reform,* pp. 17–18.

45. Quoted in Juliet Eilperin, "Feeling the Sting of 'Soft Money,'" *Washington Post,* October 14, 2000, p. A11.

46. *Buckley* at 45.

47. Senator McCain is quite clear that one purpose of his bill is to protect candidates for office from attacks by independent groups. Speaking of the current system, McCain said: "Everybody knows it's got to be fixed. Look, the president of the United States would like to see it fixed. He was subject to some, quote, 'independent campaigns' that were pretty brutal. One of them run by the NAACP." See *Hardball with Chris Matthews,* January 25, 2001, CNBC News transcript, January 26, 2001.

48. Ibid.

49. Richard Gephardt, radio broadcast responding to President Bush. For the transcript, see Federal News Service, January 27, 2001.

50. Gary C. Jacobson, *The Politics of Congressional Elections,* 4th ed. (New York: Longman, 1997), p. 29.

51. Norman J. Ornstein, Thomas E. Mann, and Michael J. Malbin, *Vital Statistics on Congress 1999–2000* (Washington: American Enterprise Press, 2000), p. 131.

52. Jacobson, pp. 30–31.

53. Ornstein, Mann, and Malbin, pp. 57–58.

54. Ibid., pp. 83, 89. Note that so few challengers were successful in Senate races in 1996 and 1998 that computing their spending mean could be misleading.

55. Stephen Ansolabehere and James M. Snyder Jr., "Money and Office: The Sources of the Incumbency Advantage in Congressional Campaign Finance," in *Continuity and Change in House Elections,* ed. David W. Brady, John F. Cogan, and Morris P. Fiorina (Stanford: Stanford University Press, 2000), pp. 65–87.

56. This section relies heavily on Michael Munger, Testimony, Hearings on Political Parties in America before the Senate Committee on Rules and Administration, April 5, 2000, http://rules.senate.gov/hearings/4500hrg.htm.

57. "Sen. McCAIN: Thi—this is a system that has become dominated by the special interests, and the American—average American citizen is no longer represented, and everybody knows it's got to be fixed. Look, the president of the United States would like to see it fixed. He was subject to some, quote, 'independent campaigns' that were pretty brutal. One of them run by the NAACP which basically . . .

"MATTHEWS: Accused him of being a KKK member.

"Sen. McCAIN: Yeah. Exa—or being responsible somehow for . . .

"MATTHEWS: For the death of James Byrd." *Hardball with Chris Matthews.*

58. It is also possible that Senator McCain believes that the NAACP will be governed by his bill because the group receives corporate funding and thus falls under the ad restrictions applicable to for-profit corporations. If so, the conclusion of this paper remains the same: McCain-Feingold-Cochran would regulate the electoral activity of a broad swath of previously independent groups.

59. David Primo, "Public Opinion and Campaign Finance: A Skeptical Look at Senator McCain's Claims," Cato Institute Briefing Paper no. 60, January 26, 2001.

60. See Staff Working Draft of McCain-Feingold-Cochran bill. On the paperwork requirements, see Title I, section 103, and Title II, section 212. On certification, see Title II, section 213. On perjury, see Title II, section 201, and Title II, section 214 (a)(1)(F).

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