Special Interests After Citizens United: Access, Replacement, and Interest Group Response to Legal Change

Samuel Issacharoff
NYU School of Law, issacharoff@mercury.law.nyu.edu

Jeremy Peterman
NYU School of Law, jrp381@nyu.edu

Follow this and additional works at: https://lsr.nellco.org/nyu_lewp

Part of the Constitutional Law Commons, and the Law and Politics Commons

Recommended Citation
https://lsr.nellco.org/nyu_lewp/328
Special Interests After *Citizens United*: Access, Replacement, and Interest Group Response to Legal Change

Samuel Issacharoff & Jeremy Peterman

Abstract: The legal literature on campaign finance law and the political science literature on how and why interest groups mobilize use different methodologies to get at overlapping issues. This review integrates some of these insights to better understand the relationship between interest group participation in elections and changes in campaign finance law. The post-*Citizens United* world of law created some regulatory vacuums that only some groups tried to take advantage of. For example, little corporate money found its way into SuperPACs or groups engaging in independent electoral advocacy. We argue that understanding interest groups’ objectives of using contributions to candidates to obtain access, on the one hand, or using independent expenditures to install friendly candidates in office, on the other, is key to analyzing how interest groups respond to legal developments. We also argue that while interest group participation in elections increased in 2012, the party centric federal election system was largely resilient to increased interest group mobilizations highlighting the difficulties with the replacement-oriented strategy.

In the public eye, the world of campaign finance exists in two eras: before and after the Supreme Court’s landmark decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). Without doubt, the jurisprudential impact of that decision is widely exaggerated with even the privately funded attacks on the Cabinet nomination of former Senator Charles Hagel – an activity outside the electoral arena that has never been regulated by campaign finance laws – being popularly described as a result of the Supreme Court’s 2010 ruling. But the Supreme Court’s constitutional protection of corporate and labor union independent speech at least coincided with a renewed explosion of private money in elections, and particularly with the rise of the Super PACs, the latest organizational vehicle for spending limitless amounts of private money to influence electoral politics. Correlation may not be causation, but a wary public is more likely to credit the intuition that where there is smoke, there must be fire.

And the public has every reason to be wary. The 2012 election brought seemingly unchecked private money to the fore of the campaign narrative like no election before. In turn, that money allowed interest groups to establish a substantial presence in the national debates. Candidates ran campaigns as usual,
but many candidates were supported by Super PACs that functioned as surrogate campaigns unconstrained by contribution limits. Largely unregulated interest groups spent over $1.2 billion on advertisements supporting or opposing candidates for federal office and contributed $433 million more directly to candidate campaigns. One couple gave nearly $100 million to interest groups supporting conservative candidates, with perhaps the saving grace that all of the candidates supported by their money lost.

For the legal reformers concerned by this state of events, the fear of influence by specific interests over electoral outcomes and public policy is more the product of concerns about unequal resources, particularly for the disadvantaged sectors of the society, than about interest group strategies overall. As well captured by David Strauss (1994), most concerns about the role of money in politics reflect deeper worries about equality and the nature of democratic politics than concerns over money itself. When the Supreme Court augured in the era of judicial review of the political process in the 1960s, it held out the aspiration that all citizens should have an equal influence in political life. Implicitly or explicitly, much of interest group scholarship is premised on the claim that the equality of citizenship norm is being violated by the greater access and influence of some as opposed to others. Were interest groups able to form costlessly and have power directly proportional to their strength of support among the citizenry, there would be few interesting questions to investigate beyond the obvious how did this miraculous system form? This is not the system we have, so interest group scholars are left to investigate questions ranging from what impact interest groups have on elections to what conditions are necessary for successful interest group formation.

Our focus in this review is the relationship between changes in federal campaign finance law and interest group formation and participation in national politics. Despite significant legal changes and the jarring influx of private money in the 2012 election, the influence of interest groups on campaigns changed less than might have been expected. In particular, the claims of massive corporate interest group spending did not materialize, and interest groups did not appear to wrestle influence over campaigns away from the candidates and their parties. The most significant new group actors were Super PACs affiliated with a party or candidate, and the largest donors were wealthy individuals with broad

---

2 Unless otherwise noted, the data cited come from the Center for Responsive Politics.
3 Several of the canonical cases in this line are *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 533 (1964) in which the Supreme Court developed the one person one vote doctrine by finding that population disparities between electoral districts within states violated the Equal Protection Clause of the constitution, as well as *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), overruled by *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010), in which the Supreme Court expressed concern about the ability of corporations to “exert an undue influence” on elections.
ideological goals, not traditional interest groups seeking to influence specific policies. What explains this response?

There are overlapping but oddly disconnected discussions on interest groups and campaign finance law in the legal and political science literatures that when combined help illuminate this relationship. We argue that understanding interest groups’ political strategy is essential for understanding the response to legal developments. Strategy helps us understand both what new groups will form and how existing groups will alter their participation in electoral politics in response to legal change. As we will set out, interest groups engage the electoral arena through two basic strategies: ensuring access to the elected representatives, whoever they might be, or trying to determine who gets elected. For the most part, corporations seek advantage vis-à-vis their business rivals on issues that are not traditionally partisan and need access to accomplish that, assuming that to greater and lesser extents all elected officials will be their allies. Other interest groups, like unions or ideological organizations, are not so fortunate. For them, the identity of the elected official and her specific political orientation is generally critical.

Whether a group is access or replacement-oriented is the key to understanding how an existing group will likely respond to a changed regulatory environment. Access-oriented groups are unlikely to take advantage of new campaign finance innovations or engage in significant independent spending, while replacement-oriented groups are likely to be on the front lines. With respect to group formation, while the availability of money is critical for new groups to overcome the collective action problems that often hinder formation, a group’s (or a potential group’s) likely strategy helps explain which types of interest groups will form when money becomes more available. We begin with a discussion of the laws governing campaign finance and the leading work on interest group theory. We then refine the insights we glean through discussion of two cases of legal change: the Bipartisan Campaign Reform Act and the subsequent Citizens United and SpeechNow decisions.

The Legal Framework

Campaign finance law is an intricate web of state, federal, and constitutional law. The First Amendment of the United States Constitution limits how government may regulate political participation. In a series of decisions over the past forty years culminating most recently with Citizens United, the Supreme Court has created constitutional limits on the regulation of political speech. (Pildes 2004; Hasen 2011). This created a federal regulatory system based on federal statutes as modified by Supreme Court decisions, and as overseen by a weak and largely ineffectual federal agency, the Federal Elections Commission. This has also made legal reforms at altering the susceptibility of the electoral system to interest group influence a Sisyphean task. The constitutional limits on regulation created holes in the regulatory framework, the effect of which is well-
described by the hydraulic imagery popular in the literature (Issacharoff & Karlan 1999). Groups that want to participate are adaptive, resilient, and everpresent as they navigate the convoluted byways of the campaign finance regulatory morass.

The modern era of federal campaign finance regulation begins with the Federal Election Campaign Act of 1971 (FECA) and the Supreme Court’s decision in *Buckley v. Valeo*, 424 U.S. 1 (1974), that immediately followed. Following the Watergate scandal, Congress through FECA sought to curb the role of money in politics by limiting the amount of money individuals could contribute to candidates and groups that engaged in electoral advocacy while also limiting candidates’ demand for money by limiting how much candidates and outside groups could spend in support of a campaign. In *Buckley*, the Supreme Court effectively created a new system of regulation, upholding FECA’s contribution limits, but declaring unconstitutional the efforts to limit candidate expenditures. This created a gap between the demand for funds and the ability to satisfy that demand efficiently through large donation fundraising.

In turn, the divide between the tightly regulated domain of contributions and relatively unregulated sphere of expenditures created great incentives for circumvention of the regulatory framework by which the wielders of money sought alternative means of exerting influence. Interest groups and individuals seeking to influence campaigns could make limited contributions directly to candidates but they could also support a candidate by engaging in their own advertising without limit, as long as the money was spent independent of political parties and the candidate’s campaign.

The Court did permit regulation of one group of expenditures – corporate and union express advocacy within 60 days of a general election. In campaign finance jargon, “express advocacy” refers to advertising expenditures that expressly advocate the election or defeat of a candidate, as opposed to “issue advocacy” that seeks to opine on a particular issue and does not clearly endorse or oppose a particular candidate. The distinction was often evanescent, as issue ads would blast a particular candidate but end with the anodyne request to “Call John Smith” to inquire about the allegations (Briffault 1999). At least under the formal strictures of the *Buckley* framework then, corporations and unions were permitted to run issue advertisements in the months before elections but not express advocacy advertisements. This remained true until 2010, when the Supreme Court in *Citizens United* declared limits on corporate and union express advocacy unconstitutional so long as there was no coordination with candidates or parties that would bring the advocacy within the domain of regulated contributions.

FECA also established a legal process for the regulation of interest group activity in the form of political committees, commonly known as PACs. Interestingly, the political committee, which ostensibly creates some greater burdens on group electoral participation than individual participation, was a product of interest group
FECA, a "committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year," 2 U.S.C. § 431(4)(A), and has the "major purpose" of electoral activity, must register with the FEC as a political committee. Political committees are subject to certain contribution limits discussed in more detail below, and they are required to disclose their activities to the FEC. This means disclosing the identity of their donors and the amount of money spent on contributions and expenditures.

The "major purpose" requirement was a limitation created by the Supreme Court in *Buckley* and unfortunately lacks a clear definition. 424 U.S. at 79. This is an important ambiguity because "major purpose" for FEC registration is narrower than the portion of the tax code that affords tax exempt status to political groups. This means that some advocacy groups are able to avoid the burdens of registering as political committees with the FEC, yet retain the benefits of being recognized as a political committee under the tax laws, such as having tax exempt status with the IRS for their transactions. This enables these groups to avoid publically disclosing their donors, as long as their major purpose is not influencing federal elections – though they still need to disclose money spent on broadcast express advocacy made within 60 days of a general election. Direct mail, internet, and phone communications do not need to be disclosed.

Under current law, there are three forms of political committees regulated by the FEC: nonconnected PACs, connected PACs, and Super PACs.

*Nonconnected PACs*, are simply ordinary political groups that fall within the definition of a political committee. They are typically formed by groups that exist to promote a particular cause or ideology as opposed to the interests of a corporation or union. Nonconnected PACs are funded by individual contributions which are limited to $5000 per PAC per year. Nonconnected PACs are also limited in how much they may give to candidates, though they may spend unlimited amounts of money independent of a candidate. Nonconnected PACs registered as multicandidate PACs – that is, a PAC that has existed for six months, received contributions from 50 different individuals, and contributed to at least five different candidates – may contribute up to $5000 per candidate per election. 2 U.S.C. § 441a(a)(2)(A). Otherwise nonconnected PACs, like individuals, may only contribute $2500 per candidate per election. 2 U.S.C. § 441a(a)(1)(A).

Politics. Prior to FECA, unions would skirt prohibitions on union political activity in the Taft-Hartley Act through the formation of groups akin to PACs that would solicit funds from the individual union members. In a 1970 decision, *United States v. Pipefitters Local Union No. 562*, 434 F.2d 1127 (8th Cir. 1970), rev'd, 407 U.S. 385 (1972), the Eighth Circuit called this practice into question, and the unions responded with a concerted lobbying effort to enshrine the practice in federal law.
Connected PACs, on the other hand, are associated with a specific corporation or labor union and exist to promote the interests of the host organization. These PACs are what most people understand to be PACs: they tend to be formed by a firm outside politics in order to be able to collect funds to be leveraged politically from individuals associated with the firm, but not directly from the firm’s coffers. Since campaign finance law traditionally prohibited these groups from directly participating in political campaigns, political committees enabled these entities to engage in electoral activity. Following *Citizens United’s* holding that restrictions on independent corporate electoral spending are unconstitutional, corporations and unions are now less restricted than they have traditionally been; however, they may still only contribute to candidates through PACs. Like nonconnected PACs, connected PACs may only receive individual contributions up to $5000 per year and contribute to candidates $5000 per election, provided they satisfy the multicandidate PAC requirements. Connected PACs, however, are limited in fundraising to soliciting funds from their members and shareholders. 2 U.S.C. § 441b(b)(4)(A). While this may appear to be a significant limitation, connected PACs are permitted to accept unlimited assistance from their connected organization for administrative and operating expenses, which include fundraising, consultant, and startup costs. 2 U.S.C. § 441b(b)(2)(C). And as noted in both the political science and legal literature, this restriction provides connected PACs with an advantage over nonconnected PACs (Gais 1996; Peterman 2011).

Super PACs are the new entrant in this constantly mutating biosphere. There is no direct legal definition of a Super PAC; rather they exist as a residual category for the private collection of funds that do not fall under the regulatory sway of other PAC forms. Unlike connected and nonconnected PACs, Super PACs are PACs that only make independent expenditures, thereby evading all the regulation of contribution limits. This means that when the PAC was formed, it expressly rejected any intention to make contributions to candidates. Super PACs are of relatively recent vintage and took off prior to the 2012 presidential election as a result of the appellate court decision in *SpeechNow v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), in which regulatory limitations on contributions to PACs that only made independent expenditures were found unconstitutional. Because these Super PACs engage in independent advocacy alone, with no putative connection to any candidate or party, the courts have found that the normal constitutionally accepted logic of concerns over quid pro quo corruption does not apply. The irony is that, as these Super PACs took hold in 2012, they became the most obvious conduit of unregulated money to candidates despite their nominal independence. Super PACs developed in the presidential primaries to support a particular candidate, and many wealthy donors, most notably Sheldon Adelson, widely broadcast their large financial contributions to particular candidates.
The various PACs describe organizations created pursuant to the regulatory requirements of the federal elections laws. There are also so-called 527 organizations and 501(c) organizations, the numbers referring to the section of the federal tax code under which the groups organize. These organizations typically engage in political activity through independent spending or by bundling individual contributions, and they are prohibited from contributing directly to candidates. Section 527 provides tax exempt status for "political organizations," which include PACs; however, the definition of "political organization" is more expansive than FECA’s definition of "political committee." This creates space for organizations to obtain the tax benefits of being political entities under the tax code but evade the regulatory obligations of the campaign finance laws. In effect, these groups engage in unregulated election activity while retaining their tax exempt status. Tax exempt does not mean that political contributions are tax deductible to the donor, but it does shield the recipient organization from having to pay taxes upon receipt of funds. To maintain this privileged status, an organization may engage in "issue advocacy" but not "express advocacy" or candidate contributions that would bring it within the FEC’s grasp. Such 527 organizations that fall outside of FEC regulation are still required to disclose their donors and expenditures periodically to the IRS.

All the relative advantages and disadvantages of various institutional mechanisms for circumventing formal campaign finance limitations are subject to ebbs and flows, depending on the state of institutional innovation and momentary alterations in the regulatory environment. During the period of their ascendancy, 527s’ main advantage was that these groups would be unlimited in the amount of money they could receive from donors; however, now that Super PACs may accept unlimited contributions and make independent expenditures limited only by the generosity of their donors, individuals and organizations seeking to spend lots of money in elections no longer need to form 527s to find a welcoming regulatory niche.

The 501(c) corporations remain relevant actors. In the electoral arena, 501(c) corporations can do everything 527s can do, and they are also free to expressly advocate for or against a candidate for federal office without registering as a political committee. The advantage of this form of organization is that these nonprofit corporations are not required to publically disclose their donors. The only catch on this apparent power to escape regulation is that 501(c)s cannot have the “primary purpose” of engaging in partisan campaign activity. That is, the nonprofit must have a non-partisan primary purpose such as voter registration or educating the public on a specific issue to comply with the tax laws. Exactly what “primary purpose” means is frequently contested as groups attempt to walk the line ever more closely. The most expansive recent use of 501(c)(4) comes with Organizing for Action, a political advocacy group organized by the post-election Obama campaign, now dedicated to promoting
the President’s political message independent of formal coordination with any
candidate for federal elected office.

While inertia and convenience often lead groups to choose one form of
organization over another, a group’s strategic goals are often a major factor when
deciding what form political participation will take. An interest group that wants
to run lots of advertisements for which it alone controls the message and content
and is not concerned about donor disclosure will likely form as a Super PAC,
while a group concerned with donor anonymity might trade the additional effort
to incorporate a nonprofit and comply with the primary purpose requirement to
avoid disclosing donors. Similarly, an interest group that wants to make its
support of candidates crystal clear might form a traditional PAC through which
it can contribute directly to candidates.

**Theories of Interest Group Mobilization**

To better understand how legal structures may influence interest group
formation and mobilization, we need to understand why and how interest
groups form in the first place. Fortunately, the political science literature is
replete with a number of competing explanations. We can only provide a cursory
review of the general development of thought on interest group formation and
several of the leading theories. Readers wanting a more in depth analysis would
do well to read one of the more extensive treatments of the topic. (McFarland

The terms of the debates over interest group mobilization continue to be
shaped by Mancur Olsen’s *The Logic of Collective Action*. Olsen argued that
smaller constituencies have an advantage over larger constituencies in forming
groups to compete for public goods because of collective action problems that
make it rational for members of larger groups to “free ride.” In simpler terms,
interest groups form to lobby governments for group benefits. But these benefits
are shared among all prospective members of the group, regardless of whether
an individual participated in the effort. Therefore, rational individuals will let
others do the costly work of securing group benefits and sit back and wait for the
benefit to accrue. With large groups the collective action problem is even more
pronounced because the benefits are often smaller as they are shared among a
larger number of people. This reduced benefit may be worth less to the
individual than the cost of lobbying making it rational to stay on the sidelines.
This problem is less pronounced for small groups because they share the benefit
among fewer people and they are better able to monitor nonsupport in order to
control free riding. As a result, investing in organization is likely to be a more
rational decision for small groups seeking concentrated benefits.

Prior to Olson’s work, the dominant theory of group formation could be
called optimistic pluralism. That is, a view of interest groups that formed in
response to public demand to shape government policy through the competition
for public goods. (Bentley 1908; Truman 1971; Dahl 1961). This pluralist view
was an optimistic one because the theorists largely assumed that interest groups would form when desired and compete relatively equally with each other. According to Bentley who pioneered this theory, politics are dominated by group interests that form into interest groups to compete for government policy outcomes. Consistent with the majoritarian structure of democracy, Bentley believed that this produced generally just results as larger groups (read more popular groups) would defeat smaller groups and get their desired policy. (Bentley: 226-27, 454-55). Two features of these groups prevented any individual interest group from overreaching. Cross-cutting cleavages within groups deterred single groups from taking any policy too far for risk of isolating some members. And unorganized interests waiting in the wings to mobilize – such as consumers generally – deterred particular interests from overreaching. (Id. 506-16).

Bentley’s work, however, said little about how these interest groups would form. He simply assumed that they would (Olson 1965: 122). This void was filled by Truman (1971) who argued that groups form in response to social pressures. (Id. 22-33). Subsequently dubbed “disturbance theory,” Truman believed that social groups would organize as needed in response to social growth and industrial specialization. (Id. 52-57). If an issue was important to a group, the group would form and seek to influence policy. Truman was surely right that social disturbances matter for group formation, but this theory also assumed that impacted groups would form equally in response to such disturbances.

Olson’s insight was that these theories ignored the fact that groups are compositions of individuals acting in their individual self-interest. This meant that for an individual to organize in a group, such organization would have to be in the individual’s self-interest. While large well-mobilized groups would still likely defeat smaller groups, Olson’s theory predicted that such large groups would be difficult to form and maintain while small groups would be more likely to successfully form. (Olson: 126-31). In other words, these theorists falsely assumed that “if a group had some reason or incentive to organize to further its interest, the rational individuals in that group would also have a reason or an incentive to support an organization working in their mutual interest.” (Id. 127). Because small groups were more likely to mobilize than large groups, Olson predicted that smaller interests would dominate large diffuse interests in securing favorable government policies.

The collective action problems that stymie large interest group formation meant that large interest groups generally mobilized only as byproducts of large groups that formed for other reasons. Olson believed that these groups form only when they “have the authority and capacity to be coercive” or when they “have a source of positive inducements that they can offer the individuals in a latent group.” (Id. 133). These conditions go a long way to explaining the influence of organized labor, as opposed to workers more generally, on the political process.
Yet, Olson admits his theory has less purchase explaining the formation of interest groups that do not act out of economic motivation, such as philanthropic or political movements where the goals are noneconomic or where individuals value group participation in its own right (Id. 159-162). Nevertheless, Olson’s logic “remains the dominant paradigm for explaining the formation” of non-economic public interest groups. (Nownes & Neeley 1996: 122).

Recognizing that group formation is influenced by asymmetric incentives between potential groups severely undermined the optimistic pluralist account of interest group equality. Olson was by no means the first to argue that interest group influence is not equal or representative of the general population. (Schattschneider 1960). But his theory more than any other pushed scholars to better understand the mechanics of interest group formation. Since Olson, a number of scholars have attempted to explore how social interest groups form despite the logic of collective action.

One approach argues that large social interest groups provide sufficient benefits to their members to overcome mobilization problems. Robert Salisbury (1969) developed a theory of mutual exchange whereby interest groups are formed by “entrepreneurs” who attempt to maintain their groups through the continuing advantageous exchange of benefits between the group and the groups’ members. In Olson’s terms, the “entrepreneur” works to overcome the collective action problem by ensuring members receive unique benefits for their participation, and it is the skill of the leader that is central for group formation. Similarly, Jordan & Maloney (1996) contend that mobilization is determined by the ability of groups to market non-material incentives to potential supporters rather than public demand for material (economic) benefits.

Another approach focuses on sidestepping the collective action problem altogether. Most notably, Jack Walker (1983; 1991) developed a theory of group formation driven by patrons who generously volunteer their resources to help establish new public interest groups. These patrons are able to overcome the collective action problem simply by funding a group themselves, thus minimizing the contribution required from prospective members. On this view, group formation patterns can be explained by where patrons choose to put their money, or what Nownes & Neeley (1996) refer to as the importance of an entrepreneur, one who is “willing to raise and/or provide start up resources” for group formation (136).

Lowery and Gray (1995; 1997; 2005; 2007) developed an alternative approach drawing from the biological study of ecosystems that posits that interest groups will be more numerous and diverse when there is a large amount of political energy to sustain a number of groups. Political energy is a function of two variables, party competition – which influences the stakes of elections –and the salience of interests relevant to the interest groups – which makes policy changes on relevant issues more likely. (Lowery & Gray 2007). Consistent with Olson, they believe that much interest group mobilization occurs by groups that
have already successfully mobilized for other reasons who then decide to enter the realm of electoral politics. (Gray & Lowery 1997; Snyder et al 2002). But they go farther than Olson in attributing the decision to enter politics to the energy in the political environment. (Gray & Lowery 1997, 332).

While there is disagreement about the particular mechanisms and incentives driving formation, it seems clear from this brief review that there is agreement that monetary support is critical. This may come directly from a pre-existing host organization (Gray & Lowery 1997), from a patron (Walker 1991), or through an adept entrepreneur with the ability to raise money (Nownes & Neeley 1996). With any of these theories, we would expect laws that expand access to money to make group mobilization easier.

From these theories, several insights about the relationship between campaign finance law and interest group mobilization emerge. First, limits on contributions to interest groups should make it more difficult for interest groups to form. Traditionally, PACs have been limited to accepting no more than $5000 per year from individual donors. Successful formation under this rule requires cultivating a broad donor base, a task that seems prohibitively difficult for many would-be groups. Prior to Super PACs such limits forced groups and individuals looking to play a larger role and without broad donor bases to the less regulated 527 and 501(c) organizations.

The advent of Super PACs, and the removal of limits on contributions to such PACs, should make it easier for these groups to form, although not to readily function through the traditional electoral vehicles of candidates and parties. Recall that Super PACs may accept unlimited funds from whomever they please. This change means that groups can now successfully form by relying on a few large donors for support. And as discussed later, the number of independent spending groups has increased dramatically in recent years.

In theory, the removal of the limits on contributions to Super PACs also makes it easier for groups that have traditionally been frustrated by the costs of formation to mobilize and contribute to the political dialogue. Such new participation, however, will be limited to groups wanting to make independent expenditures because Super PACs may not make contributions to candidates. If the latent interest groups that have been frustrated by start-up formation costs want to contribute directly to candidates, they will not likely be helped by recent legal developments. In the current world of campaign finance, it is far easier to create an independent spending group than one that contributes to candidates.

Second, limits on contributions to interest groups can create unequal mobilization. An oft-noted way in which such contribution limits contribute to inequality is the disparate regulation of contributions to connected and nonconnected PACs. (Gais 1996; Peterman 2011). Connected PACs, those PACs associated with a corporation or a union, are permitted to receive unlimited funds for startup costs from their host organizations. This makes it easier for connected PACs to form than for nonconnected PACs. Even if nonconnected
PACs have a generous patron, the patron will be limited to contributing $5000 per year. Therefore, connected PACs have a significant formation advantage over nonconnected PACs and are able to raise more money and contribute more of the money they raise to candidates than nonconnected PACs. (Peterman 2011)

Third, laws that target individual donors, such as disclosure laws, may make it harder for certain groups to mobilize if these laws unevenly deter contributions to groups. Some groups and individuals prefer to participate in politics anonymously or not at all, fearing commercial or personal backlash if their support of a candidate unpopular with some groups is known. This concern will steer anonymity-oriented patrons away from PACs and 527s to 501(c) organizations that are not required to disclose their donors, or out of the electoral process altogether.

The take away is that the primary potential for campaign finance laws to affect interest group mobilization is largely limited to the ability to control interest group access to money. The theories suggest that legal changes that increase the availability of money should lead to an increase in interest groups that have been struggling to mobilize as these groups will have easier access to the resources required for mobilization. Yet in so far as recent legal developments have made more money available to interest groups – a debatable question because there have always been avenues through which interest groups could receive substantial amounts of money from contributors – any new sources of unregulated contributions are only available for interest groups that make independent expenditures. Therefore, new groups are only likely to form if their strategy is consistent with spending on independent expenditures. Whether a group is likely to be interested in making only contributions rather than independent expenditures depends on the reasons such groups enter the electoral arena, a subject to which we now turn.

**How Interest Groups Participate**

The literature on how groups participate in elections recognizes two dominant goals of interest groups – access and replacement – and each goal has a dominant campaign strategy (Franz 2011). Access focuses on engaging in political activity so that an officeholder will listen to the group when a policy of concern to the interest group arises. Access strategies work well when the policy goods sought are not conventionally partisan and therefore do not depend on the partisan composition of Congress, as well as when a desired policy may be achieved by simply lobbying for altered language in a bill before a committee or a regulation before an agency. Historically, access has been the preferred strategy of corporations and economic interests who are most concerned with getting a seat at the table. Corporations are often able to achieve desired polices through lobbying the political process, so gambling on who gets elected is both inefficient and risky. This is likely why studies of corporate influence find that corporations
spend approximately nine times as much lobbying as they do on influencing elections. (Milyo et al 2000).

Replacement focuses on promoting the election or defeat of a particular candidate, with the hope that the victorious candidate will espouse the group’s values once in office. Replacement is a costlier strategy and makes sense for interest groups that seek policies that are highly partisan and require legislative majorities for passage. Replacement has historically been the dominant strategy of unions who overwhelmingly prefer Democratic candidates and, more recently, ideologically oriented groups that are invested in general social and economic issues.5

Groups seeking access typically make contributions directly to candidates. This makes sense for several reasons. First, contributions are clean and clear signals of support. A candidate knows who the contribution came from and how much it was for, and the candidate is able to use that money for immediate political benefit. Second, contributions are limited to $5000 for a multicandidate PAC and $2500 for an individual. This allows groups seeking access on particular issues, but without strong attitudes about the general candidate, to get away cheap because the low limits do not force them to disclose the intensity of their support. A corporate PAC can make a few $5000 contributions to the important members of Congress on particular issues and be done with it. A contribution strategy lets a group that is begrudgingly participating in the political game signal support to a candidate without investing in more expensive independent expenditures.

For replacement-oriented groups, independent spending is the name of the game, though many of these groups also make direct contributions to candidates. Independent spending allows the group to reach voters directly to make the case for the group’s candidate and for the reasons that further the group’s aims. Unlike with the access strategy, replacement oriented strategy generally seeks to mobilize voters to act in the way the group desires and to do so in a way that furthers the group’s ideological objectives. The group, rather than the candidate who receives the contribution, is in charge of the advertising and the message. Replacement-oriented groups may also decide to use other voter contact tools such as direct mail, and if they have sufficient membership, grassroots mobilization and “Get Out the Vote” (GOTV) mobilizations. Of all the interest groups, unions are the only group that consistently has the base of

---

5 The two strategies may blend together as both are designed to secure a group’s preferred policy outcome. But in practice groups appear to act differently in how they seek these outcomes. Moreover, access-oriented groups should be unlikely to really care about who is in office as long as their views are listened to, while replacement groups are focused entirely on replacing unfavorable officeholders. Access-oriented groups will be unlikely to engage in expensive independent spending, but replacement-oriented groups may see contributions to candidates to be a complementary strategy to independent spending.
support to contribute significant GOTV mobilization resources.\(^6\) These two strategies may also function in combination, perhaps with low contributions offering the prospect of greater support through lobbying, or the tacit threat to engage in replacement efforts if the contributions fail to prompt legislative attention.

A group’s participatory strategy appears to be a good predictor of a group’s response to legal change, and as the recent history of elections shows, the decision between an access and a replacement strategy appears to be largely independent of legal changes. More concretely, access-oriented groups are unlikely to form new independent spending focused interest groups in response to legal changes that make such groups more feasible because independent spending does not further the access goal. Influencing elections through independent spending is both expensive and difficult, so groups that may achieve their goals through an access strategy are unlikely to switch to independent spending in response to legal changes. Conversely, replacement groups will be eager to form new groups that provide more efficient mechanisms for engaging in political campaigns.

**The post-BCRA Experience**

As the world of FECA and *Buckley v. Valeo* spun with increasingly complex institutional end-runs on campaign finance regulation, Congress responded with the Bipartisan Campaign Finance Reform Act of 2002 (BCRA). BCRA made two major changes to campaign finance law. First, BCRA prohibited the national parties from receiving so called “soft money.” Soft money refers to unregulated — that is unlimited — contributions that corporations, unions, and individuals could make to the parties for party building activities and coordinated spending with state parties. The second major innovation of BCRA was a ban on corporate and union electioneering communications. Electioneering communications are ads supporting or opposing an identified candidate aired within 60 days of a general election. BCRA forced corporations and unions seeking to run such ads to air them outside of this period. PACs affiliated with these organizations, 501(c)s, and individuals, however, remained free to run express advocacy ads to their hearts content.

Throughout the 1990s, national and state political parties became the recipients of significant amounts of soft money, something which raised their power in the internal political struggles among their supporters. Famous events,

---

\(^6\) There is an additional reason a group might choose to make independent expenditures rather than contributions that is worth mentioning in passing. As discussed above with the access strategy, independent expenditures are flashy and public and signal to group members that the group is really doing something to get their candidate elected. On this view, it is possible that groups run television advertisements and other such expenditures as a strategy for maintaining a mobilized group membership.
such as the Lincoln bedroom sleepovers at the Clinton White House, or other official events that could not serve to raise funds directly, were in fact fundraisers designed to funnel money to federal candidates by channeling it through state party committees. In 2000, the parties received a combined $456,878,202 in soft money contributions. This represented over half of the money raised by the Democrats and just under half raised by the Republicans. Corporations and other organizations were also the primary soft money contributors: In 2000, individuals made up only 38% of soft money contributions. With the passage of BCRA, soft money became illegal, leaving interest groups and individuals that previously made soft money contributions with funds requiring other outlets to be politically effective.

In BCRA’s wake, commentators feared the death of the political party and growing interest group influence. More specifically, there was a concern that parties would lose their significant role in controlling elections. (La Raja 2008). In their place, interest groups would come to play a larger role as money that previously went to the parties through soft money contributions would be redirected to outside groups. And these outside groups would be able to avoid the electioneering provision of BCRA by engaging in “issue advocacy” rather than “express advocacy” in the days before an election. So long as funds were filtered through parties and candidates who had to stand for office, there were always mediating forces that kept national politics within the main channels of largely centrist parties. The fear was that pushing money away from parties and candidates would leave nothing standing between single-minded, single-issue advocacy and the electorate.

Following BCRA interest groups had to confront two realities: 1) they could no longer give unlimited sums directly to the national or state parties, and 2) those organized as corporations and unions were limited as to when they could run television advertisements in support or opposition to a clearly identified candidate. While the reforms focused on what groups could do rather than from where groups could get their money, the limitation on soft-money contributions to parties potentially made this money available for new interest groups. Based on the Walker (1991) and Nownes & Neeley (1996), we would expect these changes to increase group formation as new money was available for patrons and benefactors to bestow on new interest groups. If money like water finds its own level, something was going to give. If individuals who previously made soft-money contributions wanted to continue to use this money for political purposes, interest groups that could accept unlimited contributions would be a potential outlet, and groups in need of a donor to overcome formation problems could more easily get off the ground.

The immediate history of the response to BCRA yields several insights, which we examine first at the level of individual interest groups and then at the systemic level. At the group level, BCRA appears to have encouraged replacement-oriented interest groups to spend more on independent
expenditures and may have aided the formation of ideologically-oriented issue groups. BCRA, however, does not appear to have significantly affected the number of corporate, union, or traditional issue interest groups. At the systemic level, the parties proved more resilient than the predictions of interest group takeover would have anticipated.

Under one admittedly crude measure of the number of political interest groups – the number of registered PACs – there was not a significant change following BCRA. Data from the Federal Election Commission shows that on Jan. 1, 2002, there were 3,891 registered PACs – 1,508 corporate PACs, 1,055 nonconnected PACs, and 891 union PACs to name the largest subgroups. On Jan. 1, 2003, two-months after the first post-BCRA election, there were 4,027 registered PACs, an increase of only 136 PACs or 3.5 percent. Of this increase, 84 were new union PACs, 20 new corporate PACs, and 36 new nonconnected PACs. The increase in union PACs is significant, but given that the unions existed prior to BCRA, the increase seems more properly considered a new form of organization employed by existing unions that decided to use some of their former soft money outlay for PACs than an increase due to new money that enabled nascent unions to overcome the barriers to formation.

This lack of significant growth in the number of PACs following BCRA is unsurprising because BCRA did not reduce the collective action problems limiting PAC formation; contributions to all PACs remained limited in 2003, preventing a patron from funding a new group on her own. According to the theories of formation that focus on overcoming collective action problems, we would expect the money formerly used for soft money contributions to flow to interest groups organized in legal forms permitted to accept unlimited contributions. Consistent with this observation, the BCRA restrictions did appear to lead to an increase in these groups. Of the 80 groups formed under Section 527 that received over $200,000 in donations in 2004 (the first post-BCRA election cycle), 51 were new groups. (Weissmann & Hassan 2006: 83). These groups also appear to have been new political actors as only seven had an associated PAC, a feature shared by many established interest groups. (Id.)

Replacement-oriented groups, like unions, also appear to have shifted the money they previously used for soft money contributions to their own independent spending groups, while access-oriented groups, primarily for-profit corporations, do not appear to have altered their behavior. Following BCRA, Weissman & Hassan (2006) conducted an in-depth study of interest group response to BCRA. The authors’ hypothesized that 527 organizations were the likely financial outlet for groups that wanted to spend the large sums they previously gave to the parties. To test the response, they created a data set of the 527 organizations that participated in the 2004 election and analyzed what constituencies the groups represented and who the most significant donors were. They found, as did others who performed similar studies (Boatrigh et al. 2005), that corporations basically discontinued soft money activities following BCRA.
In 2000, corporations gave roughly $216 million in soft money, yet in 2004, corporations gave $2 million less to 527s than in 2000. (Id. at 90). Unions on the other hand increased 527 contributions from $55 million to $96 million, suggesting that they sought to continue to put the money previously used for soft money contributions to political use. Similarly, individual donors, who gave $173 million in soft money in 2000, drastically increased their contributions to 527 groups from $37 million to $254 million. This suggests that 527 organizations became an alternate form for groups and individuals who wanted to spend significant money on elections, and for whom the 527 format proved to be the most efficient way to work around the formal prohibitions under campaign finance laws.

Why did large individual donors and unions but not corporations increase independent spending in response to this legal change? And why did we only see a significant increase in large independent spending groups? Consistent with the work discussed above on access and replacement-oriented groups, soft money contributions appear consistent with an access oriented strategy in a way that independent spending is not. Soft money contributions went directly to the political parties whose members populate the halls of Congress. The parties knew exactly who gave soft money, and how much. If contributions were able to secure access to officeholders on issues that mattered to contributors, soft money contributions would be a great way to secure access. Many of these access-oriented contributors may have been solicited by the parties, and for the corporate donors, this may have appeared to be a “shake down” where the party threatened to discontinue access if soft money contributions were not forthcoming. As many have suggested, the legal prohibition in BCRA may have corresponded to the desire of corporations not to give.

With the passage of BCRA, soft money became illegal, so access-oriented actors who prefer giving directly to parties and candidates were limited to giving hard money, which is subject to contribution limits. Since parties and candidates are not supposed to coordinate with independent spending groups, it became significantly cheaper to engage in access oriented strategies, and the corporations appear to have been grateful to get out of the soft money business. Unions and ideologically oriented individuals who are more replacement oriented, moved their money to 527s to continue their effort to elect candidates of their choice. Consistent with this account, corporations did not appear to rebel against the BCRA prohibitions, and not a single corporation filed an amicus brief in its own name in *McConnell v. FEC*, 540 U.S. 93 (2003), which challenged the soft money ban, or in *Citizens United* on the side of striking down the restrictions on soft money and corporate participation.

Post-BCRA, the largest increase in interest groups appears to have been among ideological issue groups as opposed to interest groups focused on discrete issues. With soft money donors presumably having money to spend on
new political endeavors, this could have been an opportunity for a diversity of new interest groups to mobilize with the help of a patron or entrepreneur. The fact that the vast majority of new groups to emerge were general ideological groups that essentially sought to support candidates of consistent ideology might suggest that these were the only interest groups waiting to mobilize that had not already overcome the barriers to formation. That is, in 2004 the large specific issue-oriented constituencies may have already been represented by interest groups like the NRA or the Sierra Club and therefore were not waiting for monetary support to mobilize new groups. This left only the ideological groups to capture the new monetary support.

Alternatively, and consistent with our intuition about access and replacement, issue groups that represent interests other than broad ideological ones may in fact have been waiting to mobilize but preferred an access-oriented strategy to a replacement one. Since the newly available money could only flow in unregulated amounts to groups that made only independent expenditures, groups that preferred an access strategy would still be frustrated in their attempt to mobilize. Determining which interest groups of a non-ideological nature prefer access strategies is beyond the scope of this work, but we do know that ideological groups fit the replacement mold because they seek partisan policy goals that are dependent upon a favorable Congress.

With respect to independent expenditures, the response to BCRA may simply be a shift in when political money was spent. It appears that corporations and unions spent earlier and engaged in prohibited spending through alternative groups. In 2004, corporations and unions spent seven times more outside of the restricted period than in the 2002 election. (Boatright et al. 2005: 124). Moreover, the increase in 527 groups, especially for unions, let organizations continue to run issue ads within the prohibited period.

Thus, BCRA appears to have had some effect on interest group mobilization at the group level. It freed corporate interests from the apparent obligation to give soft money to the parties, but it does not appear to have influenced corporate PACs consistent program of making contributions to candidates or encouraged more corporations to form PACs or engage in independent advocacy. For unions and some wealthy individuals, it encouraged more independent spending through 527s. Perhaps most significantly, a new wave of ideologically oriented groups emerged.

At the systemic level, the fears of an interest group takeover suggested by La Raja (2008) and others were largely unfounded, illustrating the difficulty of pursuing a replacement strategy in contested national campaigns. BCRA did encourage more money to flow away from the parties to independent spending organizations, but this change was less significant than may be readily apparent for two reasons. First, BCRA also doubled the contribution limits for individuals contributing to candidates, meaning that candidates were able to raise more money directly from individuals. (Issacharoff 2010). Neither candidates nor
donors appear to have viewed the soft money system that existed in the 1990s as optimal. The expansion of “hard money,” as FECA/BCRA regulated contributions are termed, meant that a credible alternative to soft money was created. Candidates and parties also developed better systems for mobilizing small donor contributions. Between the 2000 and 2004 elections, contributions to Congressional candidates increased approximately 12%. Second, the most successful of the new 527 organizations were formed by people with close relationships to the parties. (Weissman & Hassan 2005). In other words, many of the new 527s that formed were not traditional interest groups advocating a specific interests, but party proxy groups. Of the estimated $405 million in contributions to 527s in the 2004 election, $186 million went to groups with close ties to one of the major political parties, and the parties appear to have carefully planned this transition from soft money to 527s. (Id. at 84).

The post-Citizens United Experience

As we noted at the beginning, no case in the campaign finance chain has caught the popular imagination like Citizens United, which in turn has become the shorthand for all the subsequent changes to electoral finance, regardless of whether actually prompted by the decision. The actual holding of the case was surprisingly narrow: in Citizens United, the Supreme Court held unconstitutional BCRA’s prohibition on union and corporate uncoordinated express advocacy during the run-up to federal elections. This meant that corporations and unions became free to spend unlimited money in support or opposition to candidates for federal office as they wanted, so long as they did not contribute money to parties or candidates.7 Thus, Citizens United simply undid BCRA’s restriction on independent spending which was the subject of the previous section.

There was also a second change in 2010 that is far more significant for interest group mobilization. In a decision following on the heels of Citizens United, the D.C. Circuit held it unconstitutional to limit the amounts individuals and corporations may contribute to PACs that only make independent expenditures – what are now termed Super PACs in the wake of SpeechNow v. FEC. This enabled these newly formed groups to accept unlimited sums from donors that could then be spent on express advocacy. The decision allowed this large concentration of advocacy funds to develop without the Super PACs or their donor fearing that they would run afoul of federal law.

The public and media response to these decisions is best described as derisive. Commentators, particularly on the left, feared that the decision would leave corporations free to exert unmatched influence over elections. Others

---

7 The significance of this change was minimized by a 2007 decision, Wisconsin Right to Life v. FEC, which drastically narrowed the limits on express advocacy to ads that a reasonable person would believe had no purpose other than to expressly advocate for the election or defeat of a specific candidate. This enabled ideological groups organized as non-profit corporations to run a wider range of ads during the regulated time period.
believed that interest groups would come to dominate individuals and parties with rampant independent spending. Few expected little change. Like with BCRA, the immediate history suggests that the change in law affected interest group mobilization, but the party system remained rather resistant to these changes. The development of independent party proxy groups, coordination of party congressional expenditures, the increased polarization of the parties, and the national focus of elections in 2008, 2010, and 2012 gave renewed vitality to the national parties, even as Super PACs and the emergence of the Tea Party shook up traditional forms of campaigning.

At the individual group level we would expect the response to easing unlimited contributions to independent spending groups to be similar to the post-BCRA experience. There was no meaningful change that would affect established interest groups’ legal options for political participation. Yes, Super PACs presented a new organizational method for political participation and surer legal footing than 527s and 501(c)s, but Super PACs did not fundamentally alter what groups could do or from whom groups could receive money. Groups that wanted to use unlimited donations for political spending could do so prior to the advent of the Super PAC. Therefore, like after BCRA, we would not expect for-profit corporations to form Super PACs or serve as major contributors to independent spending organizations because of their preference for access-oriented strategies over independent spending. Unions would also be expected continue to make independent expenditures and perhaps shift to participation through Super PACs from 527s. And, we would expect the new Super PACs unconnected to established interest groups to be ideologically-oriented groups rather than latent corporate or specific interests waiting for monetary assistance to mobilize given ideological groups’ preference for a replacement strategy.

The post-Citizens United experience largely conforms to these expectations. In 2012, 98 groups spent over $1 million on election related advertising, an increase from 57 groups in 2008, and these groups were primarily organized as Super PACs. While in 2008 independent spending groups organized as 527s or 501(c)s, in 2012, 57 of the 98 groups spending over $1 million were registered as Super PACs and only one remained solely organized as a 527. Of these 98 groups, none was a for-profit corporation, seven were unions, a few were established interest groups such as the NRA, the Club for Growth, and NARAL, and the remainder were new ideological groups organized for the purpose of independent spending.

Similarly, corporations contributed minimally to these independent expenditure groups, and the few corporations that did contribute were mostly closely held corporations. Of the 147 contributors giving over $1 million to

---

8 Additionally, corporations were already permitted to pay all of their connected PAC administrative expenses with unlimited funds, so the new ability for PACs to receive unlimited contributions to PACs would not significantly alter any barriers to corporate PAC formation.
independent expenditure groups, only eight were for-profit corporations who gave a little under $18 million. Unions on the other hand were major contributors and gave over $90 million. The big change, however, consistent with the post-BCRA experience was the continued rise of ideologically-oriented groups funded by individuals (as Olson taught us most interest groups are). Ninety-three individuals gave over $1 million to independent spending groups. And in total, independent expenditures in federal elections increased from $157 million and $206 million in 2008 and 2010 to over $1 billion in 2012. This pattern of group spending again appears consistent with what we would expect from the access and replacement-oriented groups.

The 2012 group spending also marked a substantial increase in interest group spending on independent expenditures. While the sheer volume of interest group spending was remarkable, several factors limited the effectiveness of this increased interest group mobilization and prevented interest groups from upsetting the candidate-party centric election system. The reasons for the resilience of the traditional system in 2012 also help explain why replacement is a costly and undesirable strategy for groups that can succeed with the access approach. This difficulty is clear to American Crossroads – the Super PAC that spent over $100 million on independent spending in the 2012 election – and its wealthy supporters. For all it spent in 2012, American Crossroads desired result occurred in only 1.29% of the races in which it was active (Young 2013).

First, interest group spending on television advertising is less efficient than candidate spending; candidates are able to buy television advertising at significantly lower rates than interest groups, and the more interest groups vying for advertising time, the greater this disparity becomes. Estimating the exact disparity is difficult as it would require comparing the average of the cost of ads run at the same time in the same markets; however, data from the Wesleyan Media Project suggest that interest groups may pay twice as much for air time, whereas the sheer volume of interest group spending was remarkable, several factors limited the effectiveness of this increased interest group mobilization and prevented interest groups from upsetting the candidate-party centric election system. The reasons for the resilience of the traditional system in 2012 also help explain why replacement is a costly and undesirable strategy for groups that can succeed with the access approach. This difficulty is clear to American Crossroads – the Super PAC that spent over $100 million on independent spending in the 2012 election – and its wealthy supporters. For all it spent in 2012, American Crossroads desired result occurred in only 1.29% of the races in which it was active (Young 2013).

First, interest group spending on television advertising is less efficient than candidate spending; candidates are able to buy television advertising at significantly lower rates than interest groups, and the more interest groups vying for advertising time, the greater this disparity becomes. Estimating the exact disparity is difficult as it would require comparing the average of the cost of ads run at the same time in the same markets; however, data from the Wesleyan Media Project suggest that interest groups may pay twice as much for air time,

---

9 Included in this count are Whitco Industries, Melaleuca Inc., Working Assets, Clayton Williams Energy, Weaver Popcorn, Chevron Corp., Contran Corp., and Oxbow Corp. Excluded are corporations that formed close to the election and appear to have no purpose other than as channels for campaign contributions, as well as private holding companies.

10 The data from the Center for Responsible Politics cited above likely overstates the increase in outside spending because the measure only includes independent expenditures by political committees. The data do not include issue advocacy spending by groups not registered as political committees, data that is more difficult to ascertain because it does not need to be reported. Such issue advocacy was likely greater in previous elections than in 2012, as it provided a way to skirt the campaign restrictions that were invalidated by *Citizens United*. As evidence of this, freed from regulatory concerns, interest group spending on express advocacy in congressional elections between 2008 and 2010 increased from 7 percent of independent spending to 30 percent in House races and from 1 percent to 10 percent in Senate races in the first post- *Citizens United* election. (Franz 2010, 8). Nevertheless, whatever the limitations in head-to-head comparisons with the past, interest group spending ultimately increased vis-à-vis other actors and was far more significant than in the past.
and other reports place the figure closer to four times. (Baum 2012) This means that to match $50 million dollars of Obama campaign spending, an interest group would have needed to spend in excess of $100 million. This disparity was significant in the 2012 election as Republican candidates relied more on outside interest group spending than Democratic candidates, particularly in the presidential election.

Second, as with the period following BCRA, the largest independent spending groups were closely allied with a candidate or a party. Though these groups were still prohibited from expressly coordinating with campaigns, the close relationship with the parties meant that the groups functioned more as party proxies than as issue-oriented interest groups. The most successful of these new groups, like post-BCRA 527s, were formed by political operatives with close ties to the major political parties. American Crossroads, the largest independent spender in the 2012 election, was founded by Karl Rove and spent a staggering $175 million. Rounding out the top-3 were Restore Our Future, a Super PAC created by close supporters of Mitt Romney that spent $142 million and Priorities USA, a Super PAC with close ties to President Obama, that spent $66 million.

Finally, at a certain level of advertising saturation, the money likely washes out, reducing the ability of any group to effectively influence voters through advertising. This is likely the effect in the highest stakes races, such as the presidential election. There is less information about less well funded election contests, including at the state level.

Given these factors limiting the effectiveness of interest groups in high profile races, interest groups were far more influential when these constraints were not present. In primaries, where the party is disabled from backing any candidate, independently funded interest groups have great leverage. The most notable example from 2012 is the Republican Party primaries. In these elections, the party apparatus and party-oriented outside groups are generally unable to intervene to offset interest group spending. In the 2012 cycle tea party affiliated interest groups spent significant sums in the Republican primaries ousting moderate-establishment Republicans in favor of tea party candidates. A study by the Columbia Journalism Review found that very conservative groups were responsible for the overwhelming majority of independent spending in Republican primaries and that primary candidates supported by these groups were far more successful than the general election candidates these groups supported. (Chavkin 2013). This result prompted American Crossroads, the Republican establishment Super PAC to consider directing its strategy at supporting more mainstream Republican candidates in future primaries. (Tumulty 2012). In these party primaries the parties were unable to exert their usual influence, and the amount of money spent by candidates was not significant enough to wash out the effect of interest group spending.

***
Following both BCRA and the more recent changes in campaign finance law, we have observed increases in independent political spending by interest groups and an increase in the number of ideologically-oriented interest groups. So far we have focused primarily on explaining the pattern of change as a reflection of interest group strategy: Replacement-oriented groups took advantage of new avenues for independent spending while access-oriented groups generally did not. We have, however, largely ignored the question of whether the legal changes caused the increases in interest groups and independent interest group spending. Can we attribute causation to the legal changes?

In our view, consistent with Lowery & Gray, the changes are likely more attributable to changes in politics than law, although it is often difficult to disentangle the two. Intuitively it is unlikely that legal changes caused such drastic increases in independent spending, because actors have always been able to engage in independent spending. *Citizens United* and *SpeechNow* really only removed minor limitations and legal obstacles that stood in the way of such spending. If groups wanted to spend big money before these decisions, they were always able to do so.

An alternative explanation is that recent increases in partisanship and the stakes of elections, Lowery & Gray’s political energy variable, have lead to the increase in spending. (Franz 2008, 2012). The increase in partisanship – that is the ideological distance between members of the two parties – in the past twenty years has been well-documented as has the increased frequency with which the balance of power legislative power is in play. (Franz 2012). With more at stake and more to gain, replacement appears to be a more desirable strategy for interest groups so they spend more.

On the other hand, the removal of legal prohibitions may have changed the sociology of funding independent outfits and may have allowed new organizational forms to increase the flow from the open spigot. The creation of the legal framework for Super PACs to develop may have encouraged groups seeking to engage in independent spending to form Super PACs and enter the world of political spending.

A peculiar feature of the campaign finance system that merits further study is the apparently faddish nature of political participation. Political donors and interest groups appear to quickly adapt to the latest form of political participation. And these changes are often preceded by legal developments that affect the form organization takes. These shifts in participation might be caused by greater certainty over the legality of practices and/or more widespread social acceptance of campaign strategies. For example, the greatest growth in the number of PACs occurred immediately after FECA established this legal form. Groups were arguably able to engage in similar activities prior to FECA, yet groups rushed to participate following the creation of the legal mechanism for participation. Similarly, following *SpeechNow*, groups rushed to adopt the Super
PAC form as Super PACs were a more notable and perhaps sounder option (legally speaking) for groups that desired to accept unlimited contributions and engage in unlimited political advocacy.

The rise of ideologically-oriented interest groups might have similar origins. Though it is difficult to establish causation, BCRA may have paradoxically encouraged the normalization of the role of independent spending in elections. This does not mean that independent spending became less controversial but rather the continued formation of independent spending groups increased the familiarity of the groups within the political system. As the groups became more established, they may have become more familiar to donors looking to spend money on politics. Once independent spending by interest groups with large individual donors developed, more individuals recognized the opportunity to engage in politics and those who may have previously been wary became less squeamish about the legal and social implications of funding such groups. For many, big dollar political fundraisers for such groups became signs of social status as much as political idealism.

**Legal Frontiers**

Before concluding it is worth noting a few developing campaign finance regulations, particularly at the state level, that have the potential to influence interest group formation and mobilization strategy. These restrictions fall into two related categories: 1) increased disclosure requirements, and 2) more onerous reporting requirements that impose costs on interest group political activity. In this category of regulation, Wisconsin recently passed a law requiring interest groups to disclose all donors who contribute more than $25 dollars to the group, to include lengthily disclaimers on advertising, and to issue a sworn statement before running advertising swearing that there was no coordination with a candidate.

The constitutionality of this and similar restrictions is currently being litigated before the Courts of Appeal, but if such regulations survive constitutional scrutiny the impact on group formation could be significant. Disclosure provisions will discourage spending by the group of individuals who prefer anonymity, a group that appears to be dominantly, though not exclusively, Republican in affiliation. But more significantly, the cost of complying with these regulations may prevent smaller interest groups from engaging in political speech. This is analogous to the difference in treatment between connected and nonconnected PACs with connected PACs being able to receive unlimited funds for administrative expenses from their host organizations and nonconnected PACs being restricted to limited individual contributions. While it is too early to draw conclusions about the effect of these laws, a result that privileges large over small interest groups would be an unwelcome development.
Conclusion

The legal regulation of party and candidate funding operates to control a shifting array of institutional actors, organizing and reorganizing in response not only to the legal rules but to the political and ideological battles of the day. Our suspicion is that interest groups will invariably seek to influence the political process through access to resources, and that the entrepreneurs of influence will seek the organizational form that most effectively facilitates fundraising and most efficiently leverages those funds. The changed legal environment influences the form of such activity, but even so, it is but one among many influences. Dissecting the different aims of interest group engagement with candidates and parties, as we have done in this essay, allows one to tease out with greater precision what aspects of the regulatory environment are more or less likely to provoke institutional responses. Understanding whether groups prefer access or replacement strategies can teach us how groups will respond to new opportunities or burdens created by legal change. Perhaps in turn, legal regulation can avoid the traps of the second best as money and politics scramble for the next organizational aperture.
Literature Cited


