

**KEEP
OUT**

**How State Campaign Finance Laws Erect
Barriers to Entry for Political Entrepreneurs**

By Jeffrey Milyo, Ph.D.
September 2010





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INSTITUTE FOR JUSTICE



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EXECUTIVE SUMMARY

Whether it is the civil rights movement of the 1960s or today’s Tea Party movement, outsiders in American politics have always played a crucial role in challenging the status quo by pushing new issues to the fore and inspiring newcomers to run for public office. Such political entrepreneurs—those who form and grow new political voices and movements—provide outside competition that keeps the political establishment on its toes, much as economic entrepreneurs drive innovation and change in the marketplace.

Citizen groups that engage in independent advocacy (or “independent expenditures” in the parlance of campaign finance regulation) are classic political entrepreneurs. These are groups of individuals that pool their resources to speak out in support of or opposition to a ballot issue or a candidate *independent of* any candidate.

Faced with such competition, insiders have two choices: anticipate and adapt to new issues or try to choke off the activities of political entrepreneurs through regulation.

This report examines the effects of two types of state campaign finance regulations that act as barriers to independent citizen groups: contribution limits and political action committee, or PAC, requirements.



Contribution Limits

A start-up political group requires not just a good idea and dedicated volunteers, but also significant financial support, often in the form of a few patrons willing to take a risk and provide a large amount of seed funding. But 22 states limit how much any one individual may give to a political group that advocates for or against candidates, even if independent of those candidates. This makes it more difficult for new independent groups to launch and reduces the resources available for political advocacy.

The run-up to the 2004 presidential election shows how contribution limits harm new political groups. That election saw the growth of so-called “527” groups that engaged only in independent speech and thus were not subject to the federal contribution limits of \$5,000 per donor imposed on traditional, candidate-connected PACs. Two of the largest of these groups, America Coming Together and Swift Vets and POWs for Truth, both started with seed funding from a few large donors—\$6 million from two

billionaire businessmen for America Coming Together and about \$160,000, mostly from three large donors, for Swift Vets.

Of the 10 largest 527 groups in 2004, half received average contributions above the \$5,000 limit for federal PACs. And newly formed groups tended to raise funds from a few large donors, compared to groups linked with well-established organizations.

These groups would not have been major players in the 2004 elections without the ability to raise large start-up funds quickly. Even if they had been able to form, they would have had fewer resources to speak. For example, if those contributors who gave the maximum to the America Coming Together’s

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affiliated PAC had been able to give freely like those who gave to the 527 group did, the PAC might have had as much as \$22 million—or 66 percent—more to spend on its advocacy.



PAC Regulatory Burdens

In all 50 states, independent groups that advocate for or against candidates are regulated as candidate-connected PACs, as are groups that speak about ballot issues in the 24 states that permit them. Thus, in order to speak, these groups have to navigate a vast amount of red tape, including registering with the state, opening a separate bank account, naming a treasurer, and filing frequent and detailed reports of contributions and expenditures—all under threat of fines and other legal sanctions for mistakes.

The laws and paperwork would-be political entrepreneurs must navigate are complex and confusing. In an experiment where 255 volunteers filled out actual ballot-issue committee forms, the average score of correctly completed tasks was just 41 percent. No one completed the forms correctly. Almost 90 percent of the volunteers said the fear of civil and criminal penalties for making a mistake would deter people from getting involved with independent groups.

Keeping Political Entrepreneurs Out

The ostensible rationale for campaign finance regulations is to prevent political corruption, not to promote political protectionism. Yet these laws establish barriers to entry that, like those in the economic realm, work to keep upstarts from competing with established interests. These regulations raise the costs of citizen engagement and restrict the flow of resources to independent citizen groups, resulting in fewer voices joining the public debate.

Rather than encouraging political entrepreneurship and civic engagement, states are attacking independent political advocacy through the accretion of unnecessary regulations. It is past time to scrape away those impediments and to remember that America is great, not by accident, but because we have legal foundations that protect entrepreneurship in both markets and politics.



INTRODUCTION

The role of economic entrepreneurs, from garage-based inventors and small business owners to angel investors and venture capitalists, is generally well understood and appreciated, but not so the value of *political* entrepreneurs. In part, this is because Americans tend to be cynical about all things political; after all, our national pastime is not baseball so much as criticizing public officials. And while Americans going back to the days of the Founders have always exhibited a healthy skepticism of those in power, in recent decades this sentiment has unfortunately led to policies that have, paradoxically, stifled political competition and innovation and thereby further entrenched the political establishment.

In this report, I examine how state campaign finance regulations for independent political advocacy groups erect barriers to entry for citizens who wish to join together to engage in political entrepreneurship—that is, forming and growing new political voices and movements.

This is the fourth in a series of reports issued by the Institute for Justice that address the burden of state regulation on the political activities of citizen groups.¹ These state regulations create a complex maze that is unduly burdensome for ordinary citizens to navigate; this deters citizen engagement in public affairs and serves to entrench political insiders to the detriment of the general public.

State campaign finance regulations appear to be designed to limit popular participation in state politics. Citizen groups must register



with state authorities and make public their activities, point of view and identity, including home address and often employer. All this just for trying to meaningfully participate in political discourse. As if that were not off-putting enough, states then require citizen groups to wade through reams of legalese that define multiple types of political committees and actions, mandate frequent and detailed financial reports and warn of civil and criminal penalties for failure to comply with every restriction and mandate. In addition, 22 states place strict limits on the value of monetary and non-monetary donations (including office supplies, computers, etc.) that citizens may contribute to citizen groups, even when those groups seek only to engage in independent political advocacy; this creates a particular hardship for new groups seeking start-up funds and support.

Should you wish to pass the hat to fund an independent advertisement on a state ballot issue or for a candidate for state office, you would be best advised to retain an accountant and campaign finance lawyer first—or a bail bondsman later. The message from state

politicians and state regulators to citizens could not be clearer: “Stay home and leave politics to the professionals.”

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What is Political Entrepreneurship and Why is it Important?

Entrepreneurs are risk-takers who seek to identify and satisfy unmet needs or wants, even when the beneficiaries may not be aware of the potential benefits that await them. For example, prior to their invention and promotion, we had no concept of the usefulness of an iPhone or even the simple pleasure of a Jamba Juice. But we are better off because someone anticipated the unrealized demand for such goods. Similarly, political opinions and concerns may be latent until kindled by some current event, political speech or even a campaign advertisement. Political entrepreneurs are risk-taking innovators who



anticipate the issues and concerns of their fellow citizens and create and disseminate information about public issues and policy proposals to address those issues.² However, political entrepreneurs also play an additional role not typically faced by their economic counterparts; political entrepreneurs must solve the fundamental collective action problem of “free-riding.”³

Public policy is the product of many actors who must be inspired and cajoled to act in concert before any reform becomes a reality. This requires informed and dedicated attention to the policy process, as well as mass political action, from voting for like-minded candidates to lobbying and demonstrations—all coordinated at just the right times for any hope of effect. The real cost of taking the lead in organizing and propelling a group to successful political action must be borne by some core group, but the benefits will be enjoyed by many people, even if they did not contribute to the effort. In such circumstances, it is tempting for potential group members to hang back and let others step up and do

the heavy lifting of political organization—a phenomenon known as free riding. Of course, if no one takes the initiative, all lose out.

Political candidates often play the role of political entrepreneur by organizing, informing

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and coordinating voters, since candidates anticipate the payoff of election or re-election to office.⁴ Pre-existing interest groups or political parties also facilitate collective action, since such groups have already established a communication network with like-minded persons and so face lower costs of organizing on related issues. But *new* citizen groups must pay the set-up costs of identifying supporters and establishing communication with them, as well as solving the free-riding problems endemic to collective action. This takes dedication to purpose, hard work and a good deal of money to fund outreach activities. For



many new citizen groups this requires a patron to provide start-up funds.

Patrons Promote Citizen Groups

Few of us give our time and money to just anyone. Before people pay attention or give support to a new political group, there must be some semblance of seriousness of purpose. New political groups must establish credibility with their potential membership; this might entail public opinion research to craft a message or identify likely supporters, the creation of an interactive website, purchasing mailing lists, and creating a logo and statements of purpose. All of these activities take resources. For example, an open letter posted just one time as a full-page advertisement in a single metropolitan newspaper can cost \$30,000 or more. Even a very short public opinion poll in one state easily runs \$20,000 or more, and that is without considering the costs of analyzing or disseminating the resulting data.

A start-up political group requires not just a good idea and dedicated volunteers, but also significant financial support. As just one case in

point, consider America Coming Together, one of the largest liberal interest groups dedicated to defeating President Bush in the 2004 election.

The group was created in the summer of 2003 with seed funding of about \$6 million from two billionaire businessmen, George Soros and Peter Lewis. America Coming Together quickly became one of the largest political groups in the 2004 federal election cycle, with more than 125,000 individuals contributing more than \$75 million to the group's two federally focused political organizations.⁵ Of course, not every group seeks to unseat a president, but this does give some indication of the scale of resources that new groups must employ to become a significant player on the national stage.

As this example also suggests, in addition to getting a group off the ground, patrons signal to *other* potential donors that a new group is worth supporting. Imagine an individual who desires to give money in support of a

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particular cause, but is concerned that the group conducting independent expenditures in furtherance of that cause is a relatively new organization. This potential donor may worry about the competence or stability of such an organization (e.g., “Will they collect enough funds to subsequently hire sufficient staff and other resources to be effective advocates?”). In the presence of such doubts, some donors will instead choose to give their money to other groups that have more established reputations even though those groups may not represent the donors’ most favored cause. Any start-up political organization must deal with such reluctance among potential contributors. However, in an environment of unlimited contributions, a well-known patron may endow the start-up organization with substantial seed funding; this sends an unambiguous signal to prospective donors that the new organization has the potential to be effective and resolves the uncertainty of latent donors who would otherwise either not contribute or would be forced to “play it safe” and give to other (less favored) groups.

On a related note, consider a world in which many individuals are of a similar mind and several different groups with the same mission are created. This duplication of effort is wasteful, since each group must cover its overhead. Economies of scale in political communication mean that one large group can be more effective than many small groups. Every potential contributor knows this, and all potential contributors would prefer to coordinate and focus their giving to one group, but which one?

The ability of a political patron to make a large initial contribution to one group in this environment sends an unambiguous signal to other potential contributors as to which group to focus their giving on. This facilitates the ability of individuals to associate and articulate their political opinions more effectively.

Entrepreneurship Promotes Competition

Capitalism and democracy thrive because competition rewards risk-takers for success in satisfying the needs of others. Businesses produce useful goods and services to win the favor of consumers and gain



profit, just as candidates and parties put forth policy platforms in pursuit of votes and electoral success. In both markets and politics, competition may take a variety of forms. Firms can try to attract buyers with lower prices, better customer service or new and improved products; similarly, political actors can offer lower taxes, more attentive representation and constituent service or new policy innovations.

Anyone who has suffered through an economics course in college will recall that competition can come from inside or outside the existing market. Inside competition occurs between existing businesses; it is the jockeying over price, store hours and the like in an effort to woo consumers. The mantra often spoken by instructors of economics in detailing the working of supply and demand is “all else constant”; in other words, inside competition is analyzed in a world with fixed consumer tastes and production technology. But things get much more interesting once we consider the dynamics of competition over time.

Outside competition is the constant threat of new ideas and technologies that create whole new classes of products and services. Economic entrepreneurs invest time and effort in searching for new and better ways to satisfy consumers. Some fail, but some succeed and reap great rewards. More importantly, innovation is the engine of growth and prosperity in our modern economy.

The concepts of inside versus outside competition also apply to politics. Inside competition is the tussle between incumbent and challenger or Democrat and Republican,

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all else constant. One candidate promises to work harder, be more attentive and institute one flavor of policy, while another candidate promises the same but with a



different flavor of policy. So while inside competition between established political actors is important for inducing politicians to behave better than they would otherwise, it far from captures the vital spirit of American democracy. Indeed, even the old Soviet Union held elections, but the absence of a dynamic and open political marketplace produced sclerosis and collapse.

Outside competition in politics is the manner in which new issues and policy ideas are introduced to the public debate from non-establishment sources, and outside competition depends critically on freedom of speech and association.⁶ Whether it is the civil rights movement of the 1960s or today's Tea Party movement, outsiders in American politics have always played a crucial role in challenging the status quo by pushing new issues to the fore and inspiring newcomers to run for public office. And it is the threat of outside competition that keeps established political actors on their toes and constantly looking to get in front of breaking issues—just as the threat of outside innovation gives firms

an incentive to improve their products and services.

But this is not the only effect of political entrepreneurship. Outside competition is disruptive and transformative. In economics, innovation has long been understood to generate a “gale of creative destruction”;⁷ in the wake of every successful entrepreneur are the old, failed businesses that could no longer offer a desirable product. The invention and mass production of the horseless carriage was a disaster for the buggy whip industry but a boon to consumers in general. Similarly, the civil rights movement led to the ruin of political interests built on hard-line segregationist policies but was a watershed in American politics and social development. Social movements big and small spawn opportunities for political entrepreneurs to identify and address new or latent interests in the voting public.

This is the role of outside political entrepreneurs: to take the risk of organizing and funding new voices, new ways of thinking and new policy solutions. The toolbox of



outside political entrepreneurs includes starting and funding new groups that engage the public through independent political advertising and grassroots lobbying. Some attempts will be misguided and fail, but some risks will pay off with popular awakening and support. To the extent that political entrepreneurs identify an unmet need or concern, whether for health care reform or protection from eminent domain abuse, the organizations that they start will grow and exert influence on the public debate. This is also what makes political entrepreneurs so dangerous to entrenched political interests.

The Urge Toward Political Protectionism

The threat of outside competition gives insiders an incentive to anticipate and adapt to new issues, but it also gives insiders a reason to try to choke off the activities of political entrepreneurs. Outside political entrepreneurs make life hard for established political interests by providing a check on sloth and malfeasance. Incumbent politicians get to their position by addressing the issues and concerns of the past; all else constant, they expect to win re-election handily and

enjoy the privileges of power for many years to come. But political entrepreneurs do not leave all else constant; they instigate fellow citizens to get informed, demand change and take action. Therefore, from the perspective of entrenched political interests, outside political entrepreneurs are trouble-makers and rabble-rousers. Given this, it is no surprise that over time, entrenched interests produce regulations that have the effect of stifling outside political entrepreneurship.

This tendency toward protectionism via anticompetitive regulations is no different in politics than what is observed in some industries and trades. For example, occupational licensure requirements are often “captured” by the very businesses that are the object of such rules.⁸ Licensing requirements become artificially costly as a means to deter

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outside competition from new entrants.⁹ The ostensible rationale for campaign finance regulations is to prevent political corruption, not to promote political protectionism—and yet these laws establish barriers to entry that, like those in the economic realm, work to keep upstarts from competing with established interests.

State Regulation of Independent Advocacy

Consider a newly formed non-partisan citizen group that wishes to engage in independent political advocacy, either with respect to ballot measures or in candidate elections. Assume that the group takes contributions only from other citizens (no party, corporate or other donations) and engages in only independent advocacy (no direct or in-kind campaign contributions to candidates). This is an example of outside political entrepreneurship and American democracy in action. Now let's see how states erect barriers.

At least two types of state regulations act as barriers to groups of citizens who wish

to join together for such political advocacy: those that limit contributions to groups that speak in support of or opposition to candidates and those that force groups that speak about candidates or ballot issues to register and report their activities as if they were professional political action committees, or PACs. This report will examine each in turn—first contribution limits, then red tape requirements.

Contribution Limits on Candidate Advocacy

In campaign finance parlance, “independent expenditures” means spending on political advocacy—ads, events, mailings and the like—for or against a candidate for public office *independent of that candidate or any other*. In other words, the candidate does not control the spending or the message, and the individual or group doing the spending does not in any way coordinate with (or donate to) the supported candidate or her opponent. Groups such as SpeechNow.org (see sidebar, p. 11) that engage solely in independent expenditures are classic political entrepreneurs, acting outside the political establishment of



candidates and parties to try to sway political debate and electoral outcomes with their own unique message. But the concept of “independent expenditures” and similarly that of an “independent expenditure committee,” or a group that makes only independent expenditures, is more than just insider jargon.

Although federal and state laws do not limit the amount such groups *spend* on independent political advocacy, many state laws do limit the amount such groups may *raise* from any one individual. Of course, any constraint on fundraising will ultimately interfere with a group’s ability to spend money, as well. Below, I demonstrate that such limits in fact have a dramatic impact on the amount of spending by independent groups. In many states, groups that engage in independent political expenditures are treated essentially like political action committees, or PACs, that give contributions directly to candidates. Even though their independent speech poses no threat of corruption, they are limited in how much any individual can give to their common cause.

I have examined campaign finance regulations for the purpose of identifying which states limit contributions from individuals to citizen groups that engage only in independent expenditures. This task is complicated by the complexity and ambiguity of state campaign finance regulations. For example, Hawaii defines independent expenditures but does not otherwise indicate how its campaign finance regulations cover such activities. Rhode Island law does not even entertain the possibility of a citizen

In many states, groups that engage in independent political expenditures are treated essentially like political action committees, or PACs,

group that wishes to make only independent expenditures. Rhode Island defines independent expenditures as something that individuals may engage in acting on their own, but in order to qualify as a political action group in Rhode Island, a group must make direct contributions to multiple candidates. Thus a group of citizens wishing to engage in



“SpeechNow” Groups Spring Up in Wake of Entrepreneur’s Successful Battle

SpeechNow.org is a classic example of political entrepreneurship. The group was formed to bring a new voice to the political arena and to do so in an innovative way.

Long-time political activist David Keating founded SpeechNow.org in 2007 because he was fed up by the spread of campaign finance regulations and politicians’ dim view of citizens’ First Amendment rights. He organized the group as a unique association of individual citizens—with no ties to corporations, unions, political parties or candidates—pooling their money to advocate for or against candidates. SpeechNow.org aims to defeat federal candidates who favor restrictions on free speech, but Keating hoped that other groups of citizens would follow his organizational model to speak out about whatever issues are important to them.

First, however, SpeechNow.org had to battle the very campaign finance regulations it opposed. Though Keating deliberately created a new kind of independent citizens’ organization unlike traditional political action committees, the Federal Election Commission argued that it was a PAC and subject to PAC regulations, including burdensome red tape and contribution limits.

“PACs have to keep track of a bunch of different and arbitrary reporting deadlines, often requiring several reports in the space of a couple of weeks if you’re speaking out about candidates in multiple races—it’s a lot for a volunteer group to do,” said Keating. “By contrast, individuals making independent expenditures on their own simply have to report expenditures as they make them. It’s streamlined and makes more sense for SpeechNow.org, which after all is just a group of individuals.”

Worse, the contribution limits effectively silenced the group. During the 2008 election cycle, SpeechNow.org supporters had pledged enough for radio ads targeting two congressional incumbents, but most of the pledges were greater than the \$5,000 contribution limit for federal PACs—and thus illegal according to the FEC.

“When you have just a handful of people who feel strongly about an issue and the rest of the public hasn’t much thought about it yet, it’s hard to round up many small donations,” said Keating. “You need a political venture capitalist willing to put in a large amount of seed money and attract other people to the cause.”

So SpeechNow.org joined with the Institute for Justice and the Center for Competitive Politics to challenge the PAC limits and regulations. In March 2010, two-and-a-half years after SpeechNow.org was formed, a federal appeals court agreed that limiting contributions to independent groups is unconstitutional. In that, the appellate court was following the lead of the U.S. Supreme Court’s ruling in *Citizens United*, which likewise struck down bans on independent speech (see page 30). However, the appellate court broke with the Supreme Court by upholding the burdensome PAC registration and reporting requirements. SpeechNow.org is appealing that part of the ruling.

Thanks to SpeechNow.org’s victory over contribution limits, nearly two dozen other “SpeechNow” groups have sprung up at the federal level. These are citizen groups that have told the FEC they plan to follow SpeechNow.org’s roadmap for speaking out in elections, and their interests range from the environment to dentistry. SpeechNow.org itself is raising funds for a television ad campaign against Sen. Russ Feingold of Wisconsin, the co-sponsor of the McCain-Feingold campaign finance law.

“The SpeechNow model enables more people to start up more groups,” said Keating. “These SpeechNow groups are laboratories for people to get new ideas into the political space.”

Unfortunately, SpeechNow groups still face an uphill battle if they want to speak out in state and local elections. All 50 states impose PAC registration and reporting requirements on independent groups (see page 24), and laws on the books in 24 states limit contributions to such groups (see page 13)—though election officials in two of those states, Kentucky and Massachusetts, recognize that contribution limits for independent groups are unconstitutional and are no longer enforcing the limits.



independent expenditures is left uncertain of their legal status in Rhode Island; but do not think a simple inquiry to state authorities will necessarily lead to a quick resolution. It may take weeks to get an advisory opinion on the matter (or such a group may get the answer that I received when I telephoned a state regulatory authority with a similar question: “Hmmm... that’s a good question. It’s never come up before, so I can’t tell you.”).

In contrast, in most states the definition of a political action committee is so broad as to cover groups that make only independent expenditures, as well as groups that make direct donations to candidates. Therefore, unless state laws explicitly indicate otherwise, I assume that a group making independent expenditures falls under the definition of a political action committee.

Using this criterion, I have identified 24 states with laws on the books that limit individual contributions even to citizen groups that engage only in independent expenditures (see Table 1). However, only 22 of those states are currently enforcing the limits. Kentucky’s Registry of Election Finance recently issued an

advisory opinion concluding that such limits are unconstitutional and the agency will no longer enforce them in the wake of the U.S. Supreme Court’s ruling in *Citizens United v. FEC* and a D.C. Circuit Court of Appeals ruling in *SpeechNow.org v. FEC*.¹⁰ In Massachusetts, the Office of Campaign and Political Finance is in the process of approving new regulations that will eliminate its limits on contributions to independent expenditure groups.¹¹

What effect do such contribution limits have on those seeking to organize a political group? The run-up to the 2004 presidential election provides a useful case study at the federal level. In that election season, some large donors with strong ideological convictions seeded new “527 organizations” to engage in independent speech. Unlike traditional PACs, which are barred by federal law from accepting more than \$5,000 from any individual donor, the 527 groups accepted unlimited individual contributions. Thus, by examining the contribution patterns of the new 527 groups and comparing them to those of traditional PACs, we can tease out the effects of contribution limits on new groups.



Table 1: Limits on Individual Contributions to Independent Expenditure Committees

	Maximum Allowable Contribution	
Alaska	\$500	
Connecticut	\$750	
Florida	\$500	
Hawaii	\$1,000	
Illinois*	\$10,000	
Kentucky**	\$1,000	
Louisiana	\$100,000	Over four years
Maryland	\$4,000	Over four years
Massachusetts***	\$500	
New Hampshire	\$5,000	
New Jersey	\$7,200	
New Mexico	\$5,000	
New York	\$150,000	Aggregate contributions
Ohio	\$11,395	
Oklahoma	\$5,000	
Rhode Island	\$1,000	
South Carolina	\$3,500	
South Dakota	\$10,000	
Tennessee	\$66,100	Biennial PAC aggregate contributions
Vermont	\$2,000	
Washington	\$5,000	21 days before election
West Virginia	\$1,000	
Wisconsin	\$10,000	Annual aggregate contributions to political committee
Wyoming	\$25,000	Biennial aggregate contributions

Source: Author compilation from state government websites on campaign finance disclosure.

* Effective January 1, 2011.

** State election agency recently declared it will not enforce limits.

*** State is in the process of approving new regulations to eliminate limits.

One of these new groups was America Coming Together, which was discussed above. Another highly influential new group in the 2004 election cycle was Swift Vets and POWs for Truth; it was founded in the second quarter of 2004 with \$158,750 from a handful of contributions. Almost all of this seed funding came from three donors, Bob Perry

(\$100,000), John O'Neal (\$25,000) and Hardin Crow (\$25,000); the remainder was from a smattering of contributions ranging from \$250 to \$2,000. These small contributors included three retirees and a homemaker; however, within a few months, this group had managed to raise upwards of \$17 million from more than 18,000 contributors. Swift Vets closed out the



Table 2: Timing and Amount of Itemized Contributions to Top 527 Organizations

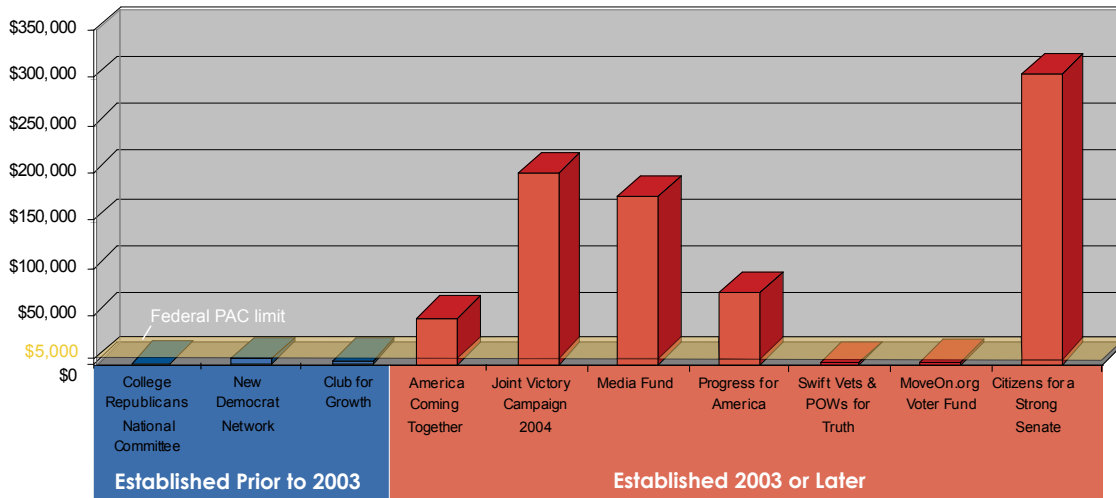
	2003 Contributions		2004 Contributions	
	Number	Average per contribution	Number	Average per contribution
<i>Panel A: Contributions from all sources</i>				
America Coming Together	23	\$544,130	925	\$72,736
Joint Victory Campaign 2004	25	\$317,847	323	\$197,726
Media Fund	-	-	116	\$530,338
Progress for America	-	-	602	\$74,633
Swift Vets & POWs for Truth	-	-	18,807	\$904
MoveOn.org Voter Fund	9,364	\$513	3,635	\$2,134
College Republicans National Committee	121,988	\$37	175,395	\$47
New Democrat Network	912	\$2,962	1,565	\$6,406
Citizens for a Strong Senate	-	-	84	\$258,422
Club for Growth	1,664	\$1,800	1,436	\$3,623
<i>Panel B: Contributions from individuals</i>				
America Coming Together	19	\$499,211	693	\$47,736
Joint Victory Campaign 2004	24	\$201,924	312	\$200,250
Media Fund	-	-	37	\$175,389
Progress for America	-	-	570	\$74,483
Swift Vets & POWs for Truth	-	-	18,761	\$895
MoveOn.org Voter Fund	9,364	\$513	3,633	\$2,127
College Republicans National Committee*	121,988	\$37	175,386	\$45
New Democrat Network	799	\$852	1,440	\$4,208
Citizens for a Strong Senate	-	-	64	\$304,335
Club for Growth	1,657	\$1,798	1,432	\$3,625

Source: Contribution data are from the Center for Public Integrity: <http://projects.publicintegrity.org/527/>.

*Because of the large number of itemized contributions to the College Republicans National Committee, I have only screened organizational donors from among itemized contributions over \$5,000; all smaller donors to this group are assumed to be individuals.



**Figure 1: Average Individual Contributions to Top 527 Organizations in 2004:
Newer vs. Older Groups**



Source: Contribution data are from the Center for Public Integrity: <http://projects.publicintegrity.org/527/>.

2004 election cycle as the fifth largest federally focused 527 organization (by receipts).¹²

In Table 2, I describe the timing and average size of contributions to each of the largest federally focused and non-party 527 political groups in the 2003–2004 election cycle.¹³ Half of these groups received average contributions that are well above the \$5,000 limit for federal PACs, including several groups with average contributions ranging from \$100,000 to more than \$500,000. Another striking aspect of these data is that newly formed 527 political organizations tended to raise funds from a few large

contributors, compared to more established 527 organizations.

For example, with the exception of the Swift Vets and POWs for Truth, those 527s with the smallest average contributions (and most numerous contributors) were all either established prior to 2003 or are associated with a well-established organization (e.g., the College Republicans National Network and the Club for Growth). In contrast, newer groups, such as America Coming Together and the Joint Victory Fund (both created in the summer of 2003), or the Media Fund, Progress for America and Citizens for a Strong Senate,



all relied on relatively few large contributors. Also, notice that in 2003, total contributions to America Coming Together and the Joint Victory Campaign were particularly few and large, compared to contributions to these groups in 2004. Figure 1 makes clear that new groups tended to rely more heavily on large contributions—far larger than federal PAC limits—compared to well-established groups.

It is difficult to imagine either America Coming Together or Swift Vets becoming major political players in the 2004 elections without the ability to raise large start-up funds from wealthy patrons—in other words, if they had abided by federal contribution limits. Of course, many Americans either love or hate

these two groups, but one would be hard-pressed to describe their speech as anything but ideological and issue-oriented—in other words, the very stuff of public debate.

As a further demonstration that contribution limits hinder the ability of groups to raise money, consider a side-by-side comparison of individual contributions to 527 groups and to PACs affiliated with those same groups.¹⁴ For the sake of this comparison, I limit my attention to the four largest 527 groups with affiliated PACs in the 2004 election cycle, America Coming Together, MoveOn.org, New Democrat Network and Club for Growth.¹⁵

As shown in Tables 3 through 6, for all four of these groups' 527 organizations, the

Table 3: America Coming Together, 2003-2004 (individual contributions only)

Size of individual contribution (\$)	527 Organization			Political Action Committee		
	Number	Sum (\$)	Cumulative % of dollars	Number	Sum (\$)	Cumulative % of dollars
<200	36	\$1,032	0.0	n.a.	\$17,788,351	53.3
200-4,999	167	\$229,806	0.5	35,630	\$14,228,276	95.9
5,000	99	\$495,000	1.7	267	\$1,335,000	99.9
5,001-10,000	125	\$1,152,649	4.4	4*	\$36,589	100
10,001-99,999	198	\$6,503,610	19.7	0	\$0	100
100,000 or more	87	\$34,184,000	100	0	\$0	100
Total individual contributions	712	\$42,566,097		>125,290	\$33,386,667	

*I have not investigated whether amounts contributed above the legal limit were returned to these contributors.



Table 4: MoveOn.org, 2003-2004 (individual contributions only)

Size of individual contribution (\$)	527 Organization			Political Action Committee		
	Number	Sum (\$)	Cumulative % of dollars	Number	Sum (\$)	Cumulative % of dollars
<\$200	7,891	\$641,789	5.1	n.a.	\$22,966,505	72.8
200-4,999	5,034	\$1,759,486	19.2	181,012	\$7,973,895	98.1
5,000	29	\$145,000	20.3	118	\$590,000	99.9
5,001-10,000	12	\$114,500	21.2	3*	\$22,450	100
10,001-99,999	17	\$540,999	25.6	0	\$0	100
100,000 or more	14	\$9,326,442	100	0	\$0	100
Total individual contributions	12,997	\$12,528,216		>296,542	\$31,552,850	

*I have not investigated whether amounts contributed above the legal limit were returned to these contributors.

Table 5: New Democrat Network, 2003-2004 (individual contributions only)

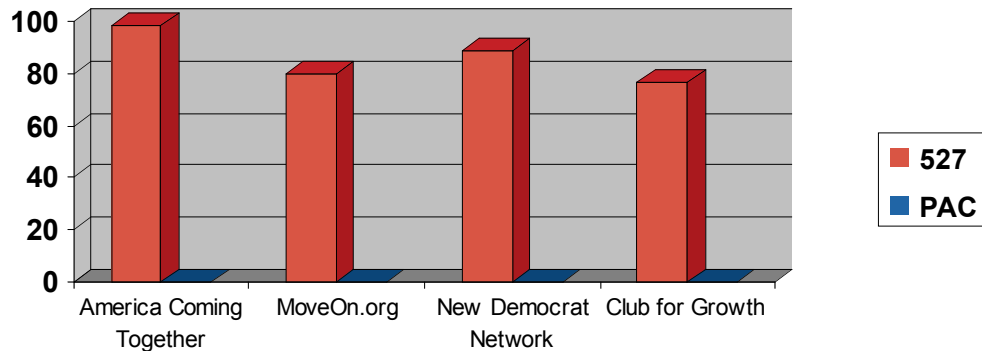
Size of individual contribution (\$)	527 Organization			Political Action Committee		
	Number	Sum (\$)	Cumulative % of dollars	Number	Sum (\$)	Cumulative % of dollars
<200	1,431	\$81,971	1.2	n.a.	\$831	0.7
200-4,999	651	\$458,212	8.0	13	\$20,745	18.5
5,000	46	\$230,000	11.4	19	\$95,000	100
5,001-10,000	32	\$315,035	16.1	0	\$0	100
10,001-99,999	56	\$1,586,000	39.6	0	\$0	100
100,000 or more	23	\$4,069,429	100	0	\$0	100
Total individual contributions	2,239	\$6,740,647		>36	\$116,576	

Table 6: Club for Growth, 2003-2004 (individual contributions only)

Size of individual contribution (\$)	527 Organization			Political Action Committee		
	Number	Sum (\$)	Cumulative % of dollars	Number	Sum (\$)	Cumulative % of dollars
<200	650	\$63,392	0.8	n.a.	\$300,317	16.0
200-4,999	2,183	\$1,370,258	17.5	1,256	\$817,750	59.5
5,000	97	\$485,000	23.5	151	\$755,000	99.6
5,001-10,000	80	\$736,500	32.5	1*	\$7,500	100
10,001-99,999	58	\$1,665,490	52.9	0	\$0	100
100,000 or more	21	\$3,850,000	100	0	\$0	100
Total individual contributions	3,089	\$8,170,640		>2,916	\$1,880,567	

*I have not investigated whether amounts contributed above the legal limit were returned to these contributors.

Figure 2: Percentage of Funds Raised from Large Individual Contributions (Greater than \$5,000), 2003-2004: 527 vs. PAC



majority of their funds from individuals came from contributions in amounts greater than \$5,000, the federal limit on contributions to PACs. Further, three of these 527 organizations raised far more money from individuals than their associated (and contribution-limited) PACs. In 2003-2004, large individual contributions (those greater than \$5,000) accounted for 98.3 percent of the funds from individual contributors to the America Coming Together 527 organization. Large individual contributions made up 79.7 percent of the contributions to MoveOn.Org, 88.6 percent of contributions to the New Democrat Network and 76.5 percent of contributions to the Club for Growth. Further, between 48 percent and 82 percent

of the individual contributions to these groups were in amounts of \$100,000 or more. Figure 2 illustrates how much more the 527 organizations relied on large individual

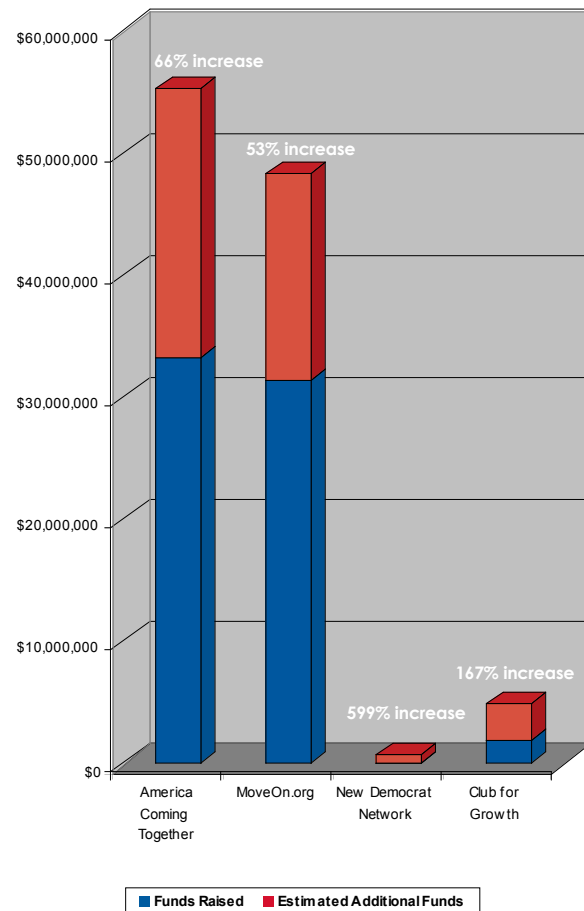
Contribution limits make it more difficult for new groups to launch and reduce the resources available for political advocacy.

contributions than their PAC counterparts. In other words, if these groups had faced contribution limits, they would have raised much less money and their political activities would have been greatly curtailed. The absence of contribution limits was therefore critical to the ability of these groups to successfully participate in the national debate.

Indeed, consider what would happen if those contributors who “maxed out” in giving to the America Coming Together PAC had been able to make unlimited contributions. If those 271 maximum contributions exhibited a similar distribution across contribution amounts as do the large contributions to the America Coming Together 527 organization, then the PAC would have raised \$22 million more than it did in 2003-2004, or about a 66 percent increase. Figure 3 shows that all four PACs might have seen dramatic increases in funding from individuals absent contribution limits.

The lessons from the 2004 election are clear: Contribution limits make it more difficult for new groups to launch and reduce the resources available for political advocacy. And when political entrepreneurs and patrons are prevented from seeding new political groups, it is not just those individuals who are harmed. It is also small donors and volunteers to start-up and grassroots organizations who have their rights to free speech and association diminished. Without large initial contributions, new political organizations, especially those that do not benefit from

Figure 3: Estimated Additional Funds from Individuals for PACs Absent Contribution Limits, 2003-2004



It is apparent that such state registration and reporting requirements are not only burdensome, but are designed to be barriers to political entrepreneurship.

an association with some pre-existing trade association or labor union, are less effective participants in the public debate.



Yet the entrepreneurial groups that accepted unlimited individual contributions to speak out in the 2004 elections were met with federal investigations and record fines from the Federal Election Commission. In December 2006, the FEC announced settlements with three 527 groups for failing to register with the FEC as political committees and for accepting individual contributions in excess of PAC limits.¹⁶ Swift Vets was fined \$299,500, MoveOn.org was fined \$180,000 and the League of Conservation Voters was fined \$180,000.

This case study demonstrates both the importance of patrons for seeding new groups and the potentially dramatic effect of contribution limits in squelching the activities of new independent advocacy groups. Nevertheless, 22 states similarly shut out political entrepreneurs by imposing contribution limits on citizen groups that engage in independent political advocacy.

Regulatory Burdens on Candidate and Ballot Issue Advocacy

In addition to contribution limits, independent expenditure groups face other

regulatory burdens imposed on PACs, and although citizen groups that advocate for or against a ballot issue do not face contribution limits, they also have to contend with very similar, if not identical, red tape as PACs. In other words, apart from contribution limits, groups that express political views independent of political candidates face essentially the same regulations as groups that work with or contribute directly to candidates for office. Indeed, every state compels groups engaged in only independent advocacy, whether for a ballot issue or a candidate, to register with the government and submit frequent and complicated reports detailing their activities and supporters. And while such “disclosure” may not sound burdensome in the abstract, in practice, it is apparent that such state registration and reporting requirements are not only burdensome, but are designed to be barriers to political entrepreneurship.

I have examined the campaign finance laws for citizen groups in all 24 states that permit citizens to make laws directly through ballot measures and for all 50 states that



Colorado Blogger Wrapped Up in Red Tape

Diana Hsieh was a blogger when few people knew what the term meant. A passionate advocate for individual rights, she launched her now-popular blog Noodlefood in 2002 while working as a programmer as a way to get herself to write regularly on political and philosophical issues. Today, Diana presides over a mini-empire of online activism including blogs, discussion groups and even a small nonprofit. A recent Ph.D. in philosophy, Hsieh regularly speaks at philosophy conferences, writes articles and podcasts on various subjects—and still manages to find time to care for a small farm's worth of dogs, cats and horses at her home in Sedalia, Colorado.

“Although I’m not a political junkie, I just can’t bear to remain silent on some issues,” said Hsieh.

In 2008, she spoke out against Colorado’s “personhood” amendment, which would have granted full legal rights from the moment of conception. Diana and fellow Colorado activist Ari Armstrong wrote a policy paper that they published via their just-formed nonprofit, the Coalition for Secular Government, and sent to local media. They continued to write letters and op-eds on the issue and to speak out on their blogs.

The amendment went down to defeat but reappeared on the ballot in 2010. Hsieh and Armstrong wanted to update the paper, but by now, out of school and extremely busy, Diana simply could not justify the work as a purely volunteer effort.

Enter the free market. Hsieh had been experimenting with raising money within her community of readers and activists to fund specific projects. She decided to try that with the policy paper, asking readers of her blog for pledges to help motivate her and to justify the time commitment.

“I want to be paid for the work I do,” she said. “To see people eagerly contributing their hard-earned dollars to that policy paper so that I can speak for them was hugely motivating to me.”

The idea was wildly successful. Hsieh and Armstrong received 63 pledges within a few weeks that would easily meet their target of \$2,000 for the entire project.

But there was one hitch. Like most states, Colorado regulates the marketplace of ideas along with the marketplace of goods and services. Under state law, any group that spends \$200 to advocate for or against a ballot issue must register with the state as an “issue committee” and comply with onerous regulations—or face fines or other legal penalties.

“In my excitement over the project, I had forgotten all about the campaign finance laws,” Hsieh remarked. Back in 2008, an attorney friend had alerted her to the laws. She spent a considerable amount of time just trying to figure out what the requirements for issue committees were. “They don’t make it easy to find this information, even if you are looking for it,” she said.

This time, Hsieh had to figure out how the law applied to a pledge drive. After an hour or so on the Secretary of State’s website, she called the office for help. She was transferred to three different people before she found someone who could answer her questions.

Colorado requires “issue committees” like Hsieh and Armstrong to report the name and address of anyone who contributes more than \$20; those who give more than \$100 must disclose their employer as well. All of this information is posted on the Internet. “It’s an invitation for harassment—or worse,” says Hsieh.

The regulatory burden also takes time away from Hsieh’s actual advocacy.



“We are not a big think tank,” said Hsieh. “It’s me, Ari and a telephone. These requirements mean we have less time to advocate our views.”

Worse, Colorado allows any person to bring a private action to enforce the laws against their political opponents.

“We’re taking a legal risk just by speaking out,” Hsieh said. “I fill out the forms and hope I don’t get sued. It’s very discouraging.”

With all the red tape and threats of fines and lawsuits, Colorado’s message to political entrepreneurs like Diana Hsieh who simply want to join the political fray is clear: Keep out!

regulate independent expenditures. All information was compiled by consulting state statutes, regulations and training manuals made available from the websites of the relevant authority in each state (e.g., the secretary of state). I present detailed tables for the minimum dollar thresholds discussed below in Tables 7 and 8.

Before proceeding, one caveat is in order: State campaign finance laws are difficult to comprehend; therefore, the information I present here should not be relied upon for legal advice. If you and your fellow citizens really want to get involved in state politics, then please consult a lawyer with expertise in campaign finance law. Interestingly, I am not the only one who makes such a disclaimer;

state authorities give similar advice in training manuals for political committees, which says a great deal about the likelihood of ordinary citizens successfully navigating these laws.

Registering with the State

Every state requires that citizen groups engaging in independent political advocacy register with regulatory authorities, albeit in most cases only once some minimum dollar threshold of activity is met. The activity threshold is typically based on money raised or spent by the group, although several states do require registration regardless of the level of financial activity. But in most states even very modest sums trigger registration. For example, it costs about \$500 for the postage on



**Table 7: State Ballot Issue Committees:
Minimum Dollar Thresholds for Selected Disclosure Requirements**

	Register as Committee	Itemize Contributions		Itemize Expenditures
		Name and Address	Employer or Occupation	
Alaska	500	0	250	0
Arizona	500	25	25	0
Arkansas	500	50	-	100
California	1,000	100	100	100
Colorado	200	20	100	20
Florida	500	0	100	100
Idaho	500	50	-	25
Illinois	3,000	150	500	150
Maine	5,000	50	50	100
Massachusetts	0	50	200	50
Michigan	500	0	100	50
Mississippi	200	200	200	200
Missouri	500	100	100	100
Montana	0	35	35	0
Nebraska	5,000	250	-	250
Nevada	10,000	1,000	-	1,000
North Dakota	0	100	-	100
Ohio	0	0	100	25
Oklahoma	500	50	50	50
Oregon	0	100	100	100
South Dakota	500	100	-	-
Utah	50	50	50	50
Washington	0/5,000*	25	100	50
Wyoming	0	25	-	0

Source: Author compilation from state government websites on campaign finance disclosure.

*The second figure represents threshold for reporting requirements. Full reporting also triggered by single contributor giving more than \$500 in aggregate.



**Table 8: State Independent Expenditure Committees Funded by Individuals Only:
Minimum Dollar Thresholds for Selected Disclosure Requirements**

	Register as Committee*	Itemize Contributions		Itemize Expenditures
		Name and Address	Employer or Occupation	
Alabama	1,000	100	-	100
Alaska	0	0	50	0
Arizona	500	25	25	0
Arkansas	500	50	50	100
California	1,000	100	100	100
Colorado	1,000	20	100	20
Connecticut	0/1,000	50	100	0
Delaware	0	100	-	100
Florida	500	0	100	0
Georgia	25,000	100	100	100
Hawaii	1,000	100	100	0
Idaho	500	50	-	25
Illinois	3,000	150	500	150
Indiana	100	100	1,000	100
Iowa	750	25	-	5
Kansas	0	50	150	50
Kentucky	0/3,000	100	100	25
Louisiana	500	0	-	0
Maine	1,500	50	50	0
Maryland	0/1,000	51	-	0
Massachusetts	0	50	-	50
Michigan	500	0	100	50
Minnesota	100	100	100	0
Mississippi	200	200	200	200
Missouri	500	100	100	100
Montana	0	35	35	0
Nebraska	5,000	250	-	250
Nevada	0	100	-	100
New Hampshire	500	25	100	0
New Jersey	2,100	300	300	0
New Mexico	500	0	250	0
New York	0/1,000	0*	-	0*
North Carolina	0	50	50	0
North Dakota	0	200	5,000	200
Ohio	100	0	100	0
Oklahoma	500	50	50	50
Oregon	0/2,000	0	0	100
Pennsylvania	250	50	250	0
Rhode Island	0/100	0	100	100
South Carolina***	500	100	-	0
South Dakota	500	100	-	-
Tennessee	250	100	100	100
Texas	500	50	50	0
Utah	50**	50	50	0
Vermont	500	100	-	0
Virginia	200	100	100	0
Washington	0/5,000****	25	100	50
West Virginia	0	0	250	0
Wisconsin	25	20	100	20
Wyoming	0	25	-	0

Source: Author compilation from state government websites on campaign finance disclosure.

* Second figure represents threshold for reporting requirements if different than registration threshold.

** \$50 in expenditures or \$750 in contributions.

*** On September 13, 2010, a federal district court in South Carolina struck down that state's statutory definition of "political committee" as unconstitutional. See *S.C. Citizens for Life v. Krawcheck*, No. 4:06-cv-2773, 2010 U.S. Dist. LEXIS 96187, *35 (D.S.C. Sept. 13, 2010).

**** Full reporting also triggered by single contributor giving more than \$500 in aggregate.



1,136 letters or for a single 30-second prime-time advertising slot on a local broadcast television station in a small media market like Jefferson City, Mo. Yet a citizen group raising and spending just \$500 on advocacy for or against a ballot measure would have to register in 19 of the 24 ballot measure states; a similar committee making independent expenditures for or against a candidate must register in 41 states. Committees have to jump through a number of hoops in order to speak. In Florida, for instance, a group that wants to talk about a ballot measure must file a registration form with the Division of Elections within 10 days of either forming or first anticipating that it will receive more than \$500 in contributions or make more than \$500 in expenditures. In that registration form, the group must name its treasurer and registered agent, as well as identify a separate bank account into which all its contributions will be deposited and from which all its expenditures will be made. Given all this red tape, citizen groups are essentially compelled to maintain the same internal structure as

a well-established professional advocacy organization.

This means that even a citizen group engaged in only independent advocacy faces the same burdens as political organizations that give directly to candidates. It is also worth noting that some states do offer more relaxed registration and reporting standards for individuals making independent expenditures out of their own pocket, but once citizens band together and take in contributions, they qualify as a political committee subject to more detailed requirements. It is unclear why groups of citizens should bear greater burdens for speaking about politics than individual citizens, especially since citizen groups are merely exercising their right to associate.

Reporting to the State

Registered political groups must keep detailed records and make periodic reports to the state on their activities, in some cases every quarter, in others monthly, but almost always with more frequency around elections. These



reports must itemize contributions over some minimum amount, where itemization includes the name and address of each contributor and sometimes the occupation or employer of contributors. Once again, the threshold for triggering these requirements is quite low in most cases. In 15 of 24 ballot measure states, committees must report the names and addresses of even people giving as little as \$50 to their cause. Most ballot measure states also require employer or occupation information for contributions in excess of \$100. For independent expenditure committees, contributions greater than \$100 must be itemized in 46 states, with most states also requiring the name of contributors' employers or occupations.

Registered committees must also report expenditures, typically by line item for amounts over some minimum threshold. Similar to what was observed for itemized contributions, in most states these minimum thresholds are \$100 or less. However, independent expenditure groups often face an added requirement in that expenditures made

close to the election must also be reported on a separate form, usually within 24 or 48 hours.

Compliance Costs

Can ordinary citizens comply with these rules and regulations? From wrestling with these state laws and training manuals, I say no (or more accurately, "NO WAY!"). Further, as noted at the start, not even state regulators believe so, since they advise citizens to seek legal counsel. For example, the State of Colorado provides its citizens with a 100-page "Campaign and Political Finance Manual" that "provides guidelines and helpful tips for proper compliance with the law."¹⁷ However, the manual also includes this disclaimer: "This manual was created for reference and

People asked to complete registration and reporting forms were flummoxed by the stilted and jargon-laden instructions and flabbergasted that anyone would be expected to complete such forms simply to speak out as part of a citizen group.

training purposes only and should not be used as a substitute for legal advice and actual



Political Enthusiasts Silenced by Florida's Campaign Finance Laws

At least once a week, Nathan Worley, Pat Wayman, John Scolaro and Robin Stublen talk politics as part of a Tampa-area political group. But in 2010, a proposed amendment to the Florida Constitution prompted them to stop just talking and take political action.

The target of their concern is Amendment 4, which is popularly known as the “Hometown Democracy Amendment.” Amendment 4 would require that municipalities that adopt or amend their local comprehensive land-use plan submit the changes to a referendum of the voters.

Nathan, Pat, John and Robin see Amendment 4 as an affront to property rights that will stifle economic growth in Florida—and they think other voters need to hear that view. So the group decided to pool their resources and run a newspaper or radio ad against Amendment 4. But, thanks to Florida's campaign finance laws, such spontaneous political expression is all but impossible.

Under Florida law, any time two or more people get together to advocate the passage or defeat of a ballot issue and raise or spend more than \$500 for the effort, they become a fully regulated political committee. At today's advertising rates, running even a single newspaper ad could cause them to cross this threshold.

Thus before even being allowed to speak the group would have to cut through a slew of red tape. First, Nathan and the others would have to register with the state and establish a separate bank account. Then the group could run its ads, but it would have to keep meticulous financial records and report all activity. This means that if they accept even a \$5 contribution, they must deposit it into their designated bank account and report to the state the name and address of the contributor. Similarly, every expenditure, even for gas to drive to the radio station to record their ad, must also be reported. And unlike most states, Florida does not place any lower limit on contributions and expenditures that have to be reported—even a one-cent contribution must be separately itemized, including the contributor's name and address, and reported to the state.

If Nathan and the others speak without complying with the law, they can face civil or criminal fines of up to \$1,000 per violation and even up to one year in jail.

Political insiders may be able to navigate Florida's regulations, but for engaged citizens who simply want to speak out when they have something to say, all the paperwork and threats of legal penalties exact too high a cost. Nathan, Pat, John and Robin have jobs, families and lives to live. They do not have the time or expertise to wade through red tape to make their voices heard.

As Pat Wayman said, “These laws make politics inaccessible to common citizens; you need to hire an attorney to make sure you don't get in trouble with the government. We shouldn't have to file any paperwork, or hire accountants or campaign finance lawyers, just to exercise our First Amendment rights.”



knowledge of the campaign finance laws and regulations.” After all, you can only say so much in 100 pages.

But we need not leave this question to informed speculation. In 2007, I ran a series of campaign finance disclosure experiments in which more than 250 people were given a simple scenario describing the activities of a citizen group engaged in independent advocacy in support of a ballot proposition; the experimental subjects were then paid for completing actual state disclosure forms from California, Colorado or Missouri.¹⁸ Because disclosure requirements for ballot measure committees and independent expenditure committees are so similar, the results of this exercise are informative about citizens’ ability to comply with campaign finance rules in either setting.

The subjects were given all relevant instructions and manuals, as well as extra forms, a calculator and 90 minutes to record a few simple transactions. In addition, subjects were paid for participating and could earn more money for completing their tasks with

few errors. Prior to starting the compliance experiment, most subjects completed a short survey that revealed that only seven percent were aware that political groups must register with the state. And while this is not a representative survey, I have no reason to think that the general population is somehow more expert on the details of campaign finance laws.

The average score of tasks completed correctly was 48 percent for the group using Colorado forms, 37 percent for the group using Missouri forms and just 29 percent for the group using California forms—the average score across all forms was 41 percent. Not one participant completed the forms correctly. Non-students fared somewhat worse than students, and variations in subject age and education were not strongly related to performance. Basically, it was a miserable showing for all involved. But what was perhaps most revealing were the written comments I received in the post-experiment debriefing.

In short, people asked to complete registration and reporting forms were



flummoxed by the stilted and jargon-laden instructions and flabbergasted that anyone would be expected to complete such forms simply to speak out as part of a citizen group. One subject lamented, “These forms make me feel stupid!” Another offered that “one truly needs legal counsel to complete these forms.” The debriefing also included a survey in which more than 60 percent of respondents indicated that this red tape alone would probably deter many people from engaging in independent political activity, while almost 90 percent suggested that fear of civil and criminal penalties for making even a single mistake on the forms would deter many people from getting involved with independent groups. In other words, not only do these laws impose burdensome red-tape requirements, but they may well deter potential group members and contributors.

Why Place Limits and Regulatory Burdens on Independent Advocacy?

Contribution limits and the regulatory burdens of PAC or PAC-like status discourage

political entrepreneurship by making it harder for new groups to form and by forcing groups to navigate a maze of red tape to speak. How can these laws be justified in a society that values the First Amendment rights of freedom of speech and association?

The Transaction Theory of Corruption

In the landmark 1976 decision in *Buckley v. Valeo*, the U.S. Supreme Court permitted the regulation of campaign financing only for the purpose of preventing *quid pro quo* corruption or its appearance.¹⁹ The Court reaffirmed that conclusion in subsequent cases, including the recent *Citizens United* case.²⁰ In this view, which might be called a “transaction theory” of corruption, government has a legitimate role in preventing cash-on-the-barrelhead trading in political favors, or the appearance of the same.

Thus, state and federal governments may limit the source and size of donations directly to candidates, political parties and PACs that themselves contribute to candidates, since the transfer of money to candidate campaigns and closely associated groups may raise concerns about *quid pro quo* corruption. For example,



the federal government and many states prohibit corporations or unions from donating money directly to candidates for office and limit the amount of money that individuals may contribute to candidates. (It should be noted, however, that several states do not limit direct contributions from corporations and unions, and there is no strong evidence that states with more restrictive campaign finance rules somehow suffer from greater corruption or the appearance of corruption.²¹)

Independent expenditures in support of or opposition to a candidate, however, do not generate concerns about corruption under the transaction theory, since by definition there is no explicit communication or planning between a candidate and the speaker. Indeed, in *Citizens United*, the Court struck down a ban on independent expenditures by corporations and made clear that independent expenditures are not corrupting: “Limits on independent expenditures . . . have a chilling effect extending well beyond the Government’s interest in preventing quid pro quo corruption.”²² Soon after, the Court

of Appeals for the D.C. Circuit applied that reasoning in *SpeechNow.org v. FEC* to strike down federal contribution limits on groups making solely independent expenditures.²³ That ruling applies only to the federal government and the District of Columbia; thus contribution limits for state independent expenditure committees remain in force in 22 states despite their ill fit with the Supreme Court’s theory of corruption.

In *Citizens United*, the Court also had harsh words for the regulatory burden of PAC status, finding that it was too arduous an option for corporations that wished to speak about candidates but were banned from doing so directly: “PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations.”²⁴ Among the burdens the Court noted, PACs must “appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organizational statement and report changes to this information within 10 days.



... [They must] file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur.” The Court did, however, uphold narrower disclosure requirements for independent expenditures than those typically required of PACs, suggesting that although states may require some disclosure, the current burdens that many states impose through PAC status ought to receive serious judicial scrutiny.

Regulation of ballot issue advocacy makes for an even poorer fit with the transaction theory of corruption for the simple reason that the text of a ballot measure is fixed; in a ballot issue election, there is no one to corrupt.

The Miasma Theory of Corruption

If the transaction theory of corruption does not justify contribution limits and PAC burdens placed on independent political advocacy, what does? A broader view of corruption, what might be called the “miasma theory,” encompasses any activity that “unduly” influences public policy. “Miasma” was the term used to describe unseen vapors that were thought to cause disease (prior to modern

germ theory); it was a wrong-headed and vague theory that led to many ineffectual and perverse medical practices, such as bloodletting. Similarly, there is a nebulous sense that political influence is somehow corrupt; left at that, the policy prescription is to try to “drain the swamp” by preventing the flow of resources into political activities as a means of reducing the miasma of “undue influence.” This view bypasses the narrow restriction that corruption entails bribery and influence peddling, and instead places the emphasis on how effective political activity is at achieving its goals (i.e., influencing policy) and how well-heeled the advocates may be. For many campaign reform advocates and even some Justices (e.g., the minority in *Citizens United*), concerns about “undue influence” are triggered primarily by the identity of the interest doing the influencing (i.e., corporations or interest groups).

While this theory accords well with popular cynicism about the role of money in politics, it offers no clear limits on government power to regulate political speech or association. It also contradicts empirical



scholarship on the efficacy of campaign contributions and campaign spending, which indicates a far more limited impact of money on political outcomes than conventional wisdom would suggest.²⁵ Nevertheless, policymakers are not above demagoguery and have been all too happy to respond to popular prejudice regarding the undue influence of “special interests”—particularly when it facilitates the adoption of anticompetitive regulations. Unlike the transaction theory, this miasma theory of political corruption can be employed to justify any policy that hinders the flow of resources into politics, or the ability of some groups to influence policy, and thus serves as a convenient excuse to erect barriers to entry.

The Informational Interest

The final possible rationale for PAC requirements is that the state has some interest in informing citizens about the identity of speakers in the public forum and that disclosure imposes no costs on political groups. Even as it upheld narrow disclosure requirements in *Citizens United*, the Court made clear that the full panoply of PAC

regulations (including registration, filing frequent and detailed reports, appointing a treasurer and so on) are too burdensome for independent expenditure groups. In addition, the Court has never upheld disclosure or other burdensome regulations for ballot issue committees; as noted above, there is simply no concern about corruption in ballot issue elections because there is no candidate to corrupt.

Moreover, recent research suggests that disclosure does impose costs on ballot issue groups with little or no informational benefit in return. The compliance experiment described above plainly illustrates the significant hassle and deterrent effects of the

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real-life bureaucratic red-tape requirements imposed on political committees. These findings are consistent with more systematic



evidence from a scientific survey of public opinion on disclosure requirements for ballot measure committees.²⁶ That study found that in the abstract people favor disclosure requirements, but only when such rules apply to others. When asked if they favor regulations that would make public *their* name and address as a requirement for contributing to a ballot measure committee, 56 percent were opposed and more than 70 percent opposed disclosure of their employer's name. Further, most respondents indicated they would "think twice" before contributing to a ballot measure group because of such requirements. And, not surprisingly, most respondents have no idea where to obtain disclosure information about donors to political groups, suggesting they make little if any use of it.

But hassle and the deterrent effect on political participation are not the only costs of mandatory disclosure. In practice, disclosure laws cover detailed personal information that strips unpopular speakers and their supporters of the benefits of anonymity.²⁷ Given that campaign finance disclosure is made part of the public record (and is often posted to the

Internet), some citizens are rightly concerned that disclosure amounts to an invitation to retribution and harassment. In just one recent example, supporters of Proposition 8 in California have complained that disclosure requirements have enabled opposing groups to publish maps to their homes and encourage acts of reprisal; other complaints range from threatening email messages and boycotts of businesses, to receiving letters filled with white powder.²⁸

Nevertheless, proponents of imposing PAC-like burdens on independent advocacy groups claim that such laws are somehow crucial for preserving the "integrity of democracy." The belief is that such laws improve political knowledge among voters, increase trust and confidence in government, encourage voter turnout and so on. These claims are irrelevant from a legal standpoint, since they stray from the narrow requirement of preventing corruption. However, it is worth noting that among all of the empirical studies that seek to identify the institutional determinants of political knowledge, trust and confidence in government, voter turnout, electoral competition



or even the concordance between public opinion and policy outcomes in the states, none finds that state disclosure laws for independent advocacy groups are important. Indeed, no such studies even include such a variable in their statistical models. No scholar of American politics has ever taken this hypothesis seriously enough to put it to the test. Given this, only an ardent believer in the miasma theory of political corruption could support mandatory disclosure for independent political groups, albeit precisely because such regulations impose significant costs on political entrepreneurship.

State Campaign Finance Laws as Barriers to Entry that Keep Out Entrepreneurs

Democracy is a dynamic process that depends critically on political entrepreneurship and an open marketplace for ideas. This is why rights of association and speech are so fundamental to the health of American democracy. Yet state campaign finance laws applied to independent citizen groups erect barriers to entry that squelch new voices and limit outside competition. Neither

contribution limits nor draconian registration and reporting requirements serve any legitimate anti-corruption goal. Instead, these regulations raise the costs of citizen engagement and restrict the flow of resources to independent citizen groups.

In fact, these regulations are so burdensome, it is apparent that they are *intended* to deter political entrepreneurship. In the compliance experiment, participants could complete only 41 percent of the required disclosure tasks and many were intimidated by red tape they encountered. Public opinion survey evidence confirms that disclosure of personal information is unpopular, unused and a deterrent to supporting political groups. Finally, the pattern of contributions to new political groups formed in the 2004 election season indicate that large contributions from patrons play a critical role in creating new groups; yet 22 states retain limits on contributions to independent citizen groups. Contribution limits are the starkest evidence that these regulations are intended to deter resources from flowing to independent political groups.

For example, the California Fair Political Practices Commission, a state government agency, has argued for imposing contribution limits on groups that make independent expenditures in the state. In a recent report the Commission even notes *approvingly* that such limits would reduce independent expenditures by 97.6 percent.²⁹ Just the cover art on the report tells the story: It shows a giant gorilla scaling the capitol dome in Sacramento and throwing dollar bills. The not-so-subtle message, of course, is that independent expenditures are somehow undesirable. The report itself makes no attempt to discuss the potential benefits of independent expenditures, let alone the rights of citizens to form groups that engage in independent political advocacy. This makes all too clear the real goal of such contribution limits and mandatory disclosure laws: limiting independent political speech.

Popular suspicion of all things political combined with a failure to appreciate the role of patrons and entrepreneurs in fostering public policy innovation and democratic competition, has enabled political insiders

to erect barriers to entry from outside groups. Rather than encouraging political entrepreneurship and civic engagement, states are attacking independent political



advocacy through the accretion of misguided and unnecessary regulations. It is past time to scrape away those impediments and to remember that America is great, not by accident, but because we have a legal foundations that protect entrepreneurship in markets and politics.



Endnotes

- 1 Also see: Carpenter, D. (2007). Disclosure costs: Unintended consequences of campaign finance reform. Arlington, VA: Institute for Justice; Carpenter, D. (2009). Mandatory disclosure for ballot initiative campaigns. *Independent Review*, 13(4): 567-583. Milyo, J. (2007). Campaign finance red tape: Strangling free speech and political debate. Arlington, VA: Institute for Justice; and Milyo, J. (2010). Mowing down the grassroots: How grassroots lobbying disclosure suppresses political participation. Arlington, VA: Institute for Justice.
- 2 The concept of political entrepreneurship is discussed at length in Schneider, M., Teske, P., & Mintrom, M. (1995). *Public entrepreneurs: Agents for change in American government*. Princeton, NJ: Princeton University Press; also see Mintrom, M. (1997). Policy entrepreneurs and the diffusion of innovation, *American Journal of Political Science*, 41(3): 738-770; and Klein, P., Mahoney, J., McGahan, A., & Pitelis, C. (2010). Toward a theory of public entrepreneurship, *European Management Review*, 7: 1-15.
- 3 Olson, M. (1965). *The logic of collective action: Public goods and the theory of groups*. Cambridge, MA: Harvard University Press.
- 4 Denzau, A., & Munger, M. (1986). Legislators and interest groups; How unorganized interests get represented, *American Political Science Review*, 80(1): 89-106.
- 5 America Coming Together established both a political action committee and a 527 committee; including contributions from all sources, the two committees raised and spent more than \$200 million in the 2004 election cycle (source: Center for Responsive Politics, <http://www.opensecrets.org/>).
- 6 Hayek, F. A. (1960). *The constitution of liberty*. Chicago: University of Chicago Press.
- 7 Schumpeter, J. (1942). *Capitalism, socialism and democracy*. New York: Harper.
- 8 Stigler, G. (1971). The theory of economic regulation, *The Bell Journal of Economics and Management Science*, 2(1): 3-21.
- 9 Also see recent Institute for Justice reports on occupational licensure: Carpenter, D. (2010). Blooming nonsense: Experiment reveals Louisiana's florist licensing scheme as pointless and anti-competitive; Carpenter, D., & Ross, J. (2009). The power of one entrepreneur; and Carpenter, D. (2008). Designed to mislead: How industry insiders mislead the public about the need for interior design regulation.
- 10 Ky. Advisory Opinion 2010-002.
- 11 See 970 CMR 2:17.
- 12 Source: Center for Public Integrity, <http://www.publicintegrity.org/>.
- 13 These data are based upon itemized contributions and have not been aggregated by contributor within each year. Therefore the figures in Table 2 may understate the size of the average contribution from any one contributor in a given year.
- 14 This listing is from Center for Responsive Politics at: <http://www.opensecrets.org/527s/527cmtes.php?level=C&cycle=2004>.
- 15 Only contributions totaling more than \$200 in a given year must be itemized and reported to the IRS. The Center for Public Integrity has collected data on contributions to 527 groups from IRS disclosure forms and made it available in tab delimited text files at <http://>



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- projects.publicintegrity.org/527/; however, the data do not extend beyond 2005. Data on contributions to PACs are from the Center for Responsive Politics at: <http://www.opensecrets.org/pacs/index.php>.
- 16 Federal Election Commission. (2006, December 13). FEC collects \$630,000 in civil penalties from three 527 organizations: <http://www.fec.gov/press/press2006/20061213murs.html>.
- 17 The most recent version of the “Colorado Campaign and Political Finance Manual” is available from the website of the Colorado Secretary of State at: <http://www.elections.colorado.gov/Content/Documents/Campaign%20Finance/State%20Manual.pdf>.
- 18 For the complete report, please see: Milyo, J. (2007). Campaign finance red tape: Strangling free speech and political debate. Arlington, VA: Institute for Justice.
- 19 *Buckley v. Valeo*, 424 U.S. 1 (1976).
- 20 *Citizens United v. FEC*, 558 U.S. ___, 130 S. Ct. 876 (2010).
- 21 Milyo, J. (2010). Do state campaign finance reforms increase trust and confidence in state government? Unpublished manuscript.
- 22 *Citizens United*, 558 U.S. ___, 130 S. Ct. 876, at 41.
- 23 *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc).
- 24 *Citizens United*, 558 U.S. ___, 130 S. Ct. 876, at 21.
- 25 For example, see: Ansolabehere, S., de Figueiredo, J., & Snyder, J. (2003). Why is there so little money in U.S. politics? *Journal of Economic Perspectives*, 17(1): 105-130; Milyo, J., Primo, D., & Groseclose, T. (2000). Corporate PAC contributions in perspective, *Business and Politics*, 29(1): 75-88; and Levitt, S. (1994). Using repeat challengers to estimate the effects of campaign spending on election outcomes in the U.S. House, *Journal of Political Economy*, 102: 777-798.
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- 27 McGeeveran, W. (2003). Mrs. McIntyre’s checkbook: Privacy costs of political contribution disclosure, *Journal of Constitutional Law*, 6(1): 1-55.
- 28 McKinley, J. (2009, January 18). Marriage ban donors feel exposed by list, *New York Times*, <http://www.nytimes.com/2009/01/19/us/19prop8.html>.
- 29 California Fair Political Practices Commission. (2008, June). Independent expenditures: The giant gorilla in campaign finance law: <http://www.fppc.ca.gov/ie/IEReport2.pdf>.



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