CHAPTER 4

CAMPAIGN FINANCE

IN OUR POLITICAL SYSTEM, election campaigns are perpetual. In contrast, some other democracies—no less committed to political representation than we Americans are—try to keep electoral politics in its place: They limit campaigns to a certain period before Election Day, schedule national elections irregularly, and limit campaigning further through informal traditions.[1]

I begin with this mundane fact simply to highlight how different—and, in many ways, unique—U.S. campaigns, parties, financing, and electoral arrangements are. Here, such limits on campaigning are not only unfeasible; they might be *unconstitutional*! Our political system, the most complex in the world, establishes a national government operating over an immense land mass but sharing political authority with fifty state—and countless local—polities. In each state (and in "home rule" localities, where permitted), the campaign finance laws and electoral arrangements are largely autonomous and uncoordinated with the federal government. Further insulating these elections from federal regulation is the U.S. Constitution, whose protection of freedom of speech applies most robustly to political speech about elections and other public issues. All state constitutions do so as well.

Indeed, the heart of our political system is located at the state level. As political scientist Nelson Polsby put it, "party structures are based primarily on local authority, and nominations to public office are locally made and sustained. Thus the American political system [is] close to a one-hundred-party system."[2] Although this is perhaps less true now than when he wrote it in 2008, it remains a loose coalition of state parties that convene every four years to nominate presidential candidates. This chapter's focus on federal campaign finance should not obscure a fundamental point: These state systems are where almost all of our national politicians come from—and where promising reforms are most likely to originate. The common focus on the federal campaign finance system, which this chapter shares, is in this sense a bit off target.

Our campaign finance arrangements at all governmental levels are likewise remarkably complex and exceedingly legalistic, pervaded (as we shall see) by issues of constitutional law, especially the First Amendment. Indeed, I exaggerate only slightly in saying that only politicians and their special teams of campaign finance lawyers, consultants, and accountants have managed to master them.* The leading treatise on the subject explains why:

> Campaign finance is an extremely complicated area of legal doctrine because of the competing claims of First Amendment rights of speech and association and the rights of citizens, through legislation, to create a democratic regime that is widely accepted as legitimate, fair, and responsive. It is also an extremely complicated area of regulatory policy; each regulatory intervention spawns further efforts to circumvent the intervention by various actors who seek to influence the outcomes of elections. The intersection between legal doctrine and policy effectiveness makes the problem all the more daunting.[3]

For this reason, any sophisticated discussion of campaign finance issues must take due account of these technicalities—although I mean to keep them to a minimum here.

* Even so, candidates often violate the rules, sometimes inadvertently, and opponents make their campaign finance practices, legal or not, political issues in their campaigns.

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The chapter proceeds in three main parts. I set the stage with some *factual context*. The second, much longer part analyzes the central campaign finance issues, most of them shaped by a handful of Supreme Court decisions. Sharpening the focus, I review the debate among political scientists about which forces determine electoral outcomes, drawing on their recent analyses. We shall see that almost all the debaters find the system pathological, citing the same unholy trinity of polarization, gridlock, and hyper-partisanship. Some add intraparty fragmentation[4] and unequal influence[5] to the list. Yet their diagnoses, remedies, and assessments of previous reforms differ markedly; no consensus on what should be done exists. In the third and final part, I present the major competing approaches to reform.

Some disclaimers are in order. I do not discuss some other elections-salient issues that are extremely important but that bear only tangentially on campaign finance. Examples include the Voting Rights Act, redistricting, negative campaigning, and state laws regulating registration, voting, and ballot access. Nor do I discuss other factors that some think contribute to political dysfunction such as reduced socializing among legislators, atomizing new media, overuse of filibusters, and diffusion of power within Congress.[6] I also ignore judicial elections, which do not occur at the federal level but have attracted the Court's attention,[7] and ballot referenda and initiatives, which are regulated entirely by state law and deal with policy issues, not individual candidates (except in the case of recalls).[8]

CONTEXT

Here, I discuss six important contextual conditions: the political salience of campaign finance; the First Amendment's role in campaign finance regulation; its legal-regulatory structure; the court decisions in the *Wisconsin Right to Life*,[9] *Citizens United*,[10] *McCutcheon*,[11] and *SpeechNOW.org* cases[12] (an important appellate court decision dovetailing with *Citizens United*); the trends in political contributions and spending; and political incivility. I discuss another important contextual element, the emergent online platforms for campaigning, in a later section.

The Political Salience of Campaign Finance

Never before in our history has the issue of federal campaign finance been so prominent in public debates over politics. This is not to say that the role of money in politics is a new one. To the contrary, it is as old as politics itself, going back at least to Plato's warnings in *The Republic* about politicians' susceptibility to corruption.[13] Our own nation's history is laced with corruption scandals.[14] What *is* new is that our current, democratically enacted, highly regulated system of campaign finance is routinely denounced in terms like "legalized bribery" (or worse),[15] and that the issue is perennially prominent in our public discourse, including that of politicians themselves. Some 84 percent of Americans say that there is too much money in politics.[16] As detailed below, recent election cycles prior to 2016 have indeed seen a huge increase in the amounts spent on federal campaigns. This growth, moreover, occurred in the face of—arguably *because* of—enactment of the landmark Bipartisan Campaign Reform Act of 2003 (BCRA, also known as "McCain-Feingold").

But surely the most provocative—indeed inflammatory—development was the Supreme Court's 2010 decision in the *Citizens United* case, "one of its most unpopular in history."[17] Briefly stated (I discuss it in detail below), it interpreted the First Amendment to bar any limits on independent expenditures by corporations and labor unions.* Five years after the decision, it remained among Google's most searched-for terms.[18] Although only 19 percent of respondents to a 2012 survey were familiar with it,[19] opinion polls find that they overwhelmingly oppose it. Indeed, a much higher percentage oppose *Citizens United* than oppose the Court's gay marriage and abortion rulings.[20]

Liberal politicians (and scholars) routinely denounce the Court's campaign finance rulings and advocate stricter regulation. Only days after *Citizens United* came down, President Obama used his State of the Union address to chastise the Court for "revers[ing] a century of

* "Independence" in the campaign finance context means not coordinated, controlled, or requested by candidates or their campaigns. "Expenditures" are funds spent by a candidate or a group to promote its views on a policy issue. I explicate these terms below.

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law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections." Senator Chuck Schumer, who may become the Senate Minority Leader, called it the "worst decision since *Plessy v. Ferguson*."[21] Hillary Clinton, the Democratic standard-bearer in 2016, constantly inveighs against *Citizens United* in equally strong terms. Conversely, the Republican leadership and many other conservative politicians support *Citizens United* and advocate further deregulation of campaign finance, invoking the First Amendment. But as election law expert Richard Hasen points out, most politicians' talk about campaign finance reform is little more than lip service and political theater, masking their satisfaction with the status quo—even (or especially) with *Citizens United*.[22]

The First Amendment and Campaign Finance Regulation

The First Amendment to the Constitution, which provides that Congress shall make no law "abridging the freedom of speech," casts an immense shadow over almost all campaign finance regulation.[23] The Supreme Court and nearly all constitutional scholars hold that *political* speech is at the very core of the First Amendment's protections, and that speech about candidates and public issues is core political speech. This "communicative interaction" between citizens and government, as First Amendment scholar Robert Post puts it,[24] is essential to self-government and must be protected even more than other kinds of speech are. (Although not a constitutional scholar, I strongly share this view.) Accordingly, virtually any restriction that Congress might enact in this area—whether it relates to campaign contributions, spending, disclosure, commentary (especially by traditional and social media, which the Amendment further protects as "freedom of the press"), or any other aspect of election activity—is under a constitutional cloud, so legal challenges to such restrictions are inevitable. Indeed, today's Supreme Court interprets the First Amendment's protection of political and other speech more broadly than any of its predecessors did.[25]

At the same time, however, the Court recognizes that Congress has a "compelling interest" in preserving the integrity of the electoral and political processes.[26] This interest, which is analyzed below, is one that *Citizens United*'s many critics think the Court has undervalued. In trying to reconcile these conflicting considerations and values, it has drawn distinctions that, although often opaque and debatable in application, lie at the very center of campaign finance regulation.

The most significant distinction, legally and politically, is that between "quid pro quo corruption" and what some—including critics of the Court's narrow approach to the subject—call "influence corruption." (Later in the chapter, I further discuss "undue access" corruption, which is often paired with its cognate, "appearance" of corruption.) But First Amendment constraints, the applicable statutes, and the ingenuity of campaign finance strategists have produced many other important distinctions: between "contributions" and "expenditures"; "independent" and "coordinated" expenditures; spending money and engaging in speech; "express advocacy" (for a candidate) and "issue advocacy" (for a policy idea); "political campaigns" and "party-building" activities; the related distinction between "hard money" and "soft money";* "substantial" and "insubstantial" (or "marginal") restrictions on free speech; "dark money" contributions (whose donors' identities need not be disclosed) and contributions whose donors must be disclosed;† human and corporate speech; and, especially salient today, "PACs" and "Super PACs."‡ Magnifying this

* The Court has defined "soft money" as "money as yet unregulated under FECA" (*McConnell v. FEC*, 540 U.S. 93, 128 [2003]). "Hard money" refers to regulated dollar contributions to a party or campaign. Parties use soft money for general party-building, get-out-the-vote, support of volunteers, consulting, and other purposes not expressly or implicitly linked to a particular candidacy.

† "Gray money" refers to contributions that must be disclosed but are hard to trace to their ultimate source. https://www.brennancenter.org/publication/secret-spending-states

‡ *PACs* are political action committees established by corporations and unions to channel their contributions to campaigns; they must register with the Federal Election Commission (FEC), are subject to specified contribution dollar limits, and must disclose their donors.

Super PACs are "independent expenditure-only" committees that can spend unlimited funds contributed to them by corporations, unions, associations, and individuals—so long as the Super PACs spend the money "independently" of the candidates and parties whom complexity, primaries, general elections, and ballot initiatives are regulated differently.

I shall explicate these and other distinctions as they become relevant in the analyses that follow. For now, the important point is this: Almost every aspect of campaign finance (and of elections more generally) potentially implicates First Amendment constraints. Regulation in this area is so specialized and technically complex, and the distinctions drawn so legalistic and fine, that it may sometimes seem (or actually be!) at variance with common sense. And because the political stakes in campaign finance are so high, these issues are always bitterly contested.

The Legal-Regulatory Structure of Campaign Finance

The first federal campaign finance law, enacted in 1867, barred federal officials from seeking campaign contributions from Navy Yard workers.[27] Subsequently, laws have limited contributions, prohibited certain sources of funds for campaign purposes, controlled campaign spending, and required disclosure. In 1907, the Tillman Act barred corporations and national banks from contributing money to federal campaigns, and the Taft–Hartley Act of 1947 barred both unions and corporations from making expenditures and contributions in federal campaigns. The campaign finance provisions of these and other such laws were largely ignored, however, because none provided an insti-

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they support. Super PACs can also accept and spend money from groups organized for tax-exempt social welfare purposes ("501(c)(4)" organizations, further defined in a footnote on page 203), and Super PACs must disclose their donors' identity if they engage in electioneering or independent expenditures on behalf of candidates. Otherwise, 501(c)(4) groups can contribute to Super PACs, which in turn can support candidates "independently" (i.e., without coordination). This practice facilitates "dark money," evading disclosure. See generally, Jane Mayer, *Dark Money: The Hidden History of the Billionaires behind the Rise of the Radical Right* (2016).

"527 organizations" are tax-exempt groups, organized under the same tax code provision as are parties, PACs, and Super PACs. 527 organizations seek to influence elections not by supporting individual candidates (which they are not permitted to do either directly or by coordinating with campaigns) but by engaging in issue advocacy and voter mobilization. There are no limits on who may contribute to them or what they may spend, but they must disclose their donors and report on where their money goes.

tutional framework to administer their provisions effectively. These laws had other flaws as well. For example, spending limits applied only to committees active in two or more states. Further, candidates could avoid the spending limit and disclosure requirements altogether by claiming to have no knowledge of spending on their behalf.

The evasion of disclosure provisions became evident in the second spasm of reform following the Watergate scandals when Congress passed the more stringent disclosure provisions of the 1971 Federal Election Campaign Act (FECA).* The FECA initiated fundamental changes: It not only required full reporting of campaign contributions and expenditures, but also limited spending. (This limit was later repealed.) The FECA also provided the basic legislative framework for separate segregated funds through PACs established by corporations and unions, along with disclosure of PACs' contributors. Although the Tillman and Taft-Hartley laws banned direct contributions by corporations and labor unions to influence federal elections, the FECA had an exception allowing corporations and unions to use Treasury funds to establish, operate, and solicit voluntary contributions for PACs; these contributions could then be used to contribute to federal races. Another 1971 law allowed citizens to check a box on their tax forms authorizing the government to use one of their tax dollars to finance presidential campaigns in the general election. By 1976, enough tax money had accumulated to fund the 1976 election, the first publicly funded federal election in U.S. history.

In 1974, comprehensive amendments to the FECA established the FEC, an independent agency, to write regulations and monitor compliance. These amendments also authorized partial federal funding, in the form of matching funds, for presidential primary candidates and in addition extended it to political parties' presidential nominating conventions. Congress also enacted strict limits on both contributions and expenditures applicable to all candidates for federal office and to political committees seeking to influence federal elections.

* In 1968, still under the old law, House and Senate candidates reported spending \$8.5 million, while in 1972, after the passage of the FECA, spending reported by congressional candidates jumped to \$88.9 million.

Another amendment relaxed a 1939 prohibition on contributions from federal government contractors. The amended FECA now permitted corporations and unions with federal contracts to establish and operate PACs.

After the constitutionality of key provisions of the 1974 amendments were challenged,[28] the Supreme Court handed down its 1976 ruling (almost 300 pages of it!) in *Buckley v. Valeo*.[29] Drawing a fateful distinction—one so pivotal that I discuss it at some length here—the Court upheld the law's contribution limits while at the same time rejecting its expenditure limits. "It is clear," the Court stated, "that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups and candidates. The restrictions . . . limit political expression at the core of our electoral process and of First Amendment freedoms." Acknowledging that both contribution and spending limits had First Amendment implications, the Court stated that the "expenditure ceiling imposes significantly more severe restrictions on protected freedom of political expression and association than do its limitations on financial contributions."[30]

Constitutional law, however, sometimes undermines policy coherence. Election law scholar Samuel Issacharoff is surely right to say that "no rational regulatory system would seek to limit the manner by which money is supplied to political campaigns, then leave unchecked the demand for that same money by leaving spending uncapped."[31] This "odd regulatory misalignment between the encumbered ability to raise money and the unfettered capacity to spend it" means that "candidates and campaigns would inevitably seek to spend—and therefore raise—more money."[32] The treatise goes on to quote from Frank Sorauf, a leading campaign finance scholar:

> We shall never know what kind of regulatory regime the FECA amendments of 1974 created because they were so drastically altered by the Supreme Court in *Buckley v. Valeo*. What was intended to be a closed system in which the major flows of money into and out of campaigns were fully controlled emerged as an open system of uncontrolled outlets when the Court struck down all limits on direct spending in the campaign by candidates, PACs,

> and individuals. A tightly constrained regulatory system became a more relaxed, open-ended one. The modifications in *Buckley* meant that the original 1974 plan would never have to meet its two severest tests: the administration of spending limits in hundreds of races and the accommodation of excess money in a system with no effective outlets. Instead, the crippled FECA affected chiefly the recruitment of money, ending the freedom of the fat cats and encouraging the development of PACs.[33]

In response to *Buckley*, Congress amended the FECA in 1976 to repeal expenditure limits (except for candidates who accepted public funding), to reconstitute the FEC (the president now appoints six members subject to Senate confirmation), and to significantly restrict PAC solicitations (specifying who could be solicited and how solicitations must be conducted, and imposing a single contribution limit for all PACs established by the same union or corporation). The basic regulatory regime established by FECA continues today. It is one "that no legislature ever voted to create and, one may surmise, no legislature would ever have voted to create."[34] As we shall see, it is also *very* complex and has become much more so over time, as regulators have tried to keep up with new evasions by the parties, donors, and other regulated entities.

In the 1990s, fund-raising efforts began to rely increasingly on contributions to parties of soft money that was not then subject to FECA restrictions and was often used to support particular candidates in ways that *Buckley* failed to prevent. In 2002, Congress enacted the third major reform, the BCRA—a legislative effort jointly coordinated by Senators McCain and Feingold—which was intended to plug this loophole.* There is evidence that BCRA reflected more of a bipartisan elite effort than grassroots pressures;[35] future reforms may follow the same pattern.[36]† BCRA prohibited national parties,

* "Loophole" implies the existence of an integrated scheme with very narrow exceptions ("loopholes") that can be used to evade the scheme's general rules. It is hard to view campaign finance regulation as such since there are so many ways to stymie enforcement, most of them constitutionally protected. The better metaphor is to Swiss cheese with more holes than cheese.

† According to political analyst Mark Schmitt, the only other major bipartisan law in

candidates, and candidate- or party-affiliated nonprofits from soliciting or spending soft money for any purpose (not just to promote particular candidates and their campaigns); barred state and local parties and committees from using soft money on federal elections; prohibited expenditures by outsiders for "electioneering communication" within a certain period before an election; and required disclosure of any contribution in excess of $200 by donor's name. Today, party and candidate committees and PACs must file periodic reports disclosing what they raise and spend, and who their contributors are.[37]* For example, candidates must identify all PACs and party committees that give them contributions, as well as all individuals who give more than $200 in an election cycle. They must also disclose expenditures exceeding $200 per election cycle to any individual or vendor.[38] In *McConnell v. FEC*,[39] a 2003 ruling, the Court upheld these provisions.

BCRA, like the FECA before it, quickly spawned evasive tactics, once again proving an old adage even mentioned by members of the Court: "Campaign money is very much like water flowing downhill on the side of a mountaintop. It is going to find its way to the valley, and you're not going to be able to build enough dams to keep the water from getting [there]."[40]† To minimize BCRA's restrictions, campaign donors increasingly directed funds to outside groups—PACs, 527 groups (defined above), 501c groups,‡ and later on, Super PACS (de-

the last fifteen years was the No Child Left behind Act of 2001. The parties, he believes, are much more polarized than the voters. For a definition of "polarization" in this context, see Nathaniel Persily, ed., *Solutions to Political Polarization in America* (2015), 4 and chaps. 2 and 3.

* PACs' ultimate contributors can be hard to identify. https://www.brennancenter.org/publication/secret-spending-states. Other tax-exempt groups whose political activities are strictly limited under the tax code must identify donors who give money to the group for electioneering purposes.

† Experts of all political stripes acknowledge this "hydraulic" fact about money in politics. See, e.g., Samuel Issacharoff & Pamela S. Karlan, "The Hydraulics of Campaign Finance Reform," 77 *Texas Law Review* (1999). I join many reformers in thinking, metaphorically, that dams cannot stop it but canals can channel it better. The question is: among the limited alternatives, where should we want it to go? See Raymond La Raja & Brian F. Schaffner, *Campaign Finance and Political Polarization: When Purists Prevail* (2015).

‡ These are nonprofit, tax-exempt groups organized under Section 501(c) of the In-

fined above)—that donors hoped were in practice unconstrained by BCRA's contribution limits and disclosure requirements. In the 2016 campaigns, these groups were where much of the financial action was, and they managed to evade full disclosure of their donors.[41]

The Decisions in Wisconsin Right to Life, Citizens United, McCutcheon, *and* SpeechNOW.org

Today's public debate over campaign finance is fundamentally shaped by the Court's 2010 decision in *Citizens United*, immediately followed by the DC Circuit's *SpeechNOW.org* decision, and the Court's 2014 decision in *McCutcheon*. The leading treatise in the field describes *Citizens United*'s effect:

> The case has defined the sharp divide in the Roberts Court on campaign finance cases. The divide spread across the scope of the First Amendment protections, the interests of corporations in speech, the definition and weightiness of the state's anti-corruption interest, and the deference owed to Congress on its findings on the ills of the political system—the deference that seemed to define the Court in *McConnell* began to ebb almost immediately. The controversy over *Citizens United* spread to Congress when President Obama criticized the decision during his State of the Union address, and appeared to provoke a response of denial from Justice Alito, seated just a few feet in front of him.[42]

Three elections have been conducted under the *Citizens United* regime; the 2016 election was the fourth.

ternal Revenue Code that can engage in varying amounts of political activity, depending on the type of group. For example, 501(c)(3) groups operate for religious, charitable, scientific, or educational purposes. These groups are not supposed to engage in any political activities, though some voter registration activities are permitted. 501(c)(4) groups are commonly called "social welfare" organizations that may engage in political activities, as long as these activities do not become their primary purpose. Similar restrictions apply to Section 501(c)(5) labor and agricultural groups, and to Section 501(c)(6) business leagues, chambers of commerce, real estate boards, and boards of trade. https://www.opensecrets.org/527s/types.php. For the rules on when 501(c)(4) groups must disclose their donors, see http://afjactioncampaign.org/wp-content/uploads/2012/08/501c4-Reporting.pdf

Here, I shall simply summarize these post-*McConnell* decisions' main holdings, deferring closer analysis of their specific rationales until later when they become relevant to particular issues.

Wisconsin Right to Life was a nonprofit, anti-abortion advocacy corporation that accepted contributions from for-profit companies. It sought to run ads—encouraging voters to contact their representatives and get them to oppose filibusters of judicial nominees—within the preelection blackout period during which BCRA prohibited electioneering communications. The FEC found that the ads violated BCRA's prohibition on ads referring to candidates within sixty days of the election, but the Supreme Court reversed in a 5–4 decision. It held that an ad during this blackout period not clearly advocating the election or defeat of a candidate could not be considered BCRA-barred electioneering. The majority issued a strongly-worded critique of the FEC's inquiry into the ad's motive and context; it insisted instead that the FEC must assess the ad on its face. In effect, BCRA could only limit ads expressly advocating a candidate's election or defeat.

Citizens United, a nonprofit organization with an annual budget of approximately $12 million raised from individual and corporate donations, produced a documentary critical of then-candidate Hillary Clinton ("Hillary: The Movie") which was aired to paying customers in theaters and on DVD during the 2008 primary campaigns. Citizens United wanted to release it through video-on-demand for wider viewership, but this would require that it broadcast the movie within thirty days of a primary election, which would violate the BCRA's restrictions (upheld earlier in *McConnell*) on the use of corporate and union treasury funds for an electioneering communication or express advocacy within a certain time period. Under the statute, corporations and unions may establish PACs for these purposes. The group challenged the BCRA's restriction on its electioneering as a violation of its First Amendment rights to engage in political speech independent of a campaign.

In a long-familiar 5–4 split, the Supreme Court held that the BCRA's restriction on using its own funds for electioneering communications that were not coordinated with a campaign violated the First

Amendment.* Justice Kennedy's majority opinion struck down various provisions of the BCRA. *Buckley*, he wrote, upheld FECA's contribution limits specifically to counter quid pro quo corruption, not to restrict mere access or influence that is not corruption at all and does not undermine public faith in our democracy. By definition, Kennedy continued, independent expenditures are not coordinated with a campaign and thus do not risk quid pro quo corruption. Because the film was an independent expenditure, therefore, Congress's restrictions on campaign contributions close to an election could not constitutionally limit it. A strong dissenting opinion by Justice John Paul Stevens, concurred in by the three more liberal justices, argued that Congress's compelling interest in avoiding even the appearance of corruption justified barring corporate spending in campaigns; such spending, he claimed, has "a distinctive corrupting potential."[43] Kennedy's opinion, however, also included *dictum*—that is, language going beyond what is needed to decide a case on its facts (its actual "holding")—to the effect that Congress's power to legislate against corruption in campaigns extends only to quid pro quo corruption, not undue influence corruption.[44] I discuss this dictum in the section on corruption.

In *McCutcheon*, the Court struck down the FECA and BCRA provisions that imposed *aggregate* limits on campaign contributions to federal candidates ($46,200) and political parties ($70,800) during a given campaign cycle, limits that *Buckley* had upheld on the ground that they were necessary to prevent donors from evading FECA's base contribution limits. Shaun McCutcheon, a Republican activist, had contributed to sixteen candidates and to the party during the electoral cycle and wanted to give to an additional twelve candidates, which would have exceeded FECA's aggregate contribution limits. The Court, again in a 5–4 decision with further splintering of opinions, found these limits to violate the First Amendment.

The fourth pivotal decision, *SpeechNOW.org v. FEC*, was decided in the wake of *Citizens United*—not by the Supreme Court but by the U.S. Court of Appeals for the DC Circuit, the nation's second most

* The Court did uphold the statute's disclosure and disclaimer requirements, and it did not disturb the century-old ban on corporate contributions directly to campaigns.

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influential court. Extending *Citizens United*'s dictum, *SpeechNOW.org* held that independent expenditures by Super PACs and other groups formed to accept contributions are not subject to the statutory limits on campaign contributions to candidates and party committees. They must register with the FEC as a political committee, but because their expenditures are independent, they can accept unlimited contributions from anyone—even from entities like unions and corporations whose direct contributions to parties and candidates are limited by statute—and can electioneer independently without restriction.

Trends in Political Contributions and Spending

The 2016 elections occurred just a few days before this chapter went to press. Solid information about contributions and spending in these elections (especially for Congress) was not yet available—especially given that disproportionate contributions and spending usually occur just before Election Day. Readers should also bear in mind that the 2016 elections, like all others, were unique, reflecting the complex interaction of issues, candidates, competition, closeness of the races, voter interest and turnout, strategies for traditional and online media, economic and political conditions in different regions, and many other factors. Campaign finance is a central component of this mix, of course, both shaping and reflecting the others. The data that we already have on the 2016 *presidential* election suggests at least three surprising facts:[45]

- *Campaign spending did not seem to matter much in either the primaries or the general election.* Donald Trump won the election handily despite having spent only a little more than half of what Hillary Clinton spent (and far less than what he had anticipated earlier in the campaign). He also won despite raising far less money than Clinton did. Clinton and her allies took in about $1 billion; Trump and the groups working on his behalf raised only about $600 million.
- Trump relied mostly on a Twitter account, his own money, and

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extensive news media coverage. Mrs. Clinton depended more on TV advertising, spending hundreds of millions of dollars on almost relentlessly negative attack ads.

- Although every presidential election tends to break the previous spending record, 2016 was a striking exception: *both candidates spent significantly less than their counterparts did in 2012*. Clinton's total expenses were $565 million, compared with $775 million for President Obama; Trump spent $322 million, about 70 percent of what Mitt Romney spent in 2012 ($460 million).

The following discussion of campaign finance trends is divided into three aspects: campaign spending, campaign contributions, and (very briefly) state and local campaigns. But several preliminary points are important in thinking about the information that follows.

- The numbers presented in this section represent the *aggregate* fund-raising figures of the parties and their candidates in order to discern the larger patterns in election spending. The parties spend a fraction of what candidates do in elections. In 2014, for example, candidates for Congress spent $1.5 billion, some five times more than the $291 million spent by the two parties' national committees.
- Spending and contributions do not fully measure a campaign's *resources*. Volunteers, for example, provide a crucial campaign input, not captured in contribution and spending data. Labor unions fielded an army of 128,000 volunteers in just the final four days of the 2012 Obama campaign![46] Although I could find no comprehensive study of the question, such volunteers evidently can have large effects on electoral outcomes.[47]
- A growing share of campaign spending is done by outside groups supposedly independent of the candidates and parties.
- Campaign spending and contributions are not the same as campaign effectiveness, a point developed later in the chapter.

Spending. Campaigns have grown much more costly in recent elections; spending now exceeds $6 billion in a presidential election and

$3 billion in an off-year election—and these numbers have surely escalated in the 2016 campaigns. On spending, *Citizens United*'s most notable aspect, especially in view of the jeremiads against it, is that the dire predictions about corporate spending have *not* been borne out in the four elections held since the decision. At this writing, data on the 2016 congressional election is not yet available.

In the 2012 *presidential* election, the first that it affected, spending did not increase very much, considering that presidential election years always attract and cost more money than off-year elections. Bradley Smith, a former FEC Chair who applauds *Citizens United*, makes several points: (1) very few business corporations donate to parties and most of those are closely-held family firms; (2) corporations' spending on elections is less than 5 percent of the total; (3) all outside spending (not just corporate) in 2014 was only 10 percent of the total (compared with 17 percent in 2000); (4) total political spending in 2014, adjusted for inflation, was only 1.5 percent higher than in 2006 (the last pre-*Citizens United* off-year election), whereas the spending increase over the previous eight-year period was 42 percent; and (5) it left donor disclosure rules unchanged.[48] Smith also argues, more dubiously, that the decision has increased competition and reduced the incumbent advantage.[49]

Citizens United has also had less effect on *congressional* election spending than was anticipated. In 2010, the first election after the decision, spending was $3.6 billion, a 27.3 percent increase from the 2006 midterms, but this was a smaller increase than the 30.75 percent between the 2006 and 2002 midterms, long before *Citizens United* came down.

For the 2012 presidential campaign, candidates, parties, and outside groups *reported* having spent $2.3 billion—$1.1 billion for Barack Obama, and $1.2 billion for Mitt Romney. The reported candidate spending was 47.6 percent of the total, national party spending was 29 percent, and outside spending was 23.4 percent.[50] In 2012, candidates allocated 58.4 percent of their spending to media, 13.7 percent to fund-raising, 8.3 percent to administration, 7.5 percent to salaries, 4 percent to unclassifiable, and 8.1 percent to "all other."[51]

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In the 2014 congressional elections, total spending by candidates, parties, and outside groups was $3.7 billion. Candidates accounted for about 42 percent of this spending; parties, 30 percent; PACs and 527 organizations, 13 percent; and other sources, the remaining 15 percent.[52] As always, incumbents enjoyed large fund-raising advantages: Senate incumbents raised on average almost ten times more money than their challengers, and House incumbents averaged six times more![53] Traditional media costs were high.*

To be sure, *Citizens United* did unleash well-funded, high-spending Super PACs. (I discuss the implications of this fact for campaign finance below.) In 2010 when Super PACs first appeared (and were allowed by the *SpeechNOW.org* decision, discussed earlier, to make unlimited independent expenditures), 83 of them spent $62 million. In 2012, a presidential election year, 1,310 of them spent $609 million. In the 2014 midterms (with the White House not at stake), 1,360 of them spent $345 million.[54] Business Super PACs outspent labor union Super PACs 15 to 1.[55] In mid-2015, with the 2016 campaign just beginning, Super PACs had already raised $250 million, *more than sixteen times what they had raised at the same point in 2012 and twice what the campaign committees had raised.*[56]

The cost of elections *overall* (calculated only for presidential election years but including those years' congressional elections as well) has risen steadily—from 2000 ($3 billion) to 2008 ($5.2 billion) to 2012 ($6.2 billion).[57] (Two new candidates ran in 2008, so more spending was to be expected.) The average House winner spent $407,000 in 1990 and $1.5 million in 2012 (an almost 285 percent increase); the average Senate winner spent $3,870,621 in 1990 and $11,474,362 in 2012 (a 196 percent increase).[58] Donor demographics were relatively similar to those in 1990, with 0.11 percent of the population contributing more than $200 in 1990 and 0.4 percent doing so in 2012.[59]

* The total of $763 million for media broke down into the following subcategories: unspecified media buys ($594 million); web ads ($94 million); media consulting ($30 million); media production ($17 million); miscellaneous media ($15 million); broadcast ads ($8 million); and print ads ($2 million).

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We can better understand this campaign spending by considering it in some comparative contexts. One comparison is to campaign spending in the United Kingdom. In the UK, party election expenditures are limited to 30,000 pounds ($45,000) per contested district and 19 million pounds ($29 million) per nationwide election.[60] With about 45 million registered voters in the UK, the expenditure limits work out to 2.36 pounds ($3.63) per voter for a nationwide election. The British system, of course, differs from ours in many ways: fewer voters, fewer and less costly media, perhaps more free TV time; smaller landmass, stronger parties, unified government, smaller area, shorter campaigns, and so forth.

A second contextual comparison is between our spending on campaigns and our spending on other items. Holiday shopping, for example, was forecast at almost $617 billion in 2014;[61] indeed, more than $31 billion would be spent on holiday gift cards alone.[62] The average shopper's holiday spending of $804[63] dwarfs the infinitesimal share of Americans (0.04 percent) who spend more than $200 in an election cycle. In 2015, the cosmetics industry's revenues were estimated to exceed $60 billion;[64] Americans also spent almost $6 billion on just the five most common cosmetic surgeries, and another $4 billion on the five top nonsurgical cosmetic procedures.[65] Consumers also spent more than $10 billion on movie tickets in 2014, almost triple what was spent on the congressional elections.[66]

Politics is inevitably expensive in a vast, diverse, media-driven country like ours. Town meetings, soapboxes, and water-cooler conversations are cheap and important, but most campaigning is done through televised debates, advertising, direct mail and other costly media, and increasingly the Internet. Money is necessary to communicate political ideas effectively; even negative advertising conveys useful information to voters.[67]

A strong case can be made, then, that we should spend more on elections than we do. Indeed, political scientists showed in 2003 that campaign spending as a share of GDP had not risen appreciably in more than a century![68] Even the $3.7 billion spent in the 2014 campaigns represented a mere 0.0002 percent of U.S. GDP that year.

Contributions. The parties, between them, raised $1.6 billion in hard money for the 2012 presidential election cycle. The two parties raised essentially equal amounts even though the Republicans were trying to unseat the incumbent, which generally requires much more spending. For the 2014 congressional elections, Democrats raised $736 million, and Republicans, $901 million. This Republican fund-raising advantage over the Democrats has diminished over time and may have disappeared in 2016.[69]

The donor population has grown significantly—3,138,564 individuals (10 percent of the population) made itemized contributions in 2012—but it remains small and very lop-sided. Less than 0.5 percent account for most of the money contributed by all individual donors.[70] Of the donations that are disclosed under the statute, only 0.23 percent of Americans contributed more than $200 in 2014, and a much smaller group (0.04 percent) contributed more than $2,400.[71] An elite corps of 769 bundlers, who collect contributions of at least $50,000, directed $186.5 million to the Obama reelection campaign.[72] Super PACs supporting specific presidential candidates spent $239 million.[73] The Open Secrets organization found 69 reported bundlers for Romney who raised $17 million and then 37 bundlers who were undisclosed by Romney but revealed in a variety of press reports.[74]

The 2014 *McCutcheon* decision applied to contributions (unlike *Citizens United*, which concerned expenditures). In *McCutcheon*, the Court struck down the statute's aggregate contribution limits, but the decision's actual effects on the concentration of donations among the very rich are less than one might think, once enforcement realities are considered. Adam Bonica and colleagues show that the FEC did not seriously enforce those limits: In 2012, with the limits ($117,000) still in effect, they identified more than 1,800 individuals and a smaller number of families who exceeded them. Studying the top 0.01 percent of the voting-age population (those listed in Forbes's list of the 400 wealthiest individuals), they found that the vast majority of these super-wealthy donors gave a lot and gave often,* steadily

* Bonica et al. treat these contributions as what economists call a normal consumption good: As their wealth has increased, they make larger donations, which constitute a smaller

increasing their share of the total contributions to 40 percent in 2012.[75] The same general pattern was already evident in the 2016 presidential campaign.[76]

Some of Bonica et al.'s empirical analysis of donations by the super-wealthy and smaller donors—their distribution by party and ideology, and their likely effects—are worth quoting at length for its wealth of information. (I omit citations, some examples, and methodological passages.)

> The Democrats have come to rely, increasingly, on contributions from individuals, particularly big money. Contributions from organized labor, never dominant, have fallen in importance. The relative proportions of funds raised by Democrats from the top 0.01 percent and from organized labor provide a telling comparison. The top 0.01 percent, whose donations had been roughly on par with those of labor during 1980s and early 1990s, outspent labor by more than a 4:1 margin during the 2012 election cycle. While Republicans had a slight advantage in fundraising from the top 0.01 percent during the 1980s, this trend had reversed by the mid-1990s, with Democrats raising more than Republicans from the top 0.01 percent in six out of eight election cycles between 1994 and 2008. Only in the last two election cycles did Republicans regain the advantage in fundraising from the top 0.01 percent. While it is difficult to gauge the effect of the Democrats' reliance on contributions from the wealthy, it does likely preclude a strong focus on redistributive policies.
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> For individual campaign donors, we have explored who gives how much to whom in terms of the ideology of the donors and candidates. In 2012, 62 percent of contribution dollars raised from the top 0.01 percent went to Republicans, accounting for 40 percent of the party's total campaign dollars. . . . Although contributions from the Forbes 400/Fortune 500 skew somewhat to the right, a sizable percentage of their contribution dollars go to sup-

fraction of their income. On the electoral influence of the super-wealthy in some other countries, see Darrell M. West, *Billionaires: Reflections on the Upper Crust* (2014), chap. 5.

port candidates who are left of center. . . . As a rule, individual donors exhibit high levels of partisanship in their giving patterns, and the super-rich are no exception. The vast majority have given at least 90 percent of their contribution dollars to one or the other party. Of those who split their contributions between parties, most give predominantly to the moderate wings of both parties. As such, the bimodal density of contribution dollars reflects the ideological diversity in the contributors, rather than individuals purchasing access or otherwise acting strategically in ways that cause them to disperse their contributions widely. Only three of the 30—George Soros, Larry Page, and Sergey Brin—would be placed in the "progressive" wing of the Democrats. Similarly, only one of the 30, Charles Koch, is to the right of the mean Republican member of Congress. The big contributions [appear] as moderate only in the limited sense that they are less ideologically extreme than the small contributions.

The ideological diversity of corporate elites is not simply a function of firm-specific incentives that would cause a firm to stake out an ideological position. Bipartisan boardrooms are the norm. One way a firm maintains political access is to have both high-profile Democratic donors and high-profile Republican donors within the firm. A consequence of the ideological diversity of the corporate community is to help keep the political financing system competitive for both parties, while at the same time ensuring that firms remain well connected in both parties.

. . . [T]he 30 richest Americans are diverse but relatively moderate. The distribution of contributions from the top 0.01 percent of the voting age population is more extreme than the Forbes 400/Fortune 500 but less extreme than the small donors. While Forbes 400/Fortune 500 individuals are more moderate than small donors, their contributions tilt toward Republicans. The top 0.01 percent of donors give pretty evenly to Democrats and Republicans. Why are big donors a bit less polarized than other donors? With regard to the left, the answer seems straightforward: those who are left and rich still have a limited tolerance for redistribution. For the right, the answer seems a bit more complicated. The wealthy are often more pro-business than pro-market . . . , and are often not anti-statist.

This section has emphasized political spending in the form of campaign contributions. We should also note that even more is spent on lobbying. While a good deal of lobbying reflects corporate competition . . . much of it gets directed in ways that increase inequality. . . .

We would also be amiss not to emphasize the role of the revolving door between between politics and the private sector as another nontrivial form of political expenditure. [Examples omitted]. . . . Revolving door jobs, lobbying, and campaign contributions by the rich, when coupled with free market ideological proclivities in the voting population, are likely to have abetted the increase in inequality.

We might wonder what these individuals receive for their contributions? A decade ago, Ansolabehere, de Figueiredo, and Snyder asked in this journal, "Why Is There So Little Money in U.S. Politics?"* . . . The question we focus on is a little different: Why have total contributions and the share of total contributions from the top .01 percent risen so much in the last few decades? One possibility is that campaign contributions are just another fad for the rich in the twenty-first century. Standard economic arguments are that rational people won't make large contributions in the hope of different policy outcomes for the same reason that rational people will not expect their personal vote to influence the outcome of elections. However, when contributions become very large, then the notion that your contributions will be completely overshadowed by others may not be as true. Large contributors may also be serving as "bundlers" (fundraisers who solicit checks from other individuals and then pass the checks along to candidates and committees), similar to the collective funding of industry lobbies such as the American Bankers Association. Contributions may help

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* This research is discussed later in the chapter.

> carry the day on very specific issues that relate to income inequality—like the provisions that allow the "carried interest" income received by private equity investors to be taxed at a lower capital gains tax rate rather than the higher marginal income tax rate.
>
> More broadly, there does seem to be evidence that members of Congress represent the views of their high-income constituents much more than those of low-income ones. . . . especially in policy domains where the opinions of rich and poor diverge. When the rich and poor (90th and 10th percentile incomes) disagree more than 10 percentage points on a policy question, the odds of a policy change are completely unresponsive to views of the poorer voters. But if 80 percent of high-income voters support the change, it has a 50 percent chance of passing compared to only a 32 percent chance of passing with 80 percent support from the poor. [77]

This and other evidence establishes some broad propositions.

- Any Republican Party fund-raising advantage over the Democratic Party (except when the latter controls Congress) has lessened and is no longer very significant. In the 2016 presidential election, it flipped.
- A tiny group of super-wealthy, mostly conservative individuals provide a vastly disproportionate share of total campaign contributions, but their overall giving, while tilting toward Republicans, is fairly bipartisan, as is much corporate giving.
- Individuals tend to be more ideologically extreme than PACs and other interest groups are.
- The candidates whom individual donors support are also more extreme (the opposite is true of those supported by corporate and union contributions to PACS).[78]
- Individuals' contributions comprise an ever-larger share of candidates' funds (almost 75 percent in 2012); indeed, an even higher share of those funds come from out-of-state donors (about 80 percent).[79]
- *McCutcheon* has had little practical significance because the FEC seldom enforced the aggregate limits when they existed.

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- *Citizens United* probably made corporate spending more opaque by channeling some of it through 501(c)(4) entities that need not disclose their contributors, and such dark money accounts for a large proportion of outside group spending.[80] Still, the decision so far has affected campaign finance much less than its critics predicted. This is mainly because corporate contributions are subject to the low statutory limits on contributions, while corporate spending—as distinct from that of wealthy individuals—is very modest and not significantly partisan.*
- Although outside organizations—especially PACs that contribute to campaigns and Super PACS that spend in thinly veiled support of them—have proliferated since 2010, their actual electoral effects remain unclear. Super PAC funding comes mostly from wealthy individuals, not corporations or unions.[81] They cannot pay for a candidate's campaign costs like salaries, rent, travel, office expenses, opinion polling, legal fees, or ballot access efforts.[82] Insurgent and maverick candidates like socialist Bernie Sanders and retired neurosurgeon Ben Carson lack personal money but still were able to raise enough to be competitive without Super PACs. Scott Walker and Rick Perry got nowhere de-

* Shortly after *Citizens United* came down, Samuel Issacharoff noted:

> [T]he Court did not act at the behest of corporations eager to exploit the vagaries of campaign finance law. No corporation filed an amicus brief in the case, with only the Chamber of Commerce making the expansive case for the First Amendment. In states where corporate campaign contributions are legal (about half the states), the evidence of an urge to overwhelm elections with corporate spending is scant, at least thus far. For example, one study from California for 2001–2006 revealed that among the top ten contributors to state independent expenditure committees, there was not a single corporate interest. There were two wealthy individuals among the top ten, banking a friend who was running for governor, but the top ten were dominated by either Indian tribes or public employee unions. Even the trial lawyers—another widely disparaged group—barely eked onto the list at number ten. When all contributions among the top ten were added together for that period, the amount expended by public employee unions was about double that attributed to corporate sources. In some individual races, there were expenditures by associations of small businesses, such as real estate interests, but even they were secondary players overall.

Issacharoff, "On Political Corruption," 124 *Harvard Law Review* 118, 130–31 (2010).

spite large Super PACs, and Jeb Bush had little to show for his despite its having raised the most.[83] Indeed, total spending by candidates and their Super PACs was *inversely* proportional to the votes received in the 2016 New Hampshire and Iowa primaries.[84]

- Super PACs support liberal campaigns as well as conservative ones. In March 2016, a group led by George Soros committed to spending hundreds of millions of dollars to get out the Hispanic vote, which would presumably aid Democratic candidates.[85]
- Republican candidates traditionally dominated small donations, while Democrats led by Sanders in the 2016 race perfected the small donor online technology.[86] Indeed, relying on small donations, they sometimes vastly outraise the more establishment candidates who are aided by Super PACs.[87] Moreover, billionaire candidates like Donald Trump don't need these groups at all; indeed, they try to discredit opponents who receive Super PACs' support, demanding that they have the groups return any money received from donors.[88] (At least one Super PAC supported Trump anyway.)[89] In a variety of ways, then, candidates' financial support is a mixed blessing—indispensable but also a weapon that their opponents wield against them. Although independent expenditures can be important, parties and candidates—and small donors, in recent campaigns—still dominate campaign finance quantitatively.

State and Local Elections. This chapter focuses on federal elections. But because the Supreme Court's interpretation of the First Amendment constrains states and localities as well, the increases in dark money and independent spending in the wake of *Citizens United* are salient there as well. Indeed, *Citizens United* invalidated laws in the twenty-four states that had restricted or banned corporate election spending.[90] In these states, outside spending increased approximately 80 percent between 2006 and 2010. (States that had previously allowed such outside spending saw an increase in it of "only" 34 percent in that period.)[91]

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Also, large donors have become increasingly prominent in state and local elections. In the 2011 San Francisco mayoral election, for example, tech mogul Ron Conway created a Super PAC that raised $600,000 for Mayor Ed Lee (who raised only $1.6 million himself). This development has increased coordination between candidates and the donors to these outside spending groups, especially since their fund-raising effect looms larger in local elections. Since 2010, election spending had increased four to twenty times in governors' elections, and disclosure laws do not make it easy to track the sources of this money. Some states have tried to minimize the effects of *Citizens United* by regulating such coordination in new ways, such as providing expanded lists of scenarios that might suggest collaboration. As we shall see in the later discussion of reform proposals, some states and localities have adopted public funding of elections.[92]

The Decline of Civility in Political Discourse

Democratic politics has always been rough-and-tumble and bitter, especially since the emergence of parties in the election of 1800 and its aftermath.[93] As humorist Finley Peter Dunne said a century later with typical understatement, "politics ain't beanbag." Today, incivility in politics may be worse than ever before. (Such things, of course, are hard to measure.) Political scientist Nathaniel Persily sees an "erosion of politics-constraining norms." He notes that extreme rhetoric, routine recall elections, mid-decade redistricting, legislators hiding to prevent a quorum, widespread efforts to disenfranchise voters, and much more—"actions previously considered 'nuclear' are now conventional."[94] This toxic, hyperpartisan atmosphere, replete with assertions that the other party started it and angrily invoked examples, makes campaign finance one of many hot-button issues whose resolution is that much more difficult. This is particularly true of campaign finance because, as discussed in the final part, there is little agreement on whether there is a problem that needs solving, much less what the problem is and which policy changes might remedy it.

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ISSUES

In this section, I shall use two types of analysis—(1) the justices' debates in *Citizens United* and *McCutcheon*, and (2) the scholarly work (mostly in political science and law) scrutinizing the justices' approaches in these cases—to distill campaign finance issues and deepen our understanding of them. These issues turn on an interrelated set of conceptual, normative, legal, empirical, and policy considerations. Before discussing them, however, I present three propositions to which all members of the Court subscribed in *Buckley* (the seminal *per curiam* decision in 1976 that upheld modern campaign finance regulation's basic architecture), propositions that the Court has reaffirmed many times since—although its unanimity in *Buckley* disappeared long ago.

- Campaign spending is equivalent to speech for First Amendment purposes. They are not the same, of course, but the Court *treats* money as speech in the crucial sense that one cannot be heard in the national public sphere without spending money—usually a lot of it. As Robert Samuelson, a leading syndicated columnist, puts it: "Political speech is a public phenomenon. It aims to affect how people behave. It requires money to hire campaign staff, build a Web site, buy political spots and the like. Penniless politicians can't easily communicate."[95] Law professor Richard Briffault captures this point, saying that campaign spending is "speechy enough" to qualify for First Amendment protection.[96] The hard question, then—part constitutional law, part policy—is how much money-funded political speech is enough to serve the public interest in enabling voters to make informed decisions. This question, however, is one that the First Amendment allows politicians to decide for us *only if* they can satisfy the constitutional standard of review described next.
- Contributions and expenditures are, constitutionally speaking, entirely different. Contribution limits are permissible while expenditure limits are highly suspect. The Court's rationale for this dis-

tinction is that expenditure's size measures the quantity of speech and thus must be protected. In contrast, a contribution is only a general expression of support because it does not communicate the underlying basis for it, and the quantity of a donor's speech does not increase perceptibly as her contribution increases. It thus deserves less protection.

To implement this core distinction, the courts must apply a two-tier standard of review, assigning contribution limits to the lower, more relaxed tier where for the limits to be upheld (a) the governmental interest need only be "sufficiently important," and (b) the limit need only be "closely" tailored to serve that interest. For limits on expenditures (whether "independent" or not), assigned to the higher, more congressionally-restricting tier: (a) the government's interest must be "compelling" in order to justify those limits, and (b) the limits must be "narrowly" tailored to serve that interest. A coordinated (non-"independent") expenditure is treated as a contribution.

- Of the two interests traditionally invoked by the government to justify expenditure and contribution limits, only prevention of quid pro quo corruption satisfies the "compelling" test; preventing "influence corruption" does not. As the Court stated in *Buckley*, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[97]

In the remainder of this section, I discuss eight fundamental, indeed defining, issues: (1) the nature of corruption in politics, and whether its avoidance is the only compelling interest that Congress may invoke to justify its regulation of campaign contributions and expenditures; (2) whether "independent" expenditures are indeed independent, and whether they counter the risk of corruption in ways that direct contributions to campaigns do not; (3) the role of incumbency; (4) whether some corporate speakers pose greater corruption risks than other corporate speakers do, such that Congress can regulate the former but not the latter; (5) whether money is decisive in

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elections; (6) how our campaign finance system affects the behavior of the major parties and other actors; (7) disclosure; and (8) regulation in the emerging world of online campaigning. In what I hope is a useful addendum to these issues, I then summarize the debate between the two leading camps on these issues before turning to the final section on reforms.

Corruption in Politics

All members of the Court and all commentators agree that Congress has a compelling interest in combating corruption and the appearance of corruption (a distinction discussed below).[98] But agreement ends there. Campaign finance policy debates and litigation often center on which kinds of conduct (or conditions*) constitute political corruption.

These competing definitions are manifest in the warring opinions in *McConnell*, *Citizens United*, and *McCutcheon*.† In *McConnell*, a sharply divided Court used the narrower, quid quo pro conception of corruption and the lower standard of review to uphold the BCRA's ban on soft money contributions. (As discussed later, the Court also upheld its regulation of "electioneering communications"). Finding that soft-money had fostered manipulation of the legislative calendar and other tactics that affected policy outcomes favoring industries' interests, the majority (Justices Breyer, Stevens, O'Connor, Souter, and Ginsburg) saw this as evidence of the kind of undue influence, unequal access, and appearance of corruption that the parties *sold* in exchange for soft money, practices that Congress could legitimately

* I add "conditions" to acknowledge Justice Thurgood Marshall's claim that political corruption in the political arena includes "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990).

† Court opinions that review campaign finance statutes deal with somewhat discrete issues raised by the statutes, so I shall discuss only those parts of opinions that deal with the particular issue under analysis—here, corruption.

regulate. (It also held that the soft money ban was narrowly tailored enough to only marginally limit protected political speech.)

On the key definition of corruption, the *McConnell* minority strongly dissented. Justice Kennedy criticized the majority for having stretched the idea of quid pro quo corruption to include "any conduct that wins goodwill or influences a Member of Congress. . . . [In this view], access has the same legal ramifications as actual or apparent corruption of officeholders." More than thirty years after FECA, he observed, *McConnell*'s trial record of more than 100,000 pages failed to cite a single direct example of votes being exchanged for independent expenditures, adding that there also was scant evidence of expenditure-related "ingratiation" that in any event—and like superior access—did not constitute corruption.[99] Kennedy further insisted that the majority, by defining corruption to include undue influence, "sweeps away all protections for speech that lie in its path." Indeed, he maintained, elected officials are *supposed* to be responsive to contributions by constituents urging them to promote certain outcomes. I discuss the notion of undue influence below.

Seven years later in *Citizens United,* Kennedy got his way. The majority was correct to hold on the specific facts of the case that (1) *Buckley*'s dichotomy between expenditures and contributions applied to corporations and unions, and (2) Citizens United's film qualified as an independent expenditure. (It did not help the government's case that its logic would allow Congress to prevent the group even from using its own funds to publish a book criticizing Clinton, which seemed to sanction book-burning—a position that Justice Alito understandably found "pretty incredible.") But the majority went further— and further than necessary to decide the case. This dictum stating Congress could bar only quid pro quo corruption, not undue influence—and related language (naively or disingenuously, depending on how one views it) ignoring the reality of widespread campaign coordination of "independent" expenditures—account for much of the criticism of *Citizens United* by many legal scholars, including Laurence Tribe, perhaps the leading constitutional law expert in the country.[100]

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This same question of what constitutes political corruption was again addressed in *McCutcheon*, which struck down the BCRA's limits on aggregate contributions by any single contributor. Writing for a plurality, Chief Justice Roberts insisted that Congress "may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse."[101] Only quid pro quo corruption, the plurality reaffirmed, is a legitimate target given First Amendment principles. Neither "[s]pending large sums of money [without] an effort to control the exercise of an officeholder's official duties," nor using contributions "to garner 'influence over or access to' elected officials or political parties," constitutes quid pro quo corruption. This line between corruption and general influence, Roberts wrote, may be vague but it is essential.[102]

The *McCutcheon* dissenters, through Justice Breyer, argued that corruption, properly defined, should include disproportionate access or influence, not just quid pro quo corruption; that aggregate limits do combat corruption; and that aggregate limits were also needed to prevent donors and parties from evading the contribution limits. Eliminating those limits, he wrote, created "a loophole that will allow a single individual to contribute millions of dollars to a political party or to a candidate's campaign. Taken together with *Citizens United*, today's decision eviscerates our Nation's campaign finance laws [and threatens democratic legitimacy]."[103]

The most recent Supreme Court analysis of corruption occurred in *McDonnell v. United States*,[104] a June 2016 decision involving a former governor of Virginia prosecuted for corruption for doing favors—arranging meetings, hosting events, and contacting other officials—for someone who gave him personal gifts, loans, and campaign contributions. The case was a federal criminal prosecution, not an enforcement action under the campaign finance laws. Still, the Court's narrow definition of corruption, endorsed by all eight justices including the *McCutcheon* dissenters, will surely affect the interpretation of campaign finance laws by making clear that providing favored access does not by itself constitute the requisite quid pro quo under the cor-

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ruption statutes; the decision or action must be an official one that the official made, or agreed to make, on the donor's behalf.

What are we to make of this debate? The claims by both sides about the nature and risks of political corruption are remarkable for their uncompromising assertiveness, tendentiousness, and paucity of rigorous empirical support. Begin with the most fundamental questions: What is quid pro quo corruption, and how much of it actually occurs via campaign finance? Obviously, we cannot know how much actually occurs but goes undetected, like the dog that didn't bark. Nevertheless, there are reasons to think that such corruption is uncommon. Although it fits the legal definition of criminal bribery—indeed, "legalized bribery" is the leading epithet hurled by the system's many critics—relatively few members of Congress had been convicted of it before the campaign finance system was established in the 1970s. Since then, only two members of the House and no senators have been expelled.[105] This rarity is especially striking, as ambitious, media-hungry prosecutors have strong political and other incentives to indict politicians, especially from the other party. Bribery, to be sure, is hard to prove; it requires evidence that A tried to give something of value to official B in exchange for, or anticipation of, B's performing a specific official act that B would not have performed otherwise. Thus, it demands proof of some incriminating communication between them; as the Court in *Buckley* noted, bribery laws "deal with only the most blatant and specific attempts of those with money to influence government action."[106]

To those who assert "legalized bribery," of course, this equation with the traditional crime misses the whole point because the reality of campaign finance obviates any need for such a surreptitious transaction. Instead, it brings the bribery out into the open in the form of check-writing—and then blesses it. But someone looking for evidence of quid pro quos between donors and politicians should at least have to find them acknowledging the specific quids and quos. If all that happens is that (1) a contributor writes a check and asks the candidate to do something if elected, and (2) the candidate simply expresses gratitude for the contribution, it is not legalized bribery but a desir-

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able process of democratic representation—unless the mere giving of money to a candidate is illegitimate, which no member of the Court (or Congress) believes.

To be culpable, then, a check-cum-thank-you must be something more. Yet political scientists, election law experts, and journalists, three groups of professionals deeply interested in unearthing corrupt exchanges, have found little of it.[107] And if a check, request for action, and gratitude constitute bribery, why can Congress permit a donor to bribe a candidate a certain amount[108]* and yet threaten an administrative (not criminal) penalty† if the donor exceeds it? Does this mean that such a small bribe (or risk of it) is okay? The system's answer, ratified by the Court, is an emphatic yes—although the justices would never put it this way. But what the justices *have* held is that a contribution limit can be unconstitutional if the limit is *too low*—on the theory that the law is unduly burdening the right to contribute a noncorrupting amount.[109] But the parameters of the Court's Goldilocks zone—not too high, not too low—remain uncertain.

Adding to the confusion concerning how quid pro quo corruption actually works in politics is the principle, uniformly accepted by the Court, that it is illegal not only if it *actually* exists but even if it merely *appears* to exist. Since appearance is in the eye of the beholder, who gets to decide whether a donation creates an appearance of corruption? Empirical studies present a confused picture of appearance of corruption.[110] No jury considers this question, so the FEC (in the first instance) and judges (if and when it gets to them) must decide it—and not after the fact based on the context of a specific donation, but instead through a generic ex ante rule—that *all* contributions above the statutory level *categorically* create the *appearance* of quid pro quo corruption. If this is so, then the contribution limits, albeit constitutionally valid, are arbitrary in the sense that there is no clear justifica-

* For the 2015–16 elections, the limit is $2,700 for individual donors and other amounts for various kinds of donor committees.

† The FEC's enforcement process is remarkably mild, replete with opportunities for delay and evasion. See "Enforcement Actions" at http://www.fec.gov/pages/brochures/fecfeca.shtml#anchor257909

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tion for drawing the line at this amount rather than some other amount. Of course, most line-drawing—in law as in life—is arbitrary in this sense. (Some people are qualified to be president at age thirty-four, but the Constitution draws the line at thirty-five; the same is true of the legal drinking age, as different states prescribe different ages.) We usually rely on our elected representatives to draw lines as best they can. The First Amendment, however, makes it much harder to do so in the campaign finance context. It ordains that any contribution limits that Congress enacts must be "closely tailored" to prevent quid pro quo corruption or its appearance, and that any expenditure limits must be be "narrowly tailored" to that purpose.

Finally, there is the question of the other kind of corruption in politics, sometimes called undue influence.* This lies at the core of the public's concerns about campaign finance. But I am not at all sure what "undue" means here. Specifically, I do not see how we can distinguish it factually and morally from (a) the normal—and normatively accepted—practical politics of influence in a representative democracy, and (b) other sources of influence not necessarily connected to campaign contributions.

Normal politics in a healthy democracy necessarily entails tough, messy, horse-trading, favor-doing, and influence-peddling among politicians and interest groups with few holds barred. As one analyst puts it, "government is a blur of the high-minded and the petty, where it is often difficult to distinguish between rewards to constituents and matters of policy and principle."[111] Governmental activities are both preceded and followed by complex interactions among voters, interest groups, and politicians in which they all seek to influence each other. Short of bribery, blackmail, or some other criminal transaction, we deem these influences legitimate, salutary, and even essential. No

* Larry Lessig, a prominent legal scholar and briefly a candidate in the 2016 presidential election on a single-issue campaign finance reform platform, calls this "dependency corruption." He argues that politicians' dependence on "the funders" rather than "the People" corrupts democratic *institutions*. But while "dependency" surely occurs in many cases, it connotes an abject reliance that may or may not in fact result from a donor's dollars, whereas those dollars doubtless improve the donor's opportunities for physical or other access to the recipient or staff.

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well-informed person doubts this, nor should anyone doubt that money is one legitimate instrument among others for conveying both the information and the influence. Were this not the case, it would make no sense at all to allow any contributions to politicians, yet we do so—up to a point. Reasonable people (and the justices) obviously disagree about the point beyond which a contribution becomes illegitimate because it tends (or appears to tend) to corrupt.

In thinking about this, consider a central, often-ignored fact: *Money is only one of many sources of influence over politicians*. While no one doubts that financial support is indispensable for candidates ("mother's milk," it is called), opponents often use their campaign spending against them, so it is a mixed blessing. Indeed, political scientists find that *other* resources are usually decisive—and help attract campaign contributions in the first place. They include: better organizational skills; friendship; past contacts or ties; the size, intensity, and thus influence of interest groups; tactical expertise; valuable information; media access and free (known as "earned") TV time;* personal charisma or eloquence; name recognition; dynastic power; persuasive arguments; propitious timing; a compelling life story; and still others—especially incumbency (discussed below).†

Campaign finance rules treat money altogether differently than any of these other levers of influence: Money alone is subject to legal limitation. Why is this? Money seems more measurable and controllable than these other advantages, and it enables campaigns to purchase many other things of political value that can then be converted into some (not all) of the non-monetary advantages I have just

* Donald Trump has vastly exceeded his rivals in this category, enabling him to run a relatively cheap campaign. In March 2016, the *New York Times* reported that he had already "earned close to $2 billion worth of media attention, about twice the all-in price of the most expensive presidential campaigns in history," and twice that of Hillary Clinton, the next best at earning media. Bernie Sanders had earned more media than any of the Republicans except Trump. Of course, not all of this attention is positive. http://www.nytimes.com/2016/03/16/upshot/measuring-donald-trumps-mammoth-advantage-in-free-media.html?emc=eta1

† Political scientist Norman Ornstein claims that money matters more in down-ballot elections where there is much less of it. http://www.aei.org/publication/in-politics-money-isnt-everything-but-it-still-matters/

listed—lobbyists, for example. The $3.24 billion spent on lobbying policy makers in 2014[112] dwarfs the $1.6 billion in campaign contributions spread over many candidates and only during election campaigns. Lobbying, however, cannot be limited constitutionally, while contributions can. A detailed study of the repeal of the estate tax in 2001 finds that campaign contributions played a much smaller role than money spent for core protected speech: research and publishing, political organizing, disseminating opinion, and lobbying. Washington insiders' "most frequently repeated view was that campaign contributions are overrated when it comes to getting legislation passed. [They] consider lobbying and interest groups far more important."[113] Political scientist Nolan McCarty thinks that any effort to further restrict campaign contributions or spending would simply divert the money to increased lobbying, where equalization and control are much more problematic.[114]

Another reason reformers focus on money, of course, is inequality: The rich have so much more of it than their fellow citizens do and can use it to gain greater access or influence, multiplying their existing advantages. To the *McCutcheon* dissenters, this "derails the essential speech-to-government-action tie [and frustrates] Congress' concern that a few large donations not drown out the voices of the many."[115] But as we saw earlier, *Buckley* (and more recently, *McCutcheon*) emphatically and *unanimously* rejected the notion that the First Amendment permits Congress to justify spending or contribution limits to achieve equal access or influence.

Nevertheless, many (perhaps most) critics of the current system find this egalitarian rationale to be more convincing than the corruption rationale; it is the outsized influence of moneyed interests that they most strongly decry and think is most corrosive of democratic legitimacy.[116] But emphasizing financial inequality is odd in two important respects. The amount spent on campaigns is less decisive than how efficiently it is spent;[117] after a certain point, the marginal returns to spending decline significantly. And many of the *nonmonetary* assets listed above (especially earned media) are distributed *even more unequally* than wealth is.[118] We often ignore these

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crucial facts simply because money is so much easier to measure than these other assets are. I will discuss this misleading "monetization" of the reform discourse later.

Larry Lessig points out another fact bearing on this debate about undue-influence corruption: Many contributions come from donors who live outside the district and whom, strictly speaking, the candidate would not even represent.

> [T]he vast majority of contributions to a congressional campaign are not even from "the voters" in that district. At one point, Representative John Murtha (D-Pa; 1973–2010) had raised over $200,000, with only $1000 coming from his district. OpenSecrets.org reports that 67 percent of John Kerry's contributions in his 2008 reelection to the Senate came from out-of-state donors. His Republican opponent received 73 percent of his funding from outside Massachusetts.[119]

To summarize: Fundamental confusions pervade both the linkage between contributions and corruption, and the key concepts that define these terms and this linkage. Once we leave the rare outright bribery example, it is not at all clear what corruption is—and, as noted earlier, it is even less clear what the appearance of corruption (assuming no *actual* corruption) means.[120] As "small-d democrats," we want voters to try to influence the politicians who seek to represent them and we want them to press numerous levers of influence in order to do so. One particular form of influence—money—is approved for this purpose, yet the law deems it illegitimate only when it exceeds a certain dollar amount stated in the statute. Nor does the law tie contributions to the representative-constituent relationship; as Lessig explains, even those who are not eligible to vote for the candidates and are not directly represented by them can give them money. Supposedly, campaign finance regulation assures public confidence in the electoral and representative processes, but clearly it does just the opposite. Indeed, the more Congress has enacted new reforms to fix the loopholes left in the previous ones, the more cynical the public has become about the system.[121] An intriguing question, then, is why reformers think that new reforms, discussed in the chapter's final section, can somehow erase the growing cynicism that earlier reforms failed to dispel and may even deepen.

Independent Expenditures

The Supreme Court held in *Buckley* that Congress cannot restrict "independent" expenditures, and has reaffirmed that principle on many occasions. The Court's rationale, as noted earlier, was that expenditure limits restrict the freedom of speech and association far less than contribution limits do. They do so, according to the Court, because the quantity of the expenditure directly correlates with the quantity of speech and because its communication value is greater than that of merely writing a check for a contribution.

Both of these reasons are debatable. Although the amount spent may *tend* to correlate with the quantity of speech, this is not certain. And it is hard to see how giving money to a PAC that uses it to urge voters to "elect Smith" communicates any more than does giving money directly to Smith, who goes out and says the same thing. Of course, the PAC might instead use the money to communicate a more substantive, nuanced justification for supporting Smith, which would likely convey more (and more valuable) political information. This possibility may help explain why the Court demands greater leeway for expenditures than for contributions.

But there are several other serious problems with this distinction. One is that spending on behalf of candidates or the positions they espouse can easily become functional equivalents of direct contributions to them and thus undermine the anticorruption-based contribution limits (unless expenditures were also subjected to such limits and those limits were enforceable). For this reason, the Court only accords a higher (more constitutionally protected from regulation) status to expenditures if they are "independent" of the campaign—defined, as we saw earlier, as not being coordinated with it, directly or indirectly. This basic distinction, we also saw, lies at the very heart of the regulatory system, for two reasons: The Court deems it essential to the integrity and effectiveness of the contribution limits, and the First Amendment prohibits other limits on political speech or on spending that constitutes political speech.

Another problem with the distinction is this: Even spending that is in fact independent of the campaign "exacerbate[s] the already disturbing trend toward politics being divorced from the mediating influence of candidates and political parties. . . . Without mediating institutional buffers, money becomes the exclusive coin of the realm as politics pushes toward issue advocacy by groups not engaged in the give and take of party and coalitional politics."[122] Also, it is not clear why a distinction based on fear of corruption should apply at all to spending by parties whose very purpose, which is so essential to our political system, is to influence and promote their own candidates. Here, the notions of independence and corruption seem quite out of place, yet the Court (sharply divided, of course) has applied the distinction to party spending as well.[123] This is a classic case of a regulation begetting more regulation designed to prevent evasion of the first one: If Congress is to limit *parties*' spending for candidates, then it must also limit contributions by individual citizens to either parties or candidates.*

The fact that so much, legally, turns on the independence of these expenditures raises an obvious question: In reality, how independent are "independent" expenditures? Much depends on how assiduously the FEC can and does police this boundary. Here, the agency is (by congressional design) notoriously toothless, usually deadlocked by a 3–3 partisan division on important issues. In practice, campaigns and Super PACs use a variety of well-known ploys and loopholes to circumvent the FEC's restrictions on coordination of spending and message, while the agency temporizes[124] or looks the other way.[125] Consider just two recent examples. Hillary Clinton was still testifying before the House committee investigating the Benghazi incident when her Super PAC responded in detail to committee members'

* Chief Justice Roberts referred to this dynamic as "prophylaxis-upon-prophylaxis." *Wisconsin Right to Life v. F.E.C.*, 551 U.S. 449, 479 (2007).

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criticisms of her conduct.[126] And Super PACs are now going far beyond sponsoring advertisements, actually conducting many basic ground operations—field work, data collection, voter registration—for candidates[127] and increasing their control over candidates.[128] The coordination ban is meaningless in a political world where parties, interest groups, candidates, media, and many other sources constantly interact in and manipulate an extremely complex field of subtle influences, intimate relationships among the players, anticipated reactions, and winks and nods.

Issue ads are an important example of this enforcement dilemma. These ads, after all, are core political discourse. They are not linked explicitly to a candidate, yet they effectively aid those candidates who share the substantive position that the ads advocate at the expense of their opponents who oppose it. And the ads' sponsors, of course, intend precisely this competitive effect. Yet even if they contain little actual substantive discussion of issues, they are constitutionally protected from regulation unless they use certain "magic words" that exhort their audience, explicitly or implicitly, to support particular candidates. These words are seldom necessary; it is ordinarily quite obvious which candidate the sponsor supports.

Indeed, candidates' parties and other supporters exploited this loophole so easily that the BCRA was enacted partly to close it. Among other things, the statute limited electioneering communications—broadcast ads that refer to a "clearly identified candidate" within thirty days of a primary or caucus or within sixty days of a general election, and that is also "targeted to the relevant electorate." Invoking the distinction between impermissible "express advocacy" on behalf of a candidate, and permissible "issue advocacy" on behalf of an idea, the Court in *McConnell* upheld this BCRA limit on electioneering communications.

Also straining any commonsense notion of independence are certain practices of Super PACs, whose expenditures must be independent lest they be deemed contributions subject to the statutory limits. The *Harvard Law Review* has described these practices:

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This basic notion of Super PACs as independent of candidates is becoming increasingly attenuated with the growth and development of Super PACs, especially a new form of Super PAC focused on electing a single candidate. Single-candidate Super PACs are often set up and funded by former aides, family, or close friends of the favored candidate for the express purpose of electing that candidate. For example, the "Restore Our Future" Super PAC dedicated to electing Governor Mitt Romney as President in 2012, and "Priorities USA," a similar Super PAC focused on reelecting President Barack Obama, were run by former aides of the candidates the Super PACs were dedicated to supporting. Beginning with the 2012 election, major candidates were put at a serious competitive disadvantage if they were not supported by at least one Super PAC. In the 2012 elections, all of the serious presidential candidates had single-candidate Super PACs supporting them.* . . . Super PACs are often able to outspend the candidates they support, without contribution limits as an imposition. The major role Super PACs have come to play in U.S. elections over a short span of time has only served to diminish candidates' incentives to remain completely independent from these new groups and to fuel the fire behind collaborative fundraising efforts. . . . After the major impact these new Super PACs had in the 2010 elections, candidates rushed to take advantage of any opportunity to assist these groups in their fundraising efforts, and the FEC obliged. Candidate assistance with Super PAC fund-raising has taken several forms.

Candidates may attend Super PAC–hosted fundraisers, and may solicit contributions up to the federal limits on behalf of those groups. Candidates may use common vendors with Super PACs, such as fundraising consultants, which often raises questions about whether these vendors are improperly sharing nonpublic information between the candidates and Super PACs. Super PACs

* Bernie Sanders is the proverbial exception that proves the rule. His presidential campaign, eschewing any Super PACs, raised a huge sum in small donations.

> also may solicit contributions from the wealthy family and friends of a candidate above the amounts the candidate would be able to solicit directly, sometimes even using lists of potential donors supplied by the candidate.[129]

Responding to these sorts of ploys, California's Fair Political Practices Commission adopted rules in October 2015 to prohibit these evasions of the coordination ban in state and local elections.[130] But whether they too will be evaded by winks and nods among candidates, parties, and their supporters remains to be seen.

Another kind of faux "independence" designed to avoid the contribution limits takes the form of 501(c) (4) groups, organized under that section of the tax code to promote "social welfare." The tax code allows them to spend some portion of their funds on public education about politics, and they are not required to identify their donors/members. While barred from spending to back particular candidates, they may under certain conditions donate to groups that do. According to the *New York Times*, at least one 501(c)(4) was obviously advocating for Senator Marco Rubio during his 2016 presidential campaign, running little risk of enforcement action by either the tax authorities or the FEC.[131] Surely, other such dark money groups will do (or are already doing) the same for other candidates.

Incumbency

The relationship between incumbency and the campaign finance debate is pivotal. Most campaign contributions go to incumbents in Congress* or the White House (during a first term): donors want to return incumbents to powerful positions where they can (continue to) benefit the donors and their causes. And this incumbency advantage compounds others: seniority in Congress, name recognition, franking

* In 2012, the average incumbent House member raised nearly six times the amount raised by the average challenger. For the Senate, the average incumbent raised 8.5 times as much as the average challenger (based on data from https://www.opensecrets.org/bigpicture/incumbs.php?cycle=2012). Corresponding data for the incumbency effect in the 2014 elections were presented earlier.

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privileges, knowledge of the district, experienced staff, favorable districting maps, voter partisanship, and others. Partly for this reason, representatives win reelection at very high rates (as do presidents).* (Another reason is that constituents tend to like their own representatives even while scorning the institution as a whole.) From 1976 to 2010, reelection rates in the House have averaged more than 90 percent, while Senate rates have fluctuated between 79 and 96 percent.[132] In 2014, the reelection rate was 95 percent in the House and 82 percent in the Senate.[133] Ironically, as noted above by Bradley Smith, the much-reviled *Citizens United* decision seems to have *reduced* the incumbency advantage somewhat.

Respectable arguments can be made that high incumbent reelection rates serve us well. As Persily puts it, "high turnover and a constant fear of replacement may lead to fewer representatives with the expertise and the long-term relationships necessary to build trust. Paradoxically, the more effective the electoral check on incumbent behavior, the less willing the average legislator may be to compromise."[134] To this, I would add that incumbents are likely to be better than newcomers at understanding the politics and policy of government programs, and thus better at controlling the bureaucrats who administer them. Trade-offs are unavoidable here as everywhere else in political design.

For present purposes, however, the most salient facts about incumbents are these: They write the campaign finance rules, influence how the FEC will enforce them, and have strong incentives and opportunities to use that power to shape campaign finance regulation to enhance their own electoral prospects and weaken those of potential challengers. In *Buckley*, those challenging the contribution limits cited these incumbency advantages as reasons to invalidate the limits, but the Court rejected this argument on the ground that the limits were the same for all candidates,[135] which of course raises the question of whether this formal equality in the face of immense incum-

* To be sure, incumbents are not the only ones who benefit from the high reelection rate. The greater legislative experience, policy continuity, and influence on legislation and with the agencies that goes along with incumbency all can benefit the electorate as well.

bency advantage misses the real point. These realities help to explain why past reforms have been so easily evaded, why the public has little confidence in what past reforms have wrought, and why future reforms should be approached with extreme skepticism.

Although the Court's reason for treating incumbency advantages as constitutionally irrelevant is unpersuasive, another justification for doing so has more heft. Incumbency is just one of many variables that may favor or disfavor candidates electorally, albeit a very important one, as we have seen. (Incumbency can sometimes be riskier, especially in a severe economic downturn or a Watergate-type scandal.) But although it is usually very advantageous, I see no principled reason to insist that Congress design the various contribution and other limits to compensate for this factor while leaving the others unregulated. Nor can the Court determine reliably just how much of an advantage incumbency is, either in general or in any particular campaign.

Distinctions among Types of Speakers

The Court's campaign finance decisions have included some statements that are at least superficially inconsistent. On the one hand, as noted earlier, it has emphasized that the First Amendment prohibits "restrictions distinguishing among different speakers; Congress can't allow speech by some but not others."[136] On the other hand, the campaign finance statutes have long drawn such distinctions—for example, prohibiting both contributions and independent expenditures by foreigners and agents of foreign governments, and banning both corporations and unions from using their general treasury funds to make campaign contributions.* In another example of differentiation, Con-

* The reasons for banning the use of treasury funds are both the large potential infusions coming from those funds and the view that politically diverse union members and corporate shareholders should not have their common funds used for political purposes.

The Court's position may remind some readers of Anatole France's quip about the law's "majestic equality [that] forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

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gress imposes different contribution limits on donors depending on whether they are parties, PACs, or other groups.

This issue came to a head in *Citizens United* where the Court divided on, among other things, whether corporations enjoyed full First Amendment rights. (The Court had earlier recognized the importance of voters receiving information from corporations about issues affecting business,[137] but not corporations' *own* speech rights per se.)[138] Many critics of *Citizens United* insist that corporations are merely artificial persons, not real, flesh-and-blood ones, and that their resources are so vast that they can in effect buy elections. In the decision, the Court allowed corporations to make unlimited independent expenditures on campaigns, holding that "[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether."[139] In doing so, it overruled a 1990 decision, *Austin v. Michigan Chamber of Commerce*,[140] that had allowed a state to ban political speech based on the speaker's corporate identity. The Court in *Citizens United* held that *Austin* contradicted the line of cases barring restrictions on political speech based on the speaker's corporate identity or its wealth. *Austin*'s logic, it reasoned, would allow Congress to bar wealthy media companies from paying for their own political speech* even though a corporation must publicly disclose its campaign spending but need not disclose most of its other efforts to influence government. Tracking *Buckley*'s finding that contributions and expenditures have different relationships to quid pro quo corruption, the *Citizens United* majority held that corporations' independent expenditures did not cause it, and that the fact that some shareholders might disagree with the corporation's political speech through independent expenditures could not justify banning it. For all these reasons, it also overruled the part of *McConnell* that had limited such expenditures.

The dissenting justices, in a forceful opinion written by Justice Stevens (his last on the Court), noted that prior laws and the Court's

* Congress has not yet done this; a BCRA provision exempts such companies from the corporate expenditure ban.

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own decisions had restricted corporations' political activities more than the activities of others in order to reduce the special risks of corruption posed by the use of corporate treasury funds. In any event, Stevens argued, the Citizens United group remained free to speak by contributing to its own PAC or by electioneering before BCRA's time limits kicked in. But Stevens challenged an even more fundamental tenet of the Court's canon: its "crabbed view of corruption" under which quid pro quo corruption was the only compelling concern that could justify regulation, thereby preventing Congress from targeting the "undue influence" on politics exerted by corporate money. In reality, he insisted, such influence was immense, with "distinctive corrupting potential" and the risks of drowning out noncorporate voices and "undermining self-government."

Again, powerful arguments exist on both sides of this issue of whether Congress can regulate some speakers but not (or more than) others. In favor of regulation, we do not want our electoral and political systems unduly influenced by wealthy individuals and corporations. As we have seen, such individuals donate a very high fraction of campaign contributions, and there can be no doubt that their contributions give them greater access to politicians; these donors both demand and command their attention and presumably assume that they are getting value for their money.[141] Some presumably view this as a political investment.[142] In this sense—and also in the sense, discussed earlier, that speech today requires money in order to reach and persuade an audience—money does talk. When one adds to these individual donations the large amounts spent by PACs, Super PACs, and other putatively independent entities—linked to already powerful corporate, labor union, and other well-organized interests—the danger of drowning out the voices of the vast majority of ordinary Americans becomes profound and perilous to our democracy. Indeed, even very large individual campaign contributors say that they no longer plan to contribute to campaigns because even their contributions are submerged in campaigns now dominated by Super PAC spending.[143]

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- Some speakers, especially media, already have their own megaphones—usually highly tendentious ones—that cannot constitutionally be constrained. It is hard to see why some speakers should be limited when the *New York Times*, *Wall Street Journal*, Fox TV, MSNBC, social media, and countless other publications are free to spend as much money as they like to speak and exercise political influence.
- Apart from the serious First Amendment issues that legislative efforts to control money in elections raise, such efforts inevitably create distortion and favoritism. For example, they make it harder for challengers to mount effective challenges to incumbents, magnify the effects of non-monetary factors in elections, and constrain candidates' communications with voters.
- As discussed in the next section, the factual premise of the concern about plutocracy appears to be false, or at least greatly exaggerated.

Money and Electoral Outcomes

The discussion of the amounts, sources, and types of campaign contributions and spending raise perhaps the most important question: How does this money actually affect electoral outcomes? Campaign reform advocates routinely insist that money buys elections and votes in Congress, and that it goes disproportionately to conservative candidates. Yet political scientists who study these questions consistently find that the effect of campaign spending at the margin is either small or shows no regular, discernible pattern. Raymond La Raja and Brian Schaffner, for example, studied states that allowed unlimited spending by corporations and/or unions and found that this spending had little or no effect on partisan outcomes and incumbency reelection rates.[144] In fact, for contributions that the parties report to the FEC (not including their informal networks), the Democrats have been raising more money than the Republicans: In the 2008 presidential election, the Democrats' margin was $41.8 million and this widened to $47.3 million in 2012 and promises to be even larger in 2016. In the 2014 congressional elections, the gap was $189.3 million; in 2010 it was even larger, $230.4 million.[145] What best explains outcomes—even more than the many *non-monetary* resources listed earlier in the section on incumbency—are the politician's (and his or her party's) ideology, voting record, campaign "ground game," and constituents' preferences.

The canonical study was conducted by Stephen Ansolabehere and colleagues and published in 2003.[146] The study's conclusion (omitting methodological discussion) is straightforward—and contradicts the common claims:

> An extensive literature exists that attempts to measure the political efficacy of interest group donations. Almost all research on donors' influence in legislative politics examines the effects of contributions on roll call votes cast by members of Congress. Dozens of studies have considered the effects of contributions on legislative votes, across hundreds of pieces of legislation. We surveyed nearly 40 articles in economics and political science that examine the relationship between PAC contributions and congressional voting behavior. . . . Overall, PAC contributions show relatively few effects on voting behavior. In three out of four instances, campaign contributions had no statistically significant effects on legislation or had the "wrong" sign—suggesting that more contributions lead to less support. . . . Overall, our findings parallel that of the broader literature. As regressions like these make clear, the evidence that campaign contributions lead to a substantial influence on votes is rather thin. Legislators' votes depend almost entirely on their own beliefs and the preferences of their voters and their party. Contributions explain a miniscule fraction of the variation in voting behavior in the U.S. Congress. Members of Congress care foremost about winning re-election. They must attend to the constituency that elects them, voters in a district or state and the constituency that nominates them, the party. . . . This finding helps to explain why there is so little money in politics relative to the enormous payoffs to organized interests in influencing government policy

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> [known as "Tullock's puzzle"].* Money has little leverage because it is only a small part of the political calculation that a re-election oriented legislator makes. And interest group contributors—the "investors" in the political arena—have little leverage because politicians can raise sufficient funds from individual contributors. It is true that when economic interest groups give, they usually appear to act as rational investors. . . . However, this "investor" money from organized groups accounts for only a small fraction of overall campaign funds. Since interest groups can get only a little from their contributions, they give only a little. As a result, interest group contributions account for at most a small amount of the variation in voting behavior. *In fact, after controlling for legislator ideology, these contributions have no detectable effects on the behavior of legislators.* (emphasis added)[147]

A 2012 literature review by Ansolabehere on the same issue reached the same conclusions.[148] Other political scientists—most notably in a

* The study's authors deepen this puzzle by noting the billions of dollars contributed in each campaign cycle, the proliferation of corporate PACs (and now Super PACs), and the many millions of individuals who make campaign contributions (almost all of which are small, as we have seen). They then go on to explain this conduct using a number of different datasets to test whether campaign contributions are more affected by income growth and thus are a form of consumption, or instead by government spending growth and thus are political investments:

> In our view, campaign contributing should not be viewed as an investment, but rather as a form of consumption—or, in the language of politics, participation. Recall that almost all money in the existing campaign finance system comes ultimately from individuals and in relatively small sums. We therefore expect that the factors that determine why individuals give are the factors that drive total campaign spending. The tiny size of the average contribution made by private citizens suggests that little private benefit could be bought with such donations. Instead, individuals give because they are ideologically motivated, because they are excited by the politics of particular elections, because they are asked by their friends or colleagues and because they have the resources necessary to engage in this particular form of participation. In short, people give to politics because of the consumption value associated with politics, rather than because they receive direct private benefits. Those who give to politics are also disproportionately likely to participate in other ways, including attending meetings, writing letters, talking to others and voting. . . . They account for most of the campaign money in politics. Political giving should be regarded as a form of consumption not unlike giving to charities, such as the United Way or public radio.

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2014 article by Martin Gilens and Benjamin Page—find that economic elites and business-oriented groups have much more impact on policy decisions than average citizens and mass-based interest groups do.[149] This article, however, does not challenge (or even cite) the Ansolabehere et al. analysis. Indeed, their article is not about campaign finance at all, so it does not discuss the effect, if any, of contributions and spending on policy outcomes. The substantial elite influence on policy outcomes that Gilens and Page find has many possible sources; after all, wealthier people engage in *every* form of political activity more than poorer ones do: writing letters, attending meetings, voting in primaries and general elections, contributing, lobbying, and much else.[150] And as noted earlier, the amount of money spent on lobbying, which is not regulated, vastly exceeds that spent on campaign contributions.

Finally, there is the vital question of what causes what. Because correlation does not prove causation, campaign contributions *might* occur because potential contributors are attracted to winning candidates (not just incumbents) and their positions, rather than because contributions cause their electoral victories. Of course, both of these propositions could be, and likely are, true to some extent and at the same time.

Effects of Campaign Finance Regulation on Parties and Other Actors

The laws that regulate campaign contributions and spending affect the political system and its actors in various ways. Perhaps the most important effect is to diminish the role and effectiveness of parties. Today, the parties cannot control the flow of money into campaigns, which gives them that much less leverage over the candidates, their messages, and their tactics in elections.

In preparation for the primaries before the 2016 conventions, for example, the candidates had to move quickly to attract media attention and tie up large donors early, declining exploratory committees and opting for Super PAC fund-raising instead.* *New York Times* ana-

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* But contributions to campaigns and to Super PACs are to some extent a zero-sum game. Wealthy traditional donors say that they are withholding donations from the former

lyst Nate Cohen finds that "[a]long with Internet fund-raising, Super PACs are helping to form an alternative campaign finance model that is eroding party control over the primary process."[151] Other party-weakening factors such as the growing bloc of independent voters and the rise of non-party media platforms (discussed below) also induce candidates to rely less on the party apparatus to approve or shape their campaigns. Candidates rely increasingly on non-party staff and resources: media handlers, campaign consultants, voting data analysts, election and campaign finance law experts, special accountants, contribution bundlers, etc. Independent candidacies, always hard to mount, are even more so now due to these and other (e.g., ballot access rules) high barriers to entry.

This marginalization of parties by non-party staff and resources is not new, and its causes go well beyond campaign finance patterns. Hostility to parties goes back to the earliest days of the Republic, captured most famously in James Madison's critique of factions in Federalist No. 10,[152] and later institutionalized in Progressive Era reforms designed to weaken parties, reforms that remain with us particularly at the state and local levels (where parties are strongest). These anti-party measures—always promoted as "more democracy"—included referenda and recall procedures; non-partisan elections; judicial elections; direct election of U.S. senators; requirements that delegates to national conventions be selected through primaries and caucuses over which party leaders have little influence; "sunshine" laws that ban closed-door meetings; bans on legislative earmarks; and the kinds of campaign finance rules analyzed in this chapter.[153]

Today's parties are in particularly bad odor due to gridlock[154] in Congress (although, as discussed below, this gridlock probably reflects their weakness more than their strength); growing disaffection with Washington; voters' higher levels of education and sophistication; more self-styled independents; and the new online platforms

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because the latter dwarfs their efforts. http://www.wsj.com/articles/big-obama-donors-stay-on-sidelines-in-2016-race-1447375429 that sow disdain for parties and have replaced some of their traditional functions.

Even so, the case for strong parties remains even more compelling today than it was in 1950 when the American Political Science Association issued its important "Toward a More Responsible Two-Party System"[155]—more compelling because we now know what happens when party control is attenuated. A politics dominated by entrepreneurial candidates—unmediated, unvetted, untested, and unconstrained by parties—conduces to disorganization, irresponsibility, opportunism, and inability to deliver on promises. For all their flaws, parties perform their crucial, traditional functions, albeit in a different environment. They have the strongest possible incentives to recruit solid, marketable candidates, provide coherent ideological choices, develop realistic policy options, organize legislative activity, and simplify voter choice. Given limited voter information and interest, party identification makes voter choice more rational than otherwise (e.g., just voting for the first name on the ballot). In a country in which politics is merely a sideshow for most voters most of the time (as political scientist Jack Citrin has noted), parties maintain a steady commitment to it. In contrast to today's many narcissistic, flash-in-the-pan candidates (including Donald Trump), the parties are oriented to the long term, determined to maintain their brands. They provide stabilizing ballast against transient follies and enthusiasms.

In the summary below I distill the debate about parties and suggest how they can be strengthened.

Disclosure

Today's campaign finance disclosure rules were enacted long before *Citizens United* and the proliferation of unregulated independent expenditures by non-party groups that need not disclose their memberships. They were also enacted before the Internet made cheap, rapid, easily accessible information dissemination possible. Such

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changes make disclosure policy an even greater area of contention than before.

Opponents maintain that mandatory disclosure violates donors' privacy rights and, on highly controversial issues, may even cause adverse publicity and intimidation, thus burdening their acts of citizenship and reducing their giving. Disclosure advocates, in contrast, tend to downplay the importance of donors' privacy interests. They emphasize that *public* office is at stake, after all, and that transparency will increase the legitimacy of, and public confidence in, a campaign finance system in which private donors provide most of the campaign funds used by parties and candidates.* This view also taps into a common concern, discussed earlier, about excessive influence by moneyed interests in politics. Finally, disclosure enables citizens who must decide how to vote to take into account which candidates accept money from which donors, according that factor whatever weight they wish. But even when disclosure requirements are favored, their particular design—what must be disclosed and in how much detail, reports' format, frequency, and user-friendliness, the penalties for non- or tardy compliance, their enforceability, and so forth—remain important regulatory issues.

Many states and localities impose their own disclosure requirements, which vary considerably among jurisdictions. In reviewing these laws under the First Amendment, the Supreme Court—including in *Citizens United*—has largely sided with the disclosure advocates, upholding mandated disclosures against constitutional challenge. In *Doe v. Reed*,[156] a 2010 ruling, it upheld a state law requiring disclosure of petition signers for a referendum on a measure to protect domestic partnerships. Subjecting disclosure requirements to a less demanding standard of review than the Court applies to restrictions on speech, the justices (with Justice Thomas dissenting) upheld the requirement despite claims that it would invite anti-gay harass-

* The statute authorizes public funds to help pay for conventions and, if candidates accept them, presidential campaigns.

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ment of disclosed signers. The Court found no specific evidence to support this fear, but it noted that a future challenger might show that compelled disclosure would subject signers to "threats, harassment, or reprisals from either Government officials or private parties," perhaps tipping the constitutional balance against disclosure. The empirical evidence on how disclosure laws actually affect behavior is thin, but a new study that exploits state-state and before-and-after differences in these laws and practices finds that they affect contribution patterns only negligibly, regardless of donation size and ideology.[157] Another study, however, indicates that setting a disclosure threshold too low, as many states now do, can discourage small donations (a $50 threshold caused past donors to decrease giving by 50 percent), and urges focusing instead on larger ones.[158]

To what extent is disclosure of campaign contributions and spending a substitute for direct controls on those activities? If sunlight is the best disinfectant (as Justice Brandeis claimed), perhaps fuller disclosure in real time would enable watchdog groups and the public to monitor these transactions, expose questionable financial relationships between donors and candidates, and cast votes better informed about these relationships. If direct controls on contributions and spending are unavailing—because, say, they are unconstitutional, unenforceable, too restrictive or costly, or otherwise undesirable—then disclosure mandates may be the best available policy option. Still, it seems perverse to require disclosure of $200 contributions while allowing unlimited anonymous spending by outside groups.

Even where direct controls are constitutional, of course, people will still have different answers to key policy questions about optimal trade-offs among conflicting values—for example, between transparency and conflict-of-interest rules, on the one hand, and the secrecy needed for political bargaining, on the other. Some values may not conflict much or at all (e.g., limiting large contributions and requiring disclosure), but policy trade-offs in campaign finance policy abound.

Indeed, one might think that transparency through greater disclosure would be a no-brainer—but one would be wrong. Indeed, Congress's omnibus 2016 budget law barred regulators from even considering tougher disclosure rules for corporate donors and Super PACs.[159] And as noted earlier, existing disclosure rules for these groups are easily evaded or rendered opaque when their donors are entities rather than individuals.[160]

Regulation of Online Campaign Activity

Much core campaign work—communication with potential voters and donors about candidates, issues, fund-raising, and mobilization—has moved online since the 2008 campaign, and this movement has snowballed since then. We are only beginning to grapple with the implications of this change, and of related developments such as the massive collection by Facebook and other social media of personal data about voters. With an estimated 78 percent of Americans now having a social network profile of some kind and receiving much of their news through those portals, the risk that this data will be used to influence elections cannot be ruled out. Indeed, anti-Trump employees at Facebook reportedly explored using this data to weaken his candidacy, only to be rebuffed by their superiors.[161]

In an aptly titled essay, "The Campaign Revolution Will Not Be Televised,"[162] Persily argues that our thinking about campaign finance—and about its regulation—is rooted in what is becoming a technological relic: the thirty-second TV ad. Lost in the furor over *Citizens United*, he says, is that the film at issue there (an "ideologically motivated hatchet job") was online and accessible only to those who sought it out, unlike the traditional partisan- and PAC-sponsored TV spot. Online voter-targeting platforms such as Google, Facebook, Amazon, and their ilk, Persily shows, are the main future vehicles for campaign money. As election law expert Richard Hasen explains, regulating them will raise even more constitutional and practical problems than regulating traditional media.[163]

This is a revolutionary change with vast implications for campaign finance. Reformers, Persily notes, have seen TV advertising as a special target for two main reasons that made it a focus of BCRA: its

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putative power to persuade (and mislead), and the fact that it can be regulated. Internet advertising is altogether different:

> In general, the FEC (and Congress) have left the internet alone when it comes to campaign regulation. [Apart from limited disclosure requirements] online communications are uniquely unregulated. . . . The concern about regulating online communication is well placed. Certain critical concepts in campaign finance law become especially contested in the cyberspace setting. Moreover, any domestic election authority, from whichever country, will find it difficult to enforce regulation on the web—which is worldwide, after all.

Congress and the FEC cannot control online campaign ads as either a practical or legal matter. No federal agency can control a foreign website, nor can it easily distinguish domestic websites from traditional media whose election coverage and endorsements (and the money spent on this) are constitutionally impervious to regulation. Indeed, as Persily points out, any rule that depends on establishing the identity of the speaker would be hard to implement in the online context; "the internet is potentially even more fertile ground for anonymous, unaccountable spending . . . [A] website video could come from any source anywhere in the world. . . . The internet . . . provides the perfect breeding ground for the most polarizing, least accountable, and most finely targeted forms of political communication."

Persily concludes from all this *not* that regulation of online campaign activity is impossible but rather that effective regulation will have to come from the online portals themselves as they refine their existing rules for commercial and other users—about nondiscriminatory access, tone, disclosure, misrepresentation, and fairness—in light of the many new challenges posed by online campaigning and the limited constitutional power of the government to prescribe these rules directly. In this new world, he speculates, "private regulation . . . may be better positioned to preserve democratic values than the government ever could."

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SUMMARY

Where does our exploration of these eight issues leave us? In the last section of the chapter, I shall review the leading proposals and approaches for reforming the campaign finance system. But before doing that, it is worth considering how political scientists, election law experts, and other well-informed specialists on American electoral politics come down on these issues and their policy implications. In this debate, one side claims to be "realists" about both the nature of the campaign finance problem and how to reform it, while dismissing the other side as "romantics."* (The so-called romantics in turn claim that they are the *true* realists.)

The modern version of the debate began back in the 1950s when leading political scientists began to conduct detailed theoretical and empirical studies of political parties as distinctive organizational types. Any organization, they argued, is constrained and defined by three types of incentives—material, ideological, and solidary—each with its characteristic advantages and disadvantages. Parties deploy different versions and mixes of these incentives to attract and motivate their workers and supporters enough to win elections, to govern once in office, and to perpetuate the party's effectiveness.† Traditionally, parties in many states and cities (Albany and Chicago, for example) were political machines that relied mainly on patronage (jobs, contracts, favors) and other material benefits to secure and retain power, often in unprincipled, corrupt ways. Their leaders were political professionals skilled at bargaining behind closed doors. Opposing them were predominantly middle-class, "clean government" reformers who, like Progressive-Era reformers, wanted to use antiparty measures to dismantle the machines and replace them with more public-spirited, honest, policy-oriented, transparent, participatory, efficient government.

* Other analysts label them "pragmatists" and "purists." Raymond J. La Raja & Brian F. Schaffner, *Campaign Finance and Political Polarization: When Purists Prevail* (2015).

† Especially in the old days, party leaders also used these resources to enrich themselves and their allies.

When scholars like Edward Banfield, James Q. Wilson, and Martin Meyerson at the University of Chicago studied both kinds of organizations (and their variants), they found that the machine organizations tended to govern more effectively than the more idealistic reformers did. The pathologies of the former (e.g., graft) were well understood, but those of the latter were less familiar. In a remarkably prescient 1962 book, Wilson carefully analyzed how these antiparty reform groups ("amateur Democrats," he called them) actually worked in three large cities. He found certain endemic, politically dysfunctional patterns. Given their members' more idealistic, antiparty beliefs, they found it harder than machines did to overcome free-rider and other obstacles to collective action, to impose internal discipline and hierarchical decision making and thus avoid divisive primary and leadership battles, and to compromise enough to get their platforms enacted and implemented. To mobilize voters and resources, they had to rely heavily on hard-to-control media and inflexible ideological appeals rather than the kinds of material and other incentives that are not tied closely to abstract principles (Wilson called them "issue-free resources"). This bias produced frequent schisms. It made it harder for the Democrats in amateur-dominated cities to attract the mass of less educated voters who cared more about their material needs, because the reformers, constrained by their distinctive mode of politics, often could not deliver the goods.

This perspective deeply informs the current debate among social scientists and policy makers about the trends, actual effects, and reform of campaign finance. The most recent chapter occurred in 2015 when Jonathan Rauch, a Brookings Institution analyst, published "Political Realism: How Hacks, Machines, Big Money, and Backroom Deals Can Strengthen American Democracy."[164] In this essay, Rauch presented an updated version of the old Chicago defense of strong party organizations controlling their candidates with top-down discipline, policy direction, staff support, and money. Calling this a "realist" defense of "transactional politics," he sharply contrasted it with "idealistic political reforms." Government needs a modern version of machines, Rauch argued, because only professional deal-makers

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(often dismissed by reformers as "party hacks") can "negotiate compromises and make them stick." Echoing Wilson, he recalled the long war waged by progressive, populist, and libertarian reformers against machines "by weakening political insiders' control of money, nominations, negotiations, and other essential tools of political leadership. . . . *Reforms' fixations on corruption and participation, although perhaps appropriate a long time ago, have become destabilizing and counterproductive*, contributing to the rise of privatized pseudo-machines that make governing more difficult and politics less accountable" (emphasis mine).

Rauch quoted Wilson's prescient prediction about how such reforms would cause gridlock: "The need to employ issues as incentives and to distinguish one's party from the opposition along policy lines will mean that political conflict will be intensified, social cleavages will be exaggerated, party leaders will tend to be men skilled in the rhetorical arts, and the party's ability to produce agreement by trading issue-free resources will be reduced." Rauch has a strong critique of how FECA, BCRA (he and many other realists opposed it), and other recent reforms have perversely rendered money's role in politics more corrosive, not less. I quote him at some length just below for three reasons. His provocative view of how campaign finance reforms have magnified the role of unaccountable money—well before *Citizens United*—is shared by many if not most of the nonpartisan experts in the field. It accords with my own views of how our politics does and should work (views honed as Wilson's student and erstwhile coeditor). And it helps one assess many of the reform proposals discussed in the final section.

> The first wave of progressivism, a century ago, took aim at dishonest graft, like bribery and extortion, and also at some forms of "honest graft," such as featherbedding and patronage, but it left ordinary political donations mostly alone. Disappointed by the results, a second wave, beginning in the 1970s, spread the net much more widely, establishing a web of legalistic rules and regulations which have made it much harder for candidates and par-

ties to raise money, on the general theory that fundraising and dependence on big-dollar donors are inherently corrupting. The result was not to reduce the amount of money in politics or to reduce the influence of special interests but to drive money to unrestricted channels, such as party committees. When progressive legislation restricted those channels too, the result was to push money into so-called "independent" spending by super PACS, nonprofit organizations, billionaires, and other actors who are less accountable, less pragmatic, and less transparent than Tammany ever was. To be sure, many social and political changes, not just progressive laws and regulations, have contributed to the growth of the gray market for political money. Some of what is happening would have happened anyway. But to acknowledge as much does not get the progressive paradigm off the hook: its raison d'être for four decades or more has been to sequester political professionals from political money, opening the way for amateurs to take over the job. Raymond La Raja, a political scientist, . . . points out that money raised by party committees almost tripled in real dollars from 1988 to 2004. After [BCRA] banned unrestricted donations to parties, party fundraising went into a mild decline—and spending by outside groups rushed in to fill the gap, going from trivial in the 1990s to $1 billion or so by 2012. "The campaign finance system has strengthened the hand of partisan activists by limiting the flow of financial resources to the formal party organization and its technocratic staff," he writes. "The campaign finance rules constrain coherent, party-based organizing to such an extent that partisans have side-stepped the rules to create organizations such as super PACs." To organize coalitions and deals, political machines need to talk to and organize their networks and supporters. But that imperative runs afoul of the weirdest and most perverse of modern progressive obsessions: the attempt to restrict "coordination" of campaign efforts between political parties and either their own candidates or their outside supporters. In the progressive worldview, limiting the money which private interests can give directly to

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candidates and parties does little good if the interests can pretend to spend independently while quietly letting candidates and parties direct the spending. For progressives, in other words, coordination is a way of circumventing the quarantine on political contributions. For a machine, of course, coordination with a party is something else: the whole point of politics. If a machine can't organize, assist, and direct its politicians and supporters, it might as well not exist. "The restrictions on party coordination force parties to spend 'independently' of candidates," writes La Raja. "This arrangement is not only a parody of what parties are about in most democracies, but encourages inefficient use of resources (hence ever more money is needed), legal gamesmanship, and diminished political accountability."

Predictably, trying to disconnect politicians and parties from each other and their supporters has created a gray market in coordination; driven resources, professional talent, and influence to unaccountable outside groups; hindered candidates' and parties' ability to control and transmit their message; and underwritten the growth of a burgeoning independent political infrastructure which is difficult (at best) for leaders to organize and influence. Even in principle, efforts to define and ban unacceptable "consultation" and "cooperation" criminalize politics arbitrarily. For example, conservative groups in Wisconsin have been investigated and raided by state prosecutors for spending money on issue ads in consultation with Governor Scott Walker, a form of political collaboration which a federal judge ruled is perfectly legal. Overturning that ruling, a federal appeals court threw up its hands: "The Supreme Court has yet to determine what 'coordination' means." The kinds of questions which the appeals court said await resolution are hopelessly metaphysical: for example, "What if the [coordinated] speech implies, rather than expresses, a preference for a particular candidate's election?" It's hard to assemble power in government if consulting or cooperating with the people you are assembling is a criminal act—or if you can't tell whether it's a criminal act.[165]

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This, then, is the essence of the "realist" case for rejecting the basic thrust of FECA and BCRA, modulating transparency in order to facilitate political negotiations, and returning to a system in which parties are strengthened by channeling more of the money and competitive resources through party institutions controlled by party professionals who define its policy positions and political behavior. This case has been embraced by many prominent scholars of American politics such as James Q. Wilson, Nelson Polsby, Bruce Cain, Francis Fukuyama, Jack Citrin, Nathaniel Persily, Richard Pildes, Raymond La Raja, Nolan McCarty, and Stephen Ansolabehere. I shall say a bit more about this party-strengthening approach in the final section.

The "realist" view has not gone unchallenged. Perhaps the sharpest response comes from political scientists E. J. Dionne (who is also a leading columnist) and Thomas Mann, both affiliated with the Brookings Institution and prominent advocates of the BCRA reforms.[166] They criticize the self-styled realists as "romantics" who ignore the public's reasons for rejecting machine politics and who are "fundamentally mistaken in much of their diagnosis of what ails our democracy and in many of the treatments they suggest." Acknowledging that parties and transactional politics have their place in our system and that citizens vary in their attentiveness to politics, they accuse the realists of naivete about the parties that Mann and Dionne see as "more receptacles of money than the pragmatic, center-seeking, coalition-building mechanisms the realists describe."

The real problem with FECA and BCRA, say Mann and Dionne, is not the reforms but how the Supreme Court perverted them in *Citizens United* with its false description of the current system. Many other commentators agree.[167] Political scientists Jacob Hacker and Paul Pierson, along with Mann, Dionne and others, add that Congress's polarization is now *asymmetric*: The Republican Party has become far more conservative and extreme than the Democrats have become more liberal.[168] It eschews compromise more than the Democrats do and uses the filibuster in the Senate irresponsibly. Hacker and Pierson predict that the ideological nature of today's parties and

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the fierce partisanship this produces will remain for the foreseeable future. The realists, they say, cannot reverse this but should instead deal with it. To Mann and Dionne, the great evil is corruption, and they impugn the realists' argument by identifying it with "Gilded Age politics, a period when political party leaders managing the large sums of money that came their way from well-endowed political interests had far more control over political outcomes."

> On this matter, our views could not be more distant from theirs. The threat to our system comes precisely from the growing power of concentrated political contributions. Redirecting these to the parties will not improve either the responsiveness or the efficiency of the political system. And the truth is that the parties themselves are already deeply complicit in the new money system. Giving more money to formal party structures would make little difference to the operation of government or the conduct of campaigns, but it would further tilt the system toward large donors. . . . If the goal of the realists is to strengthen parties, they should join rather than resist reformers in rolling back the Wild West world of political money that Citizens United and lax-to-non-existent regulation by the FEC have created. . . . Many of our governing problems are rooted precisely in machine-like political behavior: partisan gerrymanders, proliferating legal barriers to voting, a gutted Voting Rights Act, a primary system that fosters low-turnouts, and the oversized role of moneyed interests in shaping legislation. . . . The breakdown in governing that the realists are trying to cure was not caused by the reforms they so fervently criticize. Our system hit a crisis point later, most dramatically during President Obama's time in office, when asymmetric polarization took hold and the intense competition between the parties for control of Congress and the White House drove the oppositional politics of today.

Mann and Dionne especially dispute realist claims that the campaign finance reforms have weakened the parties. Today's Congress, they say, exhibits "the highest rate of party voting in the electorate and in

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Congress in at least a century,"* and today's parties are "bigger players in the financing of federal elections than any time since the beginning of the Progressive Era more than a century ago." Mann and Dionne also dispute the claim that the reforms have simply moved the money outside of party control:

> It is a mistake to assume that all or most non-party independent spending committees are separate from the parties. Here, too, the parties have adapted. Both parties have informally affiliated super PACs run by former party officials and operatives who act as surrogates for the party leaders. Another group of party-aligned super PACs established by traditional allies has, with few exceptions, followed the spending lead of party central. Even the non-aligned groups play almost exclusively in one party or the other, including those like Club for Growth and the Koch's Americans for Prosperity that got their starts well before BCRA and were spurred by differences with the "mainstream" party leadership. The major exception is single-candidate super PACs, which operate mostly in the battles for presidential nominations and account for much of the outside spending.

Other reformers join Mann and Dionne in criticizing the view of many realists that transparency and conflict-of-interest rules are often ineffective and have been oversold.[169]

The divide between these two camps, then, is wide indeed and applies to a whole range of empirical and normative issues. It is not surprising, then, that they, along with other analysts, differ as well about how best to approach campaign finance reform as a policy matter. This is the subject to which I now devote the final section of the chapter.

* Some political scientists who acknowledge this fact about party-line voting see it instead as institutional weakness. Under conditions of divided government, "such strong parties pose particular obstacles (all else equal) because the president then has fewer members of the ruling party in Congress that he or she can peel off to help enact preferred legislation." Nathaniel Persily, ed., *Solutions to Political Polarization in America* (2015), 5.

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REFORM PROPOSALS

The notion that our campaign finance system is "broken" and desperately needs fixing is so commonplace as to be conventional wisdom. It is routinely denounced as grotesque, plutocratic, cancerous, and barely disguised corruption—an excrescence on American democracy. At a time when popular agreement about important policy directions is notoriously elusive, this pervasive contempt for the campaign finance system and demand for reform approaches a consensus.

David Strauss, a law professor whose analysis is discussed below, notes a "curious feature" of these reform proposals: "the cure often precedes the diagnosis; and the diagnosis, when provided, is often a little vague."[170] He is right; neither the consensus nor the jeremiads against the system tell us much about just *why* or *how* it should be reformed. The critiques come from different directions and invoke diverse normative premises and inconsistent factual claims—as the debate between the realists and their opponents shows. Those disputants differ on whether (among other things) there is too much money in politics, more of it should flow through the parties, transparency is always a good thing, contributions corrupt politics, and politicians can alter the status quo. Many politicians, to be sure, join the reform chorus. They claim to find "dialing for dollars" demeaning, time-consuming, and a perverse diversion from their more important legislative work. But an entirely separate question is whether enough incumbents would actually vote to change a system that they have mastered, that helped put them in office, and that keeps their future challengers at a serious disadvantage.

I now discuss eight possible reforms: (1) overrule *Citizens United*; (2) redefine "independent expenditures"; (3) provide public funds; (4) require donor anonymity; (5) strengthen the parties; (6) require greater disclosure; (7) encourage small donations; and (8) allow free TV time. (Another reform—adapting regulation to the new world of online campaigning—was discussed earlier.) In considering them, we must bear in mind, as leading political scientists have put it, "how

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little we genuinely know about the operation of complex political processes and institutions, and, consequently, how likely it is that proposed reforms will prove ineffectual or, worse, counterproductive."[171] The history of campaign finance reforms, we saw, confirms this prudent caution.

Overrule Citizens United

As noted earlier, the decision is extraordinarily unpopular with the general public, so many politicians and others want to see it overruled. But I also argued that its actual holding was correct: The First Amendment does protect a group's right to spend its own funds criticizing a candidate for public office if it acts independently of the candidate's campaign rather than making a thinly veiled campaign contribution. Instead, its objectionable feature is its dictum that independent expenditures can never create an appearance of undue influence and that even if it did create such an appearance, this would not be a legitimate target of Congress.

Still, my earlier analysis shows how hard it would be to frame and enforce such a law defining and punishing undue influence. Political influence, we saw, has numerous sources, of which money is only one—and not necessarily the most decisive. The incumbents who would enact such a law have powerful self-protection biases. Even if the Court allowed Congress to act prophylactically against undue influence corruption, the strict scrutiny standard would cast a long shadow over the difficult line-drawing needed to design such a law. Finally, as Laurence Tribe has argued, the real culprit here is not the holding in *Citizens United* or even its dictum. Rather, it is *SpeechNow.org* and the DC Circuit's "utterly implausible" reading of that dictum to foreclose any restrictions on Super PACs' independent expenditures. Overruling *SpeechNow.org*, he suggests, would be easier for the Court. It would also be more important, to the extent that Super PAC spending is independent of campaigns,[172] an issue that I discuss immediately below. Denying Super PACs tax-exempt status is also possible.

Redefining "Independent Expenditures"

My earlier discussion of independent expenditures revealed four important facts. They are constitutionally protected by four decades of Supreme Court decisions. The key criterion of independence is defined as coordination with a campaign. The operational distance between campaigns and their Super PAC and other group supporters is often illusory, consisting of obfuscatory tactics that any crafty campaign finance lawyer can design. Finally, the FEC, assiduously neutered by Congress, does not patrol this line.

Two quite different changes to the treatment of independent expenditures are worth considering. One is to tighten the definition of coordination to render such evasions illegal, while also banning not only those but also any other practices that have that evasive effect, regardless of intent. Even without altering its precedents, the Supreme Court might well uphold such a law, perhaps modeled on the California Fair Political Practices Commission rules noted earlier. Such a law would "simply" enforce the existing system's congressionally and judicially-approved rules, so it is hard to see any serious, principled objections to it other than by those who also object to the *existing* contribution and expenditure limits. In reality, however, it would surely be difficult (especially under the current FEC regime) to enforce such a scheme and risk crossing the uncertain lines that the Court has drawn to protect independent expenditures.[173]

A better, far more realistic reform would turn the independence-enforcement approach on its head, doing the very opposite. Instead of trying to police the boundary between the parties and the outside groups that purport to spend "independently" of the party candidates they support, this reform would make a virtue of necessity. It would *ratify and legitimate* the coordination between outside groups and the parties, give the latter ultimate control over the spending, and end the hypocrisy, obfuscation, and Alice-in-Wonderland distortion of the pretended separation. It is not clear whether Congress could *require* outside groups to coordinate given the Court's interpretation of the First Amendment, but surely it could incentivize them to do so, perhaps through matching funds for coordinated donations. But it seems likely that many of these groups would welcome the chance to coordinate openly with the parties so as to increase the effectiveness of their funds. Increasing this coordination would be one of a number of important ways to strengthen the parties, a strategy discussed below.

Public Funding

A common reform idea proposes mandatory or, more often, optional public funding of campaigns. In practice, this has meant public funding of candidates, not of parties—although public funding could be used to buttress parties rather than candidates, as is the case in Germany, France, Australia, and Israel.[174] I discuss this below under "Strengthening the Parties."

For federal elections, FECA makes public funding available only to presidential campaigns. The Supreme Court upheld this scheme in *Buckley*, however, only because it was voluntary and thus consistent with candidates' constitutional right to spend money on campaigns. FECA allows presidential candidates to receive federal funds for the primaries according to how much they raise in contributions in at least twenty states. Major party candidates can receive a flat grant for the general election, while other parties can receive grants only if they won at least 5 percent of the vote in the previous general election. This federal money, however, is conditional on a candidate's agreement to comply with spending limits in both the primaries and general elections. A similar grant system exists for party nominating conventions, subject to a convention spending limit. The public funding system is financed by taxpayers who check a box on their tax returns allowing for a $3 contribution to the fund.[175]

This system has atrophied in recent elections, as candidates—most notably, Barack Obama in 2008—rejected this quid pro quo in favor of the default regime, unlimited spending. This enabled him to raise and spend many times more money than his opponent, John McCain. The 2016 candidates did likewise, and it seems almost cer-

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tain that future presidential candidates will do the same, rendering this particular public financing scheme irrelevant.

Many states and a few localities have adopted their own public funding systems for their elections. Again, these schemes must be voluntary to comply with the Court's interpretation of the First Amendment; indeed, it has struck down some that penalize additional spending by candidates who decide not to participate in it and thus forego public funding.[176] Two main approaches to public funding exist: full public financing, and matching funds. These systems have been described as follows:

> The full public funding approach, with a trigger formula . . . provides qualifying candidates with an initial grant of public funds and offers additional matching funds that may be triggered by a high-spending privately-funded opponent or independent group. A candidate who qualifies and opts into the system agrees to spend only public funds from that point forward. . . . The centerpiece to these systems is the trigger, which increases the amount of public money a candidate receives based on how much his privately financed opponent spends and, in some jurisdictions, based on how much third-party actors independently spend on behalf of the privately financed candidate. . . . The other popular public financing approach eschews the initial grant in favor of matching funds, in some cases offering a multiple match of small contributions. [Some of these schemes, like New York City's, contain triggers.][177]

Some jurisdictions provide tax credits, deductions, or even refunds to small donors, and some offer public funds to qualifying political parties. And foreign countries have a variety of campaign finance schemes, though many of them would raise clear constitutional objections under our Supreme Court's precedents.[178]

A different use of public financing has been proposed by my Yale colleagues Bruce Ackerman and Ian Ayres.[179] The ingenious Ackerman-Ayres proposal has two parts: public funding (discussed here) and donor anonymity (discussed next). Reviews by prominent

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law professors Pamela Karlan and David Strauss raise serious questions about some of its underlying assumptions and likely effects.[180] As it happens, Strauss's questions are relevant to most other reform proposals, so I present some of them—and his answers—here.

The public funding part of their scheme draws on the idea of vouchers, so popular in other settings like education and housing, by having the government issue all registered voters a certain number of "Patriot dollars" on a digital card that they could dispense to candidates, parties, or PACs of their choice at ATM machines. Private contributions of other dollars would still be allowed and contribution limits would be raised. In order to keep private contributions from swamping the Patriot dollars, however, a "stabilization algorithm" would kick in when the private contributions amounted to half the Patriot dollars being contributed; the algorithm would increase the number of Patriot dollars in the next election cycle. As already noted, voters could give Patriot dollars to PACs as well as candidates or parties, but the PACs would in turn have to give those dollars to candidates or parties; they could not use those dollars for independent expenditures or other PAC activities. A 2015 ballot initiative in Seattle authorized the city to distribute $100 in vouchers to all registered voters, which candidates could use if they abided by certain contribution and spending limits.[181]

Strauss thinks that providing public funding through Patriot dollar vouchers would improve on FECA by basing funding for third parties on current voter preferences rather than on FECA's existing prior-election-performance formula. Still, he wonders whether the Patriot dollars would, like other public funding schemes, risk further entrenching incumbents. Indeed, incumbent entrenchment is a serious constraint on the efficacy of most reforms, including public funding. After all, as discussed earlier, incumbents inevitably control the shape and terms of a reform because they write the rules.* With pub-

* Justice Scalia, dissenting in *McConnell v. FEC* (which upheld the BCRA), made this point powerfully:

> *any* restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents. Beyond that, however, the

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lic funding specifically, one would naturally expect the incumbents to keep the funding for challengers low enough, and its availability regulated enough, to maintain their own fund-raising and other advantages. Indeed, one may well doubt whether today's taxpayers, so disgusted with politics, will ever again agree to spend public funds for political campaigns, whether recipients be incumbents or challengers. Another question is whether people would allocate Patriot dollars as carefully as they would if the dollars were instead coming out of their own pockets.

Donor Anonymity

Strauss's analysis of the proposal for donor anonymity is also illuminating, as is Karlan's. Although anonymity could be intended to prevent special-interest deals, secrecy doesn't prevent such deals. If instead the point is to prevent contributions being used by the wealthy as bribes in return for special-interest deals, Strauss counters that contributors do not enrich politicians personally, as bribes do. Instead, donors contribute in order to get them elected—and in that case even anonymous donors achieve their objective. Since groups often promise their votes in exchange for desired policies, Strauss asks, why is it wrong for a group to provide "not votes but campaign contributions—bearing in mind that campaign contributions are . . .

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present legislation *targets* for prohibition certain categories of campaign speech that are particularly harmful to incumbents. Is it accidental, do you think, that incumbents raise about three times as much "hard money," the sort of funding generally *not* restricted by this legislation, as do their challengers? Or that lobbyists (who seek the favor of incumbents) give 92 percent of their money in "hard" contributions? Is it an oversight, do you suppose, that the so-called "millionaire provisions" raise the contribution limit for a candidate running against an individual who devotes to the campaign (as challengers often do) great personal wealth, but do not raise the limit for a candidate running against an individual who devotes to the campaign (as incumbents often do) a massive election "war chest"? And is it mere happenstance, do you estimate, that national-party funding, which is severely limited by the Act, is more likely to assist cash-strapped challengers than flush-with-hard-money incumbents? Was it unintended, by any chance, that incumbents are free personally to receive some soft money and even to solicit it for other organizations, while national parties are not? 540 U.S. at 249 (citations omitted)

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not a means of enriching a candidate but only a means of enabling the candidate to try to get more votes? . . . And if it is all right for officials to respond to contributions, then what's wrong with the quid pro quo exchanges that [the] anonymity requirement is designed to prevent?"[182] Strauss concludes that anonymity aims to prevent not special-interest deals but unequal influence. Yet if candidates want to pursue contributions from the rich by supporting policies that favor them, anonymity won't stop them. "It will be easy for officials to determine how to benefit wealthy people—either directly, by tax cuts for example, or indirectly, by policies that favor groups in which well-off people are disproportionately represented. Wealthy individuals will know who is acting in their interest and will contribute accordingly. Anonymity does not seem to be a very promising solution to the problem of inequality."[183] Strauss does concede that anonymity would prevent outright extortion.

Still, if Congress enacted a system that infused public funds into presidential or congressional campaigns based on some government match of small contributions, the Court would almost surely uphold it. If it included a trigger for public funds based on the opposition's spending, however, the Court (barring a change in membership) would likely strike it down as an effort to "level the playing field," which the Court has explicitly refused to recognize as a compelling governmental interest (the constitutional test in such cases). Indeed, it would likely strike such a measure down even though it arguably increases the amount of protected political speech, arguably reduces the risk or perception of corruption, and arguably reduces the burdens of fund-raising on candidates.[184]

I say that these effects "arguably" occur because such effects are hard to measure even though many public funding schemes are already operating. Also hard to predict or prove—the studies are mostly inconclusive[185]—is whether and to what extent such reforms would increase electoral competition and diversity of candidates, reduce large (but within-limits) contributions, affect independent expenditures, increase public confidence in the system, or alter other features of the campaign finance status quo.

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Strengthening the Parties

Many "realists" propose to encourage coordination, not prohibit it. They would redesign campaign finance regulation so as to give parties at both the state and national levels more control, not less, over their donors and their candidates' messages, campaigns, and behavior once in office.[186] As Persily explains, this strategy has trade-offs:

> [T]he pro-party approach gives up on electing moderates and focuses more on reining in extremists. . . . Party organizations need to be richer and more powerful to counteract the polarizing tendencies of outside groups, and party leaders need to have a greater array of tools to whip recalcitrant members into shape. . . . Such an approach takes as a given the huge demand for campaign funds and the inevitable influence of large independent expenditures in the post-*Citizens United* world. However, instead of trying to clamp down on the influence of all participants in the campaign finance system, the pro-party approach seeks to rectify the imbalance between insiders and outsiders by amplifying the voice of the parties so they can compete with outside groups.[187]

Law professor Rick Pildes sees, and welcomes, another "tragic tradeoff" in this party-strengthening approach—between the populist's claim to "certain modes of popular participation and the parties' capacity for effective governance."[188] Another tricky balance in a stronger-party system would be to retain some space for intraparty challenges by mavericks and insurgents with broad support, although the parties would have strong incentives to get that balance right.

The pro-party group readily acknowledges how hard it would be to achieve this change; after all, the trends have moved in the opposite direction for more than a century. Ever since the Progressive Era's antiparty reforms, powerful forces have conspired to keep them weak. Candidate selection, necessarily at the heart of parties' power, has devolved to party primary electorates. Primaries' outcomes are shaped by a relatively small, unrepresentative subset of each party's voters. They tend to be the most narrowly focused, ideologically extreme

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among the parties' adherents, those who most strongly resist bargaining and compromise *even within the party itself*. In recent years, this intraparty warfare has most toxically infected the Republican Party, but at other times (e.g., in the 1968–72 period) the Democrats were prone to it[189] (and might be again, having lost the party-unifying White House in 2016). The nominating convention delegates reflect this powerful tilt: 28 percent of Democratic convention delegates in 2008 were teacher's union members[190] and more than 38 percent of Republican delegates in 2016 were from majority-evangelical districts.[191] Almost half the states now have some form of election law in which independents and even members of the opposing party can, and often do, vote in a party's primary, further diluting its autonomy, coherence, and solidarity.[192] Those who advocate these more open primaries, including California's recent "Top Two" system, usually argue that it will make the parties more moderate, but the evidence does not yet confirm this prediction.[193]

If the state and national parties are to be strengthened vis-à-vis their own candidates and the outside groups, then certain restrictions on the parties must be eased or eliminated, and more campaign money—either from contributions (with full disclosure) or public funding— must go directly to them. La Raja and Rauch recently advanced workable proposals for both approaches.[194] This accords with "realist" claims that the BCRA ban on soft money contributions to parties simply starves the parties of needed funds while enabling wealthy donors to exert more influence through unaccountable nonparty groups.[195]

McCarty, a prominent realist, summarizes the pro-party view as follows: "Strong parties have autonomy from and bargaining advantages over special interest groups. Weak parties are those whose elected officials are free agents who can build electoral coalitions around narrow and extreme interests."[196] There is ample evidence to support this broad generalization. The key policy questions are these: Does extreme polarization in Congress (and the states) actually exist? The strong consensus among political scientists is yes.[197] Is this party polarization bad for our democracy? Again, almost all agree that it is.

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What has caused it? Here there is strong disagreement, with the "realists" blaming it partly on party-weakening reforms (especially campaign finance) and their critics blaming it instead mostly on growing Republican extremism and *Citizens United*. What can be done about this situation (the subject of this subsection)? And is it too late? Some argue that the popular culture, which lionizes personalities, has simply changed too much to nourish trust in parties.[198]

Expanded Disclosure

Reformers often propose greater disclosure of campaign contributions and expenditures. Their focus on disclosure has at least three rationales. The virtues of transparency are relatively non-controversial because the benefits seem obvious and the costs seem trivial. Enforcement seems fairly straightforward, with each party monitoring the other's (non-) compliance. And the Supreme Court, starting with *Buckley* and even in *Citizens United*, has deferred to Congress on disclosure mandates on the theory that disclosure increases the public's information without suppressing speech (except where serious reprisals might ensue, unlike the situation it faced in its *Doe v. Reed* ruling described earlier).

Ever since *Citizens United* allowed unlimited independent expenditures by outside groups (absent coordination), bipartisan coalitions in Congress have tried but failed to enact legislation, known as the DISCLOSE Act, to mandate disclosure of this dark money and other information. The act would require covered organizations that spend money in federal elections to promptly disclose donors of $10,000 or more during an election cycle.* A "covered organization" would include any corporation, labor organization, Section 501(c), 527 organization, or Super PAC (but not a party or candidate committee). It would exempt Section 501(c) (3) charitable groups whose tax status bars them from spending money to influence elections.† Other provi-

* Under existing rules, PACs only need to file reports periodically. This allows them to wait until after an election to disclose contributions that pour in just before it.

† The California Attorney General's order requiring such groups to disclose their do-

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sions aim to prevent political operatives from using complex arrangements or transfers to hide donor identities or otherwise game the system. Any covered organization that spends $10,000 or more on election ads would have to file a disclosure report with the FEC within twenty-four hours, and to file a new report for each additional $10,000 or more that it spends. The disclosure report must include the sources of all donations of $10,000 or more that the organization received during that election cycle. The act would also expand existing bans on foreign contributions.

New disclosure issues sometimes arise, fueling new demands for reform. "Bundling," mentioned earlier, is an example. Under a 2007 law, federal candidates and party committees must disclose the identity of registered lobbyists who have bundled $17,600 or more, but this doesn't apply to non-lobbyist bundlers, so campaigns need not disclose their names. In October 2015, Jeb Bush's presidential campaign decided to list the names of non-lobbyists who bundle that amount or more, a lower disclosure threshold than that used then by Hillary Clinton ($100,000) and other candidates. Even so, Bush was criticized because his list will not disclose what each bundler raised, making it harder to identify the major bundlers.[199] Reformers want to increase disclosure of bundlers' identities and amounts. And strengthening FEC enforcement of disclosure requirements is essential to their effectiveness.

Increasing Small Donations

Increasing the number and influence of small donors is a perennial goal of reformers who believe that the unequal influence blessed and arguably magnified by the existing system poses a serious threat to our democracy. This common concern is manifested in a 2010 joint report by scholars associated with both Brookings and the American Enterprise Institute (left-of-center and right-of-center, respectively)

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nors in order to solicit donors in the state was upheld by the Ninth Circuit. *Center for Competitive Politics v. Harris*, 784 F. 3d 1307 (9th Cir. 2015). The Supreme Court declined an appeal.

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to "foster citizen participation through small donors and volunteers" (in the words of the report's title).[200]

This report begins with the premise that campaign finance has become a "stale two-sided battleground" between those who seek to use limits to curb corruption—seen as the influence of wealthy interests—and those who seek to protect free speech. Hoping to "leap over the 'undue influence' v. free speech gulf,'" the report would empower small donors rather than restrict large ones. If enough people enter the system at the low end, it argues, there may be less reason to worry about the top. Moreover, increased participation is "healthy for its own sake." The report seeks to accomplish this by using new technologies like expanded broadband and access to digital media to increase open access to communications, lower information costs of participation, and improve transparency. It also urges the government to ensure that carriers provide access for political speech, and to create and maintain a website with voter registration information, candidate information with links to the candidates' websites, and real-time, downloadable electronic disclosure. Any radio or television statement would be required to publish real-time advertising logs for political spots with the FCC and on the voter website where all disclosures would be posted. Greater transparency would also enhance enforcement.

Most important, the report proposes a partial public financing system centered on matching funds on a multiple basis but only for small contributions. By imposing lower contribution limits but no expenditure caps, this system would increase prospective small donors' incentive to contribute. The public funding would be available to candidates as soon as they met a qualifying monetary threshold, and the matching funds would have a ceiling. Contributions by low-income donors would be supported by tax credits or rebates.

There are reasons to be skeptical about reformers' enthusiasm for encouraging small donations. As noted earlier, small donors tend to cluster at the ideological extremes, as their support for candidates Bernie Sanders, Ben Carson, and Donald Trump indicate. Small donors, moreover, *already* participate disproportionately in politics;

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they tend to be the same people who contact politicians, organize at the grassroots, and turn out for caucuses, primaries, and general elections.[201] As for transparency, small donors need not disclose their contributions to federal candidates until the amounts exceed $200. Even if, as the reformers hope, small donors' significance increases, requiring such disclosure by small donors may not be cost-effective and would have little effect on the perceived problem of undue influence.

Free TV Time

Purchasing TV time has grown ever more expensive, and TV exposure can be an important political advantage (or disadvantage, depending on the candidate's performance). Reformers often propose that Congress or the FCC require networks to provide free or reduced-fee time to candidates for public office (not their parties, as is done in many peer democracies). These proposals have never attracted much support. Broadcasters oppose them for obvious reasons. Incumbent politicians, who enjoy media access by reason of their prominence and official positions, have no incentive to provide it free to their challengers. The traditional argument for free TV time—that the broadcast spectrum is a public resource granted by the FCC and that its use by networks is not a private property right but a privilege to be allocated for public purposes—has become more tenuous with the spread of other media. In addition, a free time system would necessitate difficult judgments distinguishing between bona fide candidates and mere publicity hounds.

Federal law does impose an "equal time" rule requiring broadcasters to provide equal opportunities to all political candidates, but First Amendment concerns have qualified the rule with several important exceptions for documentaries, bona fide news interviews, scheduled newscasts, or on-the-spot news events, which in practice mitigate the rule's significance. Broadcasters are required to offer time to candidates at the rate charged to the "most favored advertiser," but that rate is still likely to be very high.

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CONCLUSION

Our campaign finance system is stalemated by the collision among four groups. The first consists of incumbents and powerful groups with deep interest in maintaining the campaign finance status quo. They think that it serves them well enough, especially those donors who are able to spread their political contributions around to reach both parties, hire lower-visibility lobbyists, and support friendly interest groups—as in the earlier campaign to repeal the estate tax, mentioned above. They resist opening the campaign finance system to wholesale changes outside their control.

A second group includes many journalists, some political scientists, and other reformers disgusted by a system they consider execrable, corrupt, and subversive of democracy and equality. To this group, the notions that money is speech and that corporations have important speech rights are nonsensical smokescreens concocted by the Supreme Court and its plutocratic allies to deform the First Amendment and preserve the status quo.

The third group includes reform skeptics and political scientists who emphasize the complexity of the political ecosystem in which campaign finance is embedded. They despair about the prospects for significant change (except perhaps in the disclosure area) and fear that new reforms, like earlier ones in FECA and BCRA, would produce unintended, sometimes perverse consequences. Campaign finance reformers, they warn, should be very careful what they wish for. After all, political actors' stratospheric stakes means that they will invest a great deal in manipulating the system to serve their interests. The hydraulic force of money in politics strongly propels it toward its intended destination. Non-monetary factors also shape political behavior and outcomes, casting doubt on the notion—an idée fixe for most in the first group—that campaign contributions and spending largely determine electoral outcomes. Constitutional principles constrain many proposed reforms. Incumbents, concerned more with their own short-term reelection prospects, control both the rules and their implementation. Political entrepreneurs increasingly operate on their own, largely beyond the parties' control. The FEC was designed by politicians to be a toothless cipher, making strong enforcement unlikely.

The last group—call them meliorists—consists of those who largely agree with this grim description of the status quo but are cautiously optimistic that reforms can improve on it. Recent reforms, they believe, have tried to use Canute-like fiats to abolish political realities and to prevent politicians from doing what they must in order to do their work effectively in an increasingly complex system—with predictably bad results. Instead, these meliorists want to use the inescapable political hydraulics of our system to restore and renovate the long-traditional system of parties and negotiation that recent reforms, in an effort to discredit this system, have only made more dysfunctional. Rauch, a leading meliorist, predicts that respecting those hydraulics rather than suppressing them will make unintended consequences less likely.[202]

These four groups subscribe to quite different normative, empirical, and policy claims about campaign finance but largely agree that the political system as a whole is dysfunctional. As they debate how politics should be organized and funded, the Court will, for better or worse, constrain future reforms. Its campaign finance jurisprudence is laced with constitutional interpretations that have become deeply embedded and resistant to change—although many of its key decisions were decided by only one vote! Two central pillars of this jurisprudence—a narrow conception of the kind of corruption that might justify restrictions, and a broad conception of independent expenditures that must be protected from limits—mean in effect that reformers can hope to work only at the margins of campaign finance activity, such as disclosure rules. Congress, an assembly of incumbents, is not about to rock the boat. And as campaign activity moves inexorably to the Internet, the most important rules will increasingly be prescribed there—and not by Congress or the Court.

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