

## Picture This: Campaign Finance Law and the Question of Values

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### I. INTRODUCTION

A campaign is not an election. No matter how well-financed its advertising, a campaign's success depends entirely on whether voters "buy" what is being "sold" on Election Day. Campaign finance law sets standards for how candidates and others finance their efforts to persuade (or dissuade) voters in an election.

The effort to limit the role of money in federal elections is reflected in laws that date back over a century.<sup>1</sup> In the 2012 federal elections, the state of campaign finance law reflected the failure of legislation to achieve a comprehensive set of limitations. The laws on the books<sup>2</sup> have been superseded by judicially imposed barriers<sup>3</sup> to limitations. As a result, complex regulations<sup>4</sup> enforce arguably vestigial limits. This campaign finance regime is overseen by a partisan mindset<sup>5</sup> in Congress and at the Federal Election Commission, which also serves to block legislative or regulatory innovation.<sup>6</sup>

The judicial decision most vilified and celebrated in this area is,

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<sup>1</sup> Tillman Act of 1907, ch. 420, 34 Stat. 864, 864-65.

<sup>2</sup> See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81.

<sup>3</sup> See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008); *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>4</sup> Federal Election Commission regulations are codified as Title 11 of the Code of Federal Regulations.

<sup>5</sup> See *Testy Gridlock*, THE ECONOMIST, May 19, 2012, <http://www.economist.com/node/21555610>; Jonathan Backer, *Gridlock and Dysfunction on Display at FEC Oversight Hearing*, BRENNAN CTR. FOR JUSTICE AT N.Y.U. SCHOOL OF LAW, Nov. 4, 2011, available at <http://www.brennancenter.org/blog/gridlock-and-dysfunction-display-fec-oversight-hearing>.

<sup>6</sup> Donald F. McGahn, Caroline Hunter & Matthew Petersen, *Hard Truths of Campaign Finance*, POLITICO, May 8, 2013, <http://www.politico.com/story/2013/05/hard-truths-of-campaign-finance-91084.html#ixzz2SpNL0lEv>.

of course, *Citizens United*.<sup>7</sup> Viewed least cynically, that decision is a celebration of the original American value of *e pluribus unum*—"out of many, one." The majority opinion recognizes that political debate is fueled by much more than mere giving in response to candidate or political party calls for funds to pay for the recipient's speech. The Court extols the constitutional value of other voices—independent voices.<sup>8</sup> This gives rise to the controversial conclusion that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."<sup>9</sup>

But the Court does not rest on this negative premise. The Court states that independent expenditures are a positive democratic force because "an independent expenditure is political speech presented to the electorate . . . . The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials."<sup>10</sup>

[S]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.<sup>11</sup>

This libertarian vision of heaven either naively discounts persuasion imbalances caused by economic might or astutely shackles big government's ability to control a political process that may be ugly but must remain free. Or, it may do both.

Because politics is ongoing and campaigns for elections are nearly always underway, there is virtually no chance to simply shut down the current system and build a new one from scratch (absent a very-hard-to-achieve constitutional amendment).<sup>12</sup> The rules today

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<sup>7</sup> 558 U.S. 310 (2010); Sean Higgins, *Citizens United: The Dog that Never Barked*, WASH. EXAMINER, Nov. 13, 2012 3:00 PM, <http://washingtonexaminer.com/citizens-united-the-dog-that-never-barked/article/2513358#> ("The howls of outrage began almost immediately after the Supreme Court ruled on *Citizens United v. Federal Elections [sic] Commission* in January 2010. It continued for months afterward.").

<sup>8</sup> See *Citizens United*, 558 U.S. at 314–15.

<sup>9</sup> *Id.* at 357.

<sup>10</sup> *Id.* at 360.

<sup>11</sup> *Id.* at 339.

<sup>12</sup> John Celock, *West Virginia House of Delegates Calls for Citizens United Constitutional Amendment*, HUFFINGTON POST, Mar. 28, 2013, <http://www.huffingtonpost.com/2013/03/28>

will likely be the rules for the foreseeable future, with some incremental erosion and adjustment, presumably as a result of further litigation. But that does not mean there is not a strong case to be made for various kinds of reform.

This Essay proceeds in three parts. First, I draw a thumb-nail sketch of the federal law as it exists today (and these federal law concepts generally have their parallels in most state and local campaign finance regulations).<sup>13</sup> Second, I offer a brief catalogue of predominant critiques of three significant components of current law follows, taking note of commonly suggested avenues for reform. Finally, I turn to the Essay's main focus: an exercise for identifying common values that should be served by campaign finance laws.

## II. EVOLUTION OF THE CURRENT REGULATORY SCHEME

Congress has periodically sought to curb the role of money in politics.<sup>14</sup> In the early 1970s, it supplemented long-standing bans on corporate and union spending with limits on individual contributions to federal candidates, limits on spending by candidates and others in relation to candidates, public disclosure requirements, and a system for publicly funding presidential candidates.<sup>15</sup> In 1976, the Supreme Court pushed back. In its decision in *Buckley v. Valeo*, the Court upheld the contribution limits, disclosure requirements, and public financing, but narrowed the scope of spending subject to public disclosure and struck down spending limits.<sup>16</sup>

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/west-virginia-citizens-united\_n\_2974556.html; Kathleen Miles, *Citizens United: California Poised To Become Largest Electorate To Vote On Constitutional Amendment*, HUFFINGTON POST, Feb. 21, 2013, [http://www.huffingtonpost.com/2013/02/21/citizens-united-california-constitutional-amendment\\_n\\_2728560.html](http://www.huffingtonpost.com/2013/02/21/citizens-united-california-constitutional-amendment_n_2728560.html).

<sup>13</sup> For more detailed summaries, see, for example, *Money in Politics 101: What You Need to Know About Campaign Finance After Citizens United*, BRENNAN CTR. FOR JUSTICE AT N.Y.U. SCHOOL OF LAW, Sept. 28, 2012, *available at* <http://www.brennancenter.org/analysis/money-politics-101-what-you-need-know-about-campaign-finance-after-citizens-united>; James Bennet, *The New Price of American Politics*, THE ATLANTIC, Sept. 19, 2012, <http://www.theatlantic.com/magazine/archive/2012/10/the/309086/>.

<sup>14</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604 (1996); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003); *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449 (2007); *Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

<sup>15</sup> Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972); Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

<sup>16</sup> 424 U.S. 1 (1976). The *Buckley* court upheld spending limits for presidential candidates as a condition for the acceptance of public funds. See *id.* at 57 n.65.

In the 2002 McCain-Feingold law, Congress placed all federal candidate and national party fundraising under the federal contribution limits and extended the ban on corporate and union spending to electioneering communications.<sup>17</sup> After exempting issue advocacy from the corporate spending ban,<sup>18</sup> the Court threw out the ban on corporate (and union) spending altogether in *Citizens United*, while again upholding public disclosure requirements.<sup>19</sup>

This decades-long clash between Congress and the Court has helped hone the policies that the state may—and may not—advance through campaign finance regulation. Specifically, Congress may adopt laws to curb the risk that money corrupts or appears to corrupt elected officials, which the Court has narrowly defined to be *quid pro quo* corruption. But under the First Amendment, as the Court made clear, government may not impose restrictions to foster fair competition<sup>20</sup> or disadvantage some classes of speakers (such as corporations) in making their voices heard.<sup>21</sup> These principles also extend to the financing of state and local election campaigns.<sup>22</sup>

Thus, in the 2012 federal elections, candidates, and political parties raised funds under contribution limits, disclosed their sources of funding, and were able to make expenditures without regard to opposing candidates' levels of financing.<sup>23</sup> Corporations and unions were forbidden from making contributions to federal candidates and political committees (although these entities are permitted to do so in many state and local elections).<sup>24</sup> Individuals were subject to aggregate limits on contributions to federal candidates and political committees in an election cycle.<sup>25</sup> Political action committees making

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<sup>17</sup> Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81.

<sup>18</sup> See Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).

<sup>19</sup> See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

<sup>20</sup> See *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

<sup>21</sup> See *Citizens United*, 558 U.S. at 365 (“[T]he Government may not suppress political speech on the basis of the speaker’s corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”).

<sup>22</sup> See *Am. Traditional P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012).

<sup>23</sup> 11 C.F.R. § 110.1 (2010); 11 C.F.R. § 102.9 (2002); see *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 744–45 (2008) (striking down Millionaire’s Amendment to BCRA).

<sup>24</sup> 11 C.F.R. § 114.2 (2007); see, e.g., 15 Del. C. § 8010 (2013); FLA. STAT. § 106.08 (2012); Md. Code Elec. Law § 13-226 (2011); N.J. STAT. ANN. § 19:44A-11.3 (2009); S.C. CODE ANN. § 8-13-1314 (2004).

<sup>25</sup> See *McCutcheon v. Fed. Election Comm’n*, 893 F. Supp. 2d 133 (D.D.C. 2012), *prob. juris. noted*, 133 S. Ct. 1242 (2013) (challenging the constitutionality of the

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contributions were subject to both source and size restrictions on the funds they raised. The actors who populate this universe—candidates, political parties, contributors and associations of contributors (PACs)—must adhere to limits on funding efforts to persuade voters.<sup>26</sup> Call them the “Limited.”

There is another parallel universe of “outside” spending that helps or hurts candidates. The actors here include: individuals, corporations and labor unions making independent expenditures or electioneering communications. “Super PACs” are another mechanism for outside spending. A Super PAC is an association of contributors raising unlimited sums, including from individuals, corporations and unions, to spend on political advertising that is not coordinated with candidates. Also, nonprofit organizations may raise unlimited sums from undisclosed sources to pay for advertisements and other activity with an apparent aim for electoral outcome. These outside spending activities are not subject to limits on funding efforts to persuade voters. These actors are the “Unlimited.”

### III. CONTRIBUTION LIMITS, PUBLIC DISCLOSURE, AND PUBLIC FINANCING

Current jurisprudence rejects the universality of limitations. The cliché that money is like water suggests that limitations may be an exercise in futility.<sup>27</sup> Removing limitations universally, however, may be unappetizing as well since experience also teaches that money is a means for corruption.<sup>28</sup>

Three core components of campaign finance reform are constitutional under the First Amendment: candidate contribution limits, public disclosure requirements, and public financing. Each component has survived stress testing in the courts.<sup>29</sup> While a more coherent federal law could be built on these foundations, no grand

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biennial aggregate contribution limit as applied to contributions to non-candidate and candidate committees. The case was heard in the October 2013 term of the Supreme Court).

<sup>26</sup> 11 C.F.R. § 110.1 (2010).

<sup>27</sup> See Joel M. Gora, *Buckley v. Valeo: A Landmark of Political Freedom*, 33 AKRON L. REV. 7, 26 (1999) (“Trying to equalize political opportunity and influence through limiting political speech and association is a futile task.”).

<sup>28</sup> Richard Hasen, Opinion, *Of Super PACs and Corruption*, POLITICO, Mar. 22, 2012, <http://www.politico.com/news/stories/0312/74336.html>.

<sup>29</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding contribution limits, public disclosure, and public financing); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 386 (2000) (contribution limits); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 366 (2010) (disclosure requirements).

bargain appears likely.<sup>30</sup> Indeed, partisan polarization is perhaps most acute when it comes to redrawing campaign finance rules. The incumbent protection instincts of those elected under the existing framework also help ensure further legislative stagnation.<sup>31</sup>

#### A. Contribution Limits

Candidates remain subject to contribution limits on the funds they raise. Given the governmental interest in diminishing candidates' susceptibility to corruption by money, that is a good thing; or is it?

##### 1. Critique from the Right

The candidate's message to voters is being drowned out by unlimited outside spending.<sup>32</sup> Candidates risk ceding control of their campaigns to outside spenders, who may not be "on message" even when intending to be supportive. The candidate may then be unfairly held accountable for circumstances beyond her control. Removal of contribution limits would put the candidates on a level playing field with these other spenders and enable candidates (or political parties) to absorb funding that is now arguably inefficiently directed into outside spending channels.<sup>33</sup>

##### 2. Critique from the Left

Large contributions to outside spenders are corrupting candidates because (1) the outside spender is not truly independent of the candidate and/or (2) the candidate will feel beholden to, or threatened by, the outside spender once elected to office.<sup>34</sup> Such

<sup>30</sup> See McGahn, *supra* note 6.

<sup>31</sup> See Joel M. Gora, *Free Speech, Fair Elections, and Campaign Finance Laws: Can They Co-Exist?*, 56 HOW. L.J. 763, 791 (2013) ("[R]emember who is writing the campaign finance rules. The people in power. Do not be shocked if they write those rules in ways most guaranteed to perpetuate their power.").

<sup>32</sup> *When Other Voices Are Drowned Out*, Editorial, N.Y. TIMES, Mar. 25, 2012, [http://www.nytimes.com/2012/03/26/opinion/when-other-voices-are-drowned-out.html?\\_r=0](http://www.nytimes.com/2012/03/26/opinion/when-other-voices-are-drowned-out.html?_r=0).

<sup>33</sup> Paul Blumenthal, *David Axelrod: Remove Campaign Contribution Limits to End Super PACs' Game*, HUFFINGTON POST, Feb. 20, 2013, [http://www.huffingtonpost.com/2013/02/20/david-axelrod-campaign-contributions\\_n\\_2725613.html](http://www.huffingtonpost.com/2013/02/20/david-axelrod-campaign-contributions_n_2725613.html).

<sup>34</sup> Richard L. Hasen, *The Biggest Danger of Super PACs*, CNN.COM, Jan. 9, 2012, <http://www.cnn.com/2012/01/09/opinion/hasen-super-pacs> ("A candidate who receives a large contribution will feel grateful to the contributor, and legislative policy could well skew in the contributor's direction.").

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candidates will be prone to represent the interests of big spenders.<sup>35</sup>

Here an obvious middle ground would be to increase contribution limits to candidates while narrowing the range of activity treated as independent. To the extent that the scope of activity treated as constitutionally protected independent expenditures may be narrowed by expanding statutory or regulatory tests for coordination, contribution limits could become applicable to the financing of a broader range of speech.

*B. Public Disclosure*

In upholding public disclosure requirements for outside spenders, the Supreme Court found that disclosure enables voters (and other audiences, specifically shareholders) to “react to the speech . . . in a proper way,” by understanding the interest of the speaker.<sup>36</sup> “[T]ransparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”<sup>37</sup>

*1. Critique from the Right*

Government should not compel disclosure by corporate speakers because they may face economic reprisals, harassment, or intimidation that threatens to indirectly limit the speech *Citizens United* said could not be limited. (This objection is ironic. While the First Amendment allows political speech to be financed by private economic activity, the Right deems private economic actions in response to political speech suspect.) Disclosure has become a stalking horse for re-imposing unconstitutional restrictions through intimidation.

*2. Critique from the Left*

Justice Kennedy posited, “[w]ith the advent of the Internet, prompt disclosure of expenditures can provide . . . information needed to hold corporations and elected officials accountable for their positions and supporters.”<sup>38</sup> But the current disclosure regime

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<sup>35</sup> *Id.* (“I am greatly concerned that when Election Day is over and the public will stop hearing about Super PACs, contributions to these groups will skew public policy away from the public interest and toward the interest of the new fat cats of campaign finance . . .”).

<sup>36</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 371 (2010).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 370.

has broken down. As outside spending has increased, the actual contributors to Super PACs may be obscured by intermediation of their contributions through shell companies and 501(c)(4) organizations.<sup>39</sup> To the extent *Citizens United* was a compromise, to the effect that limits may be safely removed precisely because disclosure is mandatory, the disclosure pillar should not only be maintained but enhanced.<sup>40</sup>

Could a middle ground be fashioned that clarifies when 501(c)(4) organizations (and other “non-political” entities) would be required to disclose political activity and funding sources, while also imposing new safeguards against illegal harassment and reprisals?

### C. Public Financing

Public financing is government action that affirmatively promotes political speech and gives candidates an alternative to funding by large private contributions.<sup>41</sup>

#### 1. Critique from the Right

This big government scheme forces taxpayers to support politicians they do not support. Public financing is pernicious because it breeds an entitlement class of politicians and operatives. It is both wasteful and unnecessary since candidates are free to raise an unlimited number of small donations and wage successful campaigns without need of any public subsidy, as the success of Barack Obama’s

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<sup>39</sup> See I.R.C. § 501(c)(4) (2013) (“Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.”); Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (2013) (“An organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of . . . the community.”).

<sup>40</sup> Daniel Winik, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of Citizens United*, 120 YALE L.J. 622 (2010) (arguing for broader disclosure and disclaimer definitions); Letter from Brennan Center for Justice to Elizabeth M. Murphy (Aug. 19, 2013), available at <http://www.scribd.com/doc/161376997/Letter-to-SEC-on-Corporate-Political-Spending-Disclosure-Requirement> (arguing for SEC to require disclosure of corporate political activity).

<sup>41</sup> Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 577–78 (1999) (“[D]ramatically unequal campaign spending that reflects underlying inequalities of wealth is in sharp tension with the one person, one vote principle enshrined in our civic culture and our constitutional law. Public funding is necessary to bring our campaign finance system more in line with our central value of political equality.”).



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two non-publicly-financed campaigns for president demonstrates.<sup>42</sup>

## 2. Critique from the Left

Many on the Left embrace government funding solutions. The matching of small donations may spur greater individual political activity.<sup>43</sup> As public dollars supplant private, candidates become less beholden to special interests, more responsive to the general interest of their constituents, and more engaged in outreach to persons of limited means. Public funds motivate greater citizen participation in elections and therefore create more “small-d” democracy.

It is hard to identify middle ground solely on the question of public funding between those who reject it categorically and those who think it a panacea. Instead of that fruitless quest, imagine a public financing system with full disclosure but no contribution limits other than those candidates voluntarily accept as a condition for receiving public funds.<sup>44</sup> Would this be a fair middle ground that preserves everyone’s options and objectives, or simply the worst of all possible campaign finance worlds?

## IV. AN EXERCISE: WHAT VALUES SHOULD CAMPAIGN FINANCE LAW SERVE?

The prospect for crafting new campaign finance law, other than through attrition by litigation, is depressing. Each new corruption scandal creates an almost gleeful reaction among reform advocates as the camel’s-back-breaking outrage that might just finally spur long-sought legislation.<sup>45</sup> With continued partisan gridlock, however, American campaign finance law—at least at the federal level—will

<sup>42</sup> See generally Molly J. Walker Wilson, *The New Role of the Small Donor in Political Campaigns and the Demise of Public Funding*, 25 J.L. & POL. 257, 265 (2009) (“Obama drew record support from small donors . . . In the case of a campaign in which the funds originate with many small donors, the result may well be increased accountability, legitimacy, and deliberative democratic involvement.”).

<sup>43</sup> Michael J. Malbin, Peter W. Bruscoe & Brendan Glavin, *Small Donors, Big Democracy: New York City’s Matching Funds as a Model for the Nation and States*, ELECTION L.J. (2012), available at [http://www.cfinst.org/pdf/state/NYC-as-a-Model\\_ELJ\\_As-Published\\_March2012.pdf](http://www.cfinst.org/pdf/state/NYC-as-a-Model_ELJ_As-Published_March2012.pdf) (noting that New York City’s matching fund system has increased the extent to which candidates rely on small donations).

<sup>44</sup> See *McDonald v. New York City Campaign Finance Board*, 2013 NY Slip Op 23153 (holding against state law preemption of local law extending contribution limits to non-publicly financed candidates). Note: the author represented the plaintiff and the case is on appeal.

<sup>45</sup> Mike Desmond, *Albany Scandals Spur Call for Public Campaign Financing*, WBFO 88.7: NPR NEWS & MORE (May 14, 2013, 10:08 AM), <http://news.wbfo.org/post/albany-scandals-spur-call-public-campaign-financing>.

likely remain a stilted product of unconscious design for a very long time to come.<sup>46</sup>

When faced with this kind of reality, fantasy beckons, the fantasy to craft radical or comprehensive reform systems,<sup>47</sup> or to indulge dreams of complete deregulation,<sup>48</sup> or to press for constitutional amendments to restore corporations to their intended position of service to actual human beings,<sup>49</sup> or to somehow control the political power of money in a capitalistic society. The remainder of this essay indulges a different fantasy.

Think of a blank canvas and try to contemplate the values the American public thinks campaign finance laws should serve in a democratic political system. Then consider the following exercise. In every campaign finance regulatory scheme, there are three essential players: (1) speakers, (2) candidates, and (3) voters. What rules should apply to each of them?

Let's first look at Speakers. What impressions may be drawn from the following depiction?<sup>50</sup>

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<sup>46</sup> See McGahn, *supra* note 6.

<sup>47</sup> See generally LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 264–304 (2011).

<sup>48</sup> Bradley A. Smith, *The Myth of Campaign Finance Reform*, NATIONAL AFFAIRS (Winter 2010), <http://www.nationalaffairs.com/publications/detail/the-myth-of-campaign-finance-reform>.

<sup>49</sup> See, e.g., Tony Romm, *Specter Pitches Constitutional Amendment in Response to Citizens United Case*, THEHILL.COM (Jan. 21, 2010, 7:25 PM), <http://thehill.com/blogs/blog-briefing-room/news/77473-specter-pitches-constitutional-amendment-in-response-to-citizens-united-case>.

<sup>50</sup> Of course the choice of picture is key for evoking particular judgments. Here I am exercising an author's prerogative. Different choices by a different author would likely result in a different set of reactions, questions and value-judgments. This quandary is useful as a reminder that law does not originate from objective sources merely for the purpose of achieving objective results. Indeed, especially in a field like campaign finance, in which some kind of regulation is fundamental for bringing some kind of order to an inherently disorderly democratic process, the prospect of attaining political goals often frames one's value-judgments about desirable process. Frankly, how could it be otherwise in a democratic state?

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A. *Picture 1: Norman Rockwell, Freedom of Speech (1943)*<sup>51</sup>

Picture 1: Freedom of Speech  
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What does this painting reveal? The focus is on a “regular Joe” expressing a viewpoint. Other people—from different walks of life—are listening to him. Is government in the painting? If so, is it an idealized depiction of American government, or rather of just one narrow element of American government at the core of the First Amendment, the town meeting?

If it is not government itself that is depicted, perhaps the viewer perceives instead the absence of government that lies at the heart of the First Amendment. Rockwell shows and the viewer “hears the voice” of a “common man;” no government is censoring or restricting him, except perhaps invisibly and benignly with respect to time, place and manner.

The painting invites a positive reaction to a man who is able to “speak his piece” at a public meeting and therefore for a “system” that protects his right to do so. Would that positive feeling be diminished if the central figure was painted as wearing a company decal or lobbyist badge?

The speaker is “standing up” for what he believes. His speech has the attention of both the viewer and the painted audience. The speaker is seen as perhaps a little uncomfortable at first but ultimately unafraid to be identified with his own speech. If the speaker is seen as authentic, presumably both audiences are giving serious consideration to his message.

Rockwell did not paint a literal speech. Rather, what is being said is left to the imagination of The Saturday Evening Post and

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<sup>51</sup> Norman Rockwell, *Freedom of Speech* [Painting], THE SATURDAY EVENING POST, Feb. 20, 1943, available at [http://www.archives.gov/exhibits/powers\\_of\\_persuasion/four\\_freedoms/four\\_freedoms.html](http://www.archives.gov/exhibits/powers_of_persuasion/four_freedoms/four_freedoms.html). Rockwell painted a series of four paintings based on President Franklin D. Roosevelt’s “Four Freedoms” speech of January 6, 1941.

broader American audience. To fully consider the merits of that speech, what other facts might be relevant?

For example, would it matter if this common man has been paid to give his own opinion? How important is that information for judging the merits of his argument? Further, what if the speaker has not only been paid, but is actually offering an opinion that is not his own? To put the issue another way: would an audience's positive feelings about the depicted speech change if the speaker has been paid to present a third party's viewpoint but that fact is kept secret?

If inauthenticity detracts from persuasiveness, how important is it to know the identity of the speaker, and whether he's speaking his own viewpoint without representing another party or merely serving as the mouthpiece for another?

Returning to the painting, just as important as his speech is the depiction of audience. The audience members are shown to be listening, giving the speaker his chance to persuade. The audience members are shown to care enough to listen respectfully. Each person is drawn to be free to reach his or her own conclusions. Rockwell celebrates how respectful attention informs both freedom and ability to think. "Freedom of Speech" reveals an artist's pride in a system in which ordinary people reach consensus by speaking and listening to each other.<sup>52</sup>

Furthermore, distinctions of class are not absent from the painting: the speaker is dressed in work clothes, listeners wear jackets and ties. Thus the ability to persuade and willingness to listen are shown as ideals that are not or should not be constrained by class distinctions. The painting suggests democracy grows stronger when people from different walks of life come together to make decisions.

From another perspective, Rockwell's painting may be recognized as an "independent expenditure" highlighting the value of political speech itself—in a very positive way. The speaker's expression suggests he is not an experienced public speaker, yet he appears to be thoughtful, perhaps to recite from memory something he has planned to say. Also, no one in this painting looks angry—instead we see an idealized civil society thriving by speaking, listening,

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<sup>52</sup> *In Search of Norman Rockwell's America: A Resource Guide for the Special Exhibition*, THE JOHN AND MABLE RINGLING MUSEUM OF ART, available at <http://www.ringling.org/uploadedFiles/Resources/Education/Details/InSearchofNormanRockwelldocentpacketfinal.pdf> ("In 1942 Rockwell attended a town meeting in Arlington, Vermont on construction of the local school. One of his neighbors expressed an unpopular opinion, but the rest of the people in attendance let the man finish what he had to say. This, Rockwell decided, epitomized freedom of speech.").

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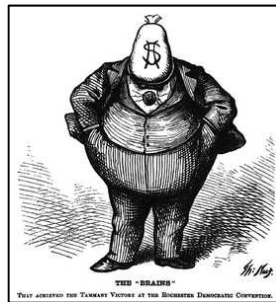
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and thinking.

Finally, the Rockwell painting, much like the celebration of free speech in *Citizens United*, is extremely simplistic—there is no passion, armband, or corporate puppet-master that could complicate the positive value of political speech. Were the speaker depicted as a demagogue or capitalist tool at a rally where the audience is apparently being swayed by an appeal to prejudice or being bombarded with misinformation, the viewer would likely have a different reaction.

Speaking of extremes, the next picture reveals character in a Candidate.

B. Picture 2: Thomas Nast, “The ‘Brains’” (1870)<sup>53</sup>



Picture 2: Thomas Nast, "The Brains"

Nast is the anti-Rockwell.<sup>54</sup> His cartoon indicates a very different view of politics: cynical, fearful, mocking, nasty. The figure depicted draws dislike, scorn, and fear. He is Boss Tweed, a defiant embodiment of the corruption of public service by money.

The cartoon's subject is especially feared because he wields power. He is anti-democratic in that his only motivation is desire for self-enrichment. That goal may be a competitive virtue in a free-market economy, but it is contrary to the meaning of public service. His desire for payoffs suggests he will ultimately serve only those willing to enrich him.

The money bag seems to be Nast's manner of unveiling Tweed's secret true nature, one that Tweed certainly strove to conceal from public scrutiny up through indictment, conviction, and

<sup>53</sup> Thomas Nast, *The Brains*, HARPER'S WEEKLY, Oct. 21, 1871 (a caricature of William M. ("Boss") Tweed).

<sup>54</sup> See, e.g., FIONA DEANS HALLORAN, THOMAS NAST: THE FATHER OF MODERN POLITICAL CARTOONS (1st Ed. 2013).

imprisonment.<sup>55</sup> This is additionally unsettling since his constituents generally would not know what goals are driving his actions. The public's victimization is complete precisely because Tweed's self-aggrandizement has been hidden.

This caricature is a challenge to the electorate to hold accountable and ultimately prevent Tweed and other politicians of his kind from holding public office or exercising any kind of public power. If this kind of politician should appear, an appropriate response would be to have him handcuffed and arrested. But that poses a problem: the public doesn't know this secret mind. Moreover, it is not a politician's mere thoughts or motivations that would be actionable as corruption; only actual behavior matters. Before punitive measures may be justified as taken in response to criminal acts, this cartoon suggests some kind of proactive limits on the politician's behavior may be needed to deter criminality and safeguard the public against possibly nefarious motivations.

But Nast does not clearly identify any solutions. Instead, there is defiance in Tweed's posture and self-satisfaction in his girth. His dimensions suggest the task will be daunting and underscore Nast's explicit challenge, "what are you going to do about it?"<sup>56</sup> One may see in Nast's cartoon the very essence of the argument for campaign finance reform, "money corrupts politicians," ironically, perhaps, in the form of an attack ad.

Finally, there are Voters. Unlike speakers and candidates, the voters' role is played *en masse*. Voters vote *en masse*. In the days and months before an election, voters are subject to mass appeals. What image might suggest how voters perceive this process of being informed?

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<sup>55</sup> Renée Lettow Lerner, *Thomas Nast's Crusading Legal Cartoons*, GREEN BAG ALMANAC 59, 63 (2011), available at [http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1289&context=faculty\\_publications](http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1289&context=faculty_publications) (noting that the Tweed Ring controlled much of the press with a combination of bribes and threats).

<sup>56</sup> This question also appears in a second Nast drawing, *The Tammany Tiger Loose*, HARPER'S WEEKLY, Nov. 11, 1871, published shortly before the election and depicting a Roman Empire-style arena where the Emperor (Tweed) and his Ring watch the Tammany Tiger maul the republic, symbolized by Columbia. Her ballot box lies broken at her side. See HALLORAN, *supra* note 54, at 139–40.

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*C. Picture 3: Jackson Pollock, Autumn Rhythm (Number 30) (1950)*<sup>57</sup>



**Picture 3: © 2013 The Pollock-Krasner Foundation / Artists Rights Society (ARS), New York**

Unlike the other two pictures, the Pollock painting is not overtly political. For many voters, the act of voting is their primary—and perhaps—only overtly political act. Many factors influence lives lived primarily in a non-political space. Various speech may be hurled at voters that later comes to bear on the decisions taken in a voting booth. It is therefore likely appropriate to consider a vision that is a blur of images. Hard as it may have been to read Tweed’s mind, at least until revealed by Nast, it is that much harder to assess what a mass of voters may glean from the variety of messages generated during an election campaign.

For these reasons, an abstract expression may be as good a starting point as any for trying to unravel the role speech plays in influencing an electorate. How does the voter experience an election campaign? Is it an experience of bombardment? Of mind-numbing redundancy? Of being swayed back and forth? Of finding confirmation of pre-formed conclusions? Of cacophony that overwhelms the ability to find coherent meaning? Of being dissuaded from participating? Do many voters find they ultimately learn little to nothing that helps them reach an informed decision?

Or, is it an experience where the voter feels enabled to intelligently draw together different strands of information from many sources, both dominant and secondary? Does this information dissemination help the voter to “think for herself?” Does this process allow the voter to see a bigger picture that enables her to make choices in casting a ballot to best serve her self-interest and that of

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<sup>57</sup> Painted in 1950, *Autumn Rhythm (Number 30)* is on display at the Metropolitan Museum of Art in New York City, see <http://www.metmuseum.org/toah/works-of-art/57.92>.

her community, state, and nation?

Prior to an election, voters are the central focus of a process of information distribution and intake. Are we concerned that the quality of governance is diminished when voters are subjected to appeals to emotion, misinformation, one-sided messaging, or other “distortions” that impede rational decision making? Or, do we inherently distrust government- and self-appointed communication referees (including the press) in a high-stakes game that determines the distribution of power in our society?

The Pollock painting suggests that not all speech is equal. Messages come in various forms and sizes, and from different directions. Does that inequality pose problems? Some of these expressions appear contradictory or conflicting. Other messages seem more harmonious, achieving a reinforcing echo effect. At over eight by seventeen feet in scale, the work dwarfs the viewer, much like a voter may think expenditures on campaign communications are excessive. But why does it matter how much is spent on conveying information to voters? Does it matter if some spending sources predominate—or which sources predominate? Is there an information-distribution process that best suits most voters? Beyond casting a ballot, what other responsibilities or conveniences should voters have as active or passive consumers of political information?

Finally, like the Rockwell and Nast works, the Pollock painting may be imagined as an independent expenditure or, perhaps, all independent expenditures seen *en masse*. Does the resulting abstraction sow confusion in the electorate? Or is abstraction actually a clever means of leading voters to conclusions the speaker/spender intended? Either way, does the painting make a case for more public disclosure of political spending sources, so that voters may make judgments informed by a context that is deeper than the message itself?

## V. CONCLUSION

Unlike most legislation, the prospect of any change in campaign finance law is a direct threat to every elected official's self-interest.<sup>58</sup>

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<sup>58</sup> Bradley A. Smith, *The Separation of Campaign and State*, N.Y. TIMES, May 24, 2012, <http://www.nytimes.com/roomfordebate/2011/06/27/the-court-and-the-future-of-public-financing/the-courts-separation-of-campaign-and-state> (“It is dangerous to have the incumbent government directly involved in shaping the quantity and substance of the very debate intended to determine how voters judge that government's performance on election day.”).



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Sometimes this threat is trumped by a corollary opportunity for personal or partisan gain that makes change seem worth the risk. But neither of these phenomena facilitates reaching consensus on reform among opposing partisan opponents.

Ideally, law is the product of rational minds. Thus, “rational basis” is a bedrock principle of constitutional jurisprudence. What, if any, campaign finance rules would be the consensus choice among persons who neither hold nor aspire to elective office? What values would their choices reflect? Would those choices and the values they embody withstand scrutiny under the Constitution?

The majority in *Citizens United* proclaims that speech directed to and among the citizenry is vital for the protection of enlightened self-government.<sup>59</sup> It is this exchange of information that leads to consensus.<sup>60</sup> Yet it is likely fantasy to think we can seek or find consensus on how to re-shape campaign finance law through gut reactions to some pictures. But then again, if we simply cannot trust visceral responses to speech and images precisely because such results are obtained through manipulation and repetition, haven’t we then lost faith in democracy as we know it?

As Thomas Nast might have asked: what are you going to do about it?

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<sup>59</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010).

<sup>60</sup> *See id.*