

On Political Corruption

Samuel Issacharoff¹

Lurking beneath the surface of all debates on campaign finance is a visceral revulsion over future leaders of state groveling for money. The process of fundraising is demeaning to any claim of a higher calling in public service and taints candidates, policies, donors and anyone in proximity to the bleakest side of the electoral process. The intuition is that at some level money must be corrupting of the political process and that something must be done to limit the role of money. In turn, and almost inescapably, the same logic appears to lead to the belief that less money is better than more money, and that successful reform must bring down the cost of modern electoral campaigning.

It is the logic of constricting the effects of money that has defined the modern era of campaign finance reform, an era that began after the Watergate scandals and is now completing its fourth decade. Time and again, the impetus behind the reform effort has been to depress the amount of money spent in campaigns and thereby limit the associated moral stain. So long as a stench attaches to money and by extension those who seek to direct political outcomes with money, the cause of campaign reform takes the high road. If money be the root of all evil, the logic runs inescapably to reducing the amount of money in the system.

With these efforts at limitation comes the inevitable result that some speakers will be handicapped in expressing their views and that the total quantity of speech will be curtailed. This point is not really disputed by the reform camp, nor by the dissident wing of the Supreme Court. The oft-invoked claim that money is not speech,² or the corollary claim of the rights of listeners not to be bombarded with excesses from one side of the debate, all assume a right to limit the propagation of certain views, presumably those that are overfunded or overexposed, or both. For Justice Stevens and a persistent minority on the Court, the claim that money is not speech lends constitutional cover to the search for a way to squeeze money out of politics. In turn, it is this attempt to restrain the amount of money in the system that runs headlong not only into the teeth of the constitutional concern of the majority of the Court but also into the brute fact of the increased scale and complexity of campaigning for contested office.

¹ Reiss Professor of Constitutional Law, New York University School of Law. I am grateful for the comments of Richard Briffault, Cynthia Estlund, Lucas Issacharoff, Burt Neuborne, and Richard Pildes. Ari Glogower and Jeremy Peterman provided the indispensable research assistance.

² *E.g.* Nixon v. Shrink Mo. Gov't PACac, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) (“Money is property; it is not speech”).

It is the restrictive aspect of the reform agenda that is ultimately both its strength and its constitutional liability. Constitutionally, it is the efforts to limit the spending of political campaigns – if not directly speech, then certainly “speechy enough”³ – that has occasioned a long line of losses for reform efforts, with *Citizens United v. FEC*⁴ but the last in an almost unbroken streak. *Citizens United* continues the troubled tradition of *Buckley v. Valeo* in drawing the divide between political contributions and expenditures. The former gives rise to potential regulation in order to combat a poorly specified corruption of the political process – a concept to which I return below – while the latter is seen as the domain of expressive liberties which the state may not seek to restrict.

Academic commentary has long had a field day with the core expenditures-versus-contributions rationale of *Buckley*. The division between a system of limited contributions but unchecked expenditures runs afoul of the animating logic of the 1974 campaign finance amendments, and is in fact a regulatory structure created by the Court.⁵ 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 unchecked.⁶ In the meantime, persistent majorities of the Court have rejected the *Buckley* divide between contributions and expenditures, with only a divide over which way to topple *Buckley* serving to shore up a frayed body of law.⁷ Whether framed as the incoherence⁸ of doctrines or simply as a doctrinal approach that proved not workable over time,⁹ critics scored easy hits on the Court’s attempt to muddle through the

³ The term is from Richard Briffault.

⁴ *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

⁵ FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE* 238 (1992) (arguing for the interrelation between contribution and expenditure limits in the statutory FECA scheme).

⁶ Justin A. Nelson, Note, *The Supply and Demand of Campaign Finance Reform*, 100 COLUM. L. REV. 524, 527-32 (2000) (assessing the market pressures on campaign fundraising).

⁷ See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 373 (3d ed. 2007) (providing the stable division on the Court over *Buckley*); J. Robert Abraham, Note: *Saving Buckley: Creating a Stable Campaign Finance Framework*, 110 Colum. L. Rev. 1078, 1091-92 (2010) (tallying half the Justices that have served since 1976 as opposed to the *Buckley* framework).

⁸ Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 37 (2004)

⁹ Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1736 (1999) (“A generation has shown us that the expenditure/contribution distinction of *Buckley* not only is conceptually flawed, but has not worked”). For recent doctrinal examples, see *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009) (combining contributions and independent expenditures to reach conclusion that the total amount of support provided by an individual to a judicial candidate was enough to create an appearance of bias); *McConnell v. FEC*, 540 U.S. 93, 139 (2003) (upholding limitations on expenditures of soft money on ground that they “limit the source and individual amount of donations. That they do so by prohibiting the spending of soft money does not render them expenditure limitations”); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 464 (2001) (“There is no significant functional difference between a party’s coordinated

difficult issue of money and politics. I confess to being a participant in looking at the failures of Court doctrine, all the while conceding in articles and the classroom just how intractable the problem seemed. Indeed, writing with Pamela Karlan a decade ago, I concluded that not much could be done about the pull of finance in elections, such that the perverse “hydraulic” of money finding its outlet¹⁰ led many campaign finance reform efforts to backfire and empower the unaccountable tertiary actors (the PACs, the 527s, and all the rest) at the expense of the candidates and parties who actually had to stand for election before We the People.

In this Essay, I want to take *Citizens United* as a launching point to revisit the central *Buckley* paradigm and examine what possibilities for reform remain to redress the vulnerabilities of democracy before the powers of the purse. Beginning with *Buckley*, the Court recognized that contributions had the unique potential to corrupt the political process. Revisiting the contribution process and the concept of corruption may yield a better handle on what should be the sources of concern in the financing of electoral campaigns. The approach taken here is to start by examining the competing concerns that tend to get glossed over by underspecified references to political corruption, then to see if the processes of financing campaigns can both be addressed to those concerns and to increasing the level of democratic engagement in politics. Specifically, the focus is on mechanisms to empower democratic participation in two ways, one by inducement, one by prohibition. Counterintuitively, the inducement looks to increasing the amount of contributions to campaigns to alleviate some of the concerns over political corruption, while the prohibition seeks to bar those in a position to distort public policy – such as government contractors – from providing support to candidates’ campaigns. The argument rests heavily on the idea that the threat to democratic governance may come from the emergence of a “clientelist” relation between elected officials and those who seek to profit by relations to the state.

The inquiry begins in Section I with the contested terrain over the nature of political corruption. Once the Supreme Court announced in *Buckley* that the concern over corruption or even its appearance could justify limitations on money in politics, the race was on to fill the porous concept of corruption with every conceivable meaning advocates could muster. As with the elusive term “diversity” after *Buckley*’s contemporary, *Bakke v. Board of Regents*,¹¹ a thin constitutional reed transformed the lexicon of political debate. In Section II, I advance the argument that the corruption concern is really a concern with ensuring public – rather than private – outputs from the policy making process. This reorientation toward corruption in the outputs of policy making suggests effective solutions to address the financial vulnerabilities of

expenditure and a direct party contribution to the candidate, and there is good reason to expect that a party’s right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending.”).

¹⁰ Issacharoff & Karlan, *supra* note ____.

¹¹ 438 U.S. 265 (1978).

democracy compatible with the Court’s strong constitutional stance in *Citizens United*, which are discussed in Section III.

I. What is Corruption?

Prior to *Citizens United*, the Court had struggled between two competing sources of potential corruption as a result of the financing of political campaigns. A fairly consistent majority position, beginning in *Buckley v. Valeo* itself, had focused on the capacity for the corruption of the candidates who aimed to ingratiate themselves to their wealthy backers. Such corruption was defined in terms of actual quid pro quo arrangements, while allowing more expansively for the potential dispiriting influence of the appearance of such arrangements.¹² The alternative vision viewed corruption as a distortion of political outcomes as a result of the undue influence of wealth.¹³ On this view, the source of corruption was large expenditures capturing the marketplace of political ideas¹⁴ and the corrupted entities were, at bottom, the voters who could only succumb to the entreaties of money. Corruption itself is poorly defined in this view, and appears as a “derivative” problem from broader societal inequalities.¹⁵ As formulated in *Austin v. Michigan Chamber of Commerce*, the only case to adopt squarely the distortion of electoral outcomes view of corruption, the inequities born of wealth are compounded by the unnatural ability of corporations to amass wealth more readily than individuals,¹⁶ although the logic extends to all disparities in electoral influence occasioned by differences in wealth.¹⁷ In

¹² See *Buckley v. Valeo*, 424 U.S. 1, 26-28 (1976); *First Nat’l Bank v. Bellotti*, 435 US 765 (1978); see also *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 121 (2003).

¹³ See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659-60 (1990) (expressing concern about the corrupting effect of “immense aggregations of wealth that are accumulated with the help of the corporate form”); *Fed. Election Comm’n v. Beaumont*, 539 U.S. 146, 155 (2003) (state has interest in prevent “war-chest corruption”); *McConnell v. FEC*, 540 U.S. 93, 143-45 (2003) (discussing the importance of prohibiting the appearance of “undue influence”); *Fed. Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 479 (2007); see also *United States v. Int’l Union United Auto, Aircraft & Agric. Implement Workers of America*, 352 US 567, 585 (1957) (“No less lively, although slower to evoke federal action, was popular feeling that aggregated capital unduly influenced politics, an influence not stopping short of corruption.”); *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 809 (White, J. dissenting).

¹⁴ *Austin*, 494 U.S. at 659.

¹⁵ David A. Strauss, *Corruption, Equality and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994).

¹⁶ See *Austin*, 494 U.S. at 660 (“the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures”); see also *Colorado Republican Fed’l Campaign Comm. v. Fed. Election Comm’n*, 533 U.S. 431, 441 (2001) (focusing on expenditures by political parties providing a path of circumvention of contribution limits).

¹⁷ See David Cole, *First Amendment Antitrust: The End of Laissez Faire in Campaign Finance*, 9 YALE L. & POL’Y REV., 236, 237 (1991)(framing *Austin* as premised on “[free market capitalism threatens the free marketplace of ideas by giving certain voices inordinate influence”); OWEN M. FISS, *THE IRONY OF FREE SPEECH* 4 (advocating state restriction of

doctrinal terms, the prevailing majorities across the broad run of the Court's campaign finance decisions invoked the liberty protections of the First Amendment to resist limitations on expression.¹⁸ For the dissenters in these cases, by contrast, the animating logic was the equality protections of democracy on the political process.¹⁹

In the view of a fairly consistent majority of the Court, the key to corruption became the surreptitious deal that by-passes the mechanisms of political accountability. The fear of such silent arrangements further allowed the Court to posit that "of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse."²⁰ But all such arrangements require a conspiratorial agreement willfully to undermine electoral accountability. Thus, the Court fastened on the distinction between coordinated and uncoordinated activity in the electoral context as the defining line for what *Buckley* deemed could be regulated: "the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."²¹ Most clearly, in *First National Bank v. Bellotti*, the Court held that a banking corporation could not be prohibited from spending money in opposition to a

speech by some and subsidies of others to equalize access to political discourse); Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 19 ("When wealth is unfairly distributed and money dominates politics...[voters] are not equal in their own ability to command the attention of others for their own candidates, interests and convictions"). These arguments run into the teeth of *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," 424 U.S. at 48-49.

¹⁸ The strongest exponent of this view has been Justice Thomas, whose opinions on campaign finance return consistently to the core prohibitory structure of the First Amendment. See, e.g., *Nixon v. Shrink Mo. Gov't Pac*, 528 U.S. 377, 410 (2000) (Thomas, J., dissenting) ("I begin with a proposition that ought to be unassailable: Political speech is the primary object of First Amendment protection").

¹⁹ The core view is expressed by the Court in the commitment in *Reynolds v. Sims* that all citizens have an "equally effective voice" in the political process. 377 U.S. 522, 565 (1964). The equality rationale appears in campaign finance cases through efforts to dampen money in general and the arms-race effects of needing to raise money. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 260 (1976) (White, J., concurring in part and dissenting in part) (Justifying expenditure limitations as a legitimate means to "counter the corrosive effects of money in federal election campaigns"). See also RICHARD HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 114 (2003) ("*Austin* represents the first and only case in which a majority of the Court accepted, in deed if not in word, the equality rationale as a permissible state interest"). To this quote, Chief Justice Roberts added *McConnell* as also being premised on the equality rationale. *Citizens United*, 130 S.Ct. at 922 n. 2 (Roberts, C.J., concurring). See also *id.* (quoting "Elizabeth Garrett, *New Voices in Politics: Justice Marshall's Jurisprudence on Law and Politics*, 52 HOWARD L.J. 655, 669 (2009) *Austin* 'has been understood by most commentators to be an opinion driven by equality considerations, albeit disguised in the language of 'political corruption'").

²⁰ *Buckley*, 424 U.S. at 27.

²¹ *FEC v. National Conservative PAC*, 470 U.S. 480, 498 (1985).

ballot initiative because such initiatives do not have candidates and there could accordingly be no risk of any quid pro quo corruption.²² Over Justice White’s dissent on the undue influence wielded by corporations, Justice Powell retreated to the liberty arguments of the First Amendment: “The fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution protects expression which is eloquent no less than that which is unconvincing.”²³

The dissenting positions, most strongly associated with Justice Stevens, argued that quid pro quo arrangements were difficult to police, but more centrally that not regulating money in politics compounded the advantages held by the wealthy in our society. At the doctrinal level, the dissenters returned to an equality rationale as a justification for restricting expenditures. The claim that money was not speech was absolutely critical to distance the proposed governmental restrictions from traditional First Amendment concerns, particularly as the proposed restrictions were often justified on the basis of the content of the speech, or even the viewpoint of the speaker. Wealth, particularly corporate wealth, allowed those with “resources amassed in the economic marketplace’ to obtain ‘an unfair advantage in the political marketplace.’”²⁴

Although generally disregarded through dozens of Supreme Court opinions on campaign financing, *Austin* held precariously to life, especially in the hearts of reform advocates.²⁵ Justice Souter, in *Nixon v. Shrink Missouri Government PAC*, sought to retool *Austin*’s approach by tying the undue influence argument to the appearance of corruption: “Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.”²⁶ Most notably, in *McConnell v. FEC*, the case that upheld most of the Bipartisan Campaign Reform Act (BCRA)²⁷ against constitutional challenge, the Court adopted a highly deferential view of congressional authority and allowed disproportionate influence on officeholders’ judgment to stand in for corruption as a justification for upholding campaign limitations.²⁸ Ultimately, however, *Austin* could not be

²² 435 U.S. 765, 788, n. 26 (1978)

²³ *Bellotti*, 435 U.S. at 790. See also *Meyer v. Grant*, 486 U.S. 414 (1998) (rejecting argument of undue influence of money and therefore striking down prohibition on paid signature gatherers for petition drives).

²⁴ *Austin*, 494 U.S. at 659, quoting *FEC v. Mass Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986).

²⁵ See, e.g., Ronald Dworkin, *The Decision that Threatens Democracy*, THE NEW YORK REVIEW OF BOOKS, May 13, 2010, at 63 (treating *Austin* as the controlling precedent on limitations on campaign expenditures).

²⁶ *Shrink*, 528 U.S. at 390.

²⁷ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified at 2 U.S.C. § 431-55)

²⁸ *McConnell*, 540 U.S. at 143-44. Even this claim was short-lived as the Court soon held that corporations could not be barred from non-electoral speech, regardless of the advantages

reconciled with the core analytic structure of *Buckley*. If the prohibition of wealth-based distortions of politics were the ultimate aim, then drawing a constitutional line between contributions and expenditures would make no sense. To have wealth compromise political outcomes requires distortionary appeals to the voters, something that of necessity occurs on the expenditure side of the ledger.

Citizens United closed the circle on the *Buckley* scenario. In expressly overruling *Austin*,²⁹ the Court has now struck down anything categorized as an expenditure limitation (unless found to be coordinated with a candidate and thereby a way of circumventing contribution limitations³⁰), while at the same time upholding virtually all contribution limits, except in the rare case where contribution limits are so low as to threaten the viability of the ensuing political debates.³¹ For Justice Kennedy, only the risk of explicit quid pro quo corruption appears to survive as a basis for regulating campaign finance.³² The critical holding comes with regard to independent expenditures: “The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo.”³³ Nor will independent expenditure create the appearance of a quid pro quo corruption because “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.”³⁴

Ultimately, *Citizens United* rejected a claimed governmental interest in “equalizing the relative ability of individuals and groups to influence the outcome of elections,”³⁵ and rejected the concern over the “undue influence” of money serving as a form of corruption that justifies regulation.³⁶ Corruption proved not as malleable as *Austin* might have indicated.

that might accrue to their corporate structure. Fed. Election Comm’n v. Wis. Right to Life, Inc., 551 U.S. 449, 480 (2007).

²⁹ *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (“overruling *Austin* effectively invalidate[s] not only BCRA Section 203, but also 2 U.S.C. 441b’s prohibition on the use of corporate treasury funds for express advocacy”).

³⁰ *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 464 (2001) (“There is no significant functional difference between a party’s coordinated expenditure and a direct party contribution to the candidate, and there is good reason to expect that a party’s right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending”).

³¹ *Randall v. Sorrell*, 548 U.S. 230 (2006) (striking down Vermont state contribution limits).

³² *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 904, 909-10 (2010).

³³ *Citizens United*, 130 S. Ct. at 908-09.

³⁴ *Citizens United*, 130 S. Ct. at 910.

³⁵ *Citizens United*, 130 S. Ct. at 904.

³⁶ *Citizens United*, 130 S. Ct. at 962 (Stevens, J., dissenting).

II. The Corruption of Politics.

Any system of privately financed campaigns invites strategic use of money to influence public officials. So far, the debates at the Supreme Court have asked only whether the candidates are corrupted through illicit quid pro quo arrangements, or per the dissents, whether electoral outcomes are distorted as a result of concentrated corporate and private wealth. The case law has now been engaged in a multi-decade search for a workable definition of just what is corrupt as opposed to benign when aspiring public officials solicit money to further their ambitions.

An alternative take on the problem of corruption of the political process would suggest that both of these definitions miss the mark. Each is concerned with the improper influences on the selection of candidates for office. While the influence of the well-heeled may be a concern, and while the prospect of out-and-out corruption is a serious issue, there is an alternative concern, perhaps the more serious problem, that looks not to inputs into who holds office, but to the outputs in terms of the policies that result from an elected class looking to future support in order to retain the prerequisites of office. On this view, the underlying problem is not so much what happens in the electoral arena but what incentives are offered to elected officials while in office. Although the question of holding office remains key to this incentive structure, the focus shifts to how the electoral process drives the discharge of public duties. Specifically, the inquiry on officeholding asks whether the electoral system leads the political class to offer private gain from public action to distinct, tightly organized constituencies, who in turn may be mobilized to keep compliant public officials in office.

Any constitutional test resting on corruption as the evil begs for a definition of the good, in this case the uncorrupted. As in many areas of law in which the good state resists simple definition, the first insight may come from process questions – which campaign finance procedures are likely to promote desirable forms of democratic governance and which are likely to promote infirmities in democracy?³⁷ A tractable definition of corruption may emerge not by reference to an idealized state of candidate election, but by looking instead to how the process of election incentivizes certain behaviors in elected officials seeking to retain office. Here the concept of corruption hinges not on a quid pro quo by which the candidate for office is impermissibly enriched, nor on a distortion of the concept of democratic equality among the electorate. Without denigrating either concept as a concern, an outputs focus on the effect on public policy looks to alterations in the use of public office resulting from the incentive structures of the electoral process.

The outputs account of corruption is concerned with the subversion of the role of government as emanating from the need to provide public goods.

³⁷ This approach is anticipated in attempts to fashion a “proceduralist” view of the aim of campaign finance regulation. Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 95 U. CHI. LEGAL F. 111, 122-23 (1995).

The classic examples of public goods are the protections of security, of the environment, of foreign relations, of the matters from which private initiative cannot realize gains and that in turn require public coordination. It is precisely this benevolent use of public authority to overcome the collective action barriers to the production of public goods that is increasingly subject to challenge. The public choice accounts of recent political economy claim that the existence of public power is an occasion for motivated special interests to seek to capture the power of government not to create public goods, but to realize private gains through subversion of state authority.

This strategy – identified in the political science literature as clientelism – defies easy categorization as corruption under current campaign finance law precisely because it concerns what happens in office, rather than during the election campaign.³⁸ At its simplest, clientelism is a patron-client relationship in which political support (votes, attendance at rallies, money) is exchanged for privileged access to public goods.³⁹ The concept differs in emphasis from quid pro quo corruption. The traditional account of corruption assumes that the harm is the private benefit obtained by the politician. While the concept of quid pro quo corruption is ample enough to include almost any benefit obtained, the focus of clientelism is not the enrichment of an individual politician but continued officeholding on the condition that “party politicians distribute public jobs or special favors in exchange for electoral support.”⁴⁰

For all democracies, there are aspects of clientelism in any responsiveness to constituent interests.⁴¹ Indeed, Justice Kennedy took pains in *Citizens United* to insist that “[i]ngratiation and access . . . are not corruption.”⁴² A pathology ensues when political decisions are made to allow important sectional supporters “to gain privileged access to public resources” for profit.⁴³ Weak political parties and candidates with difficulty holding a programmatic electoral base begin to rely on patron-client networks to retain their positions.⁴⁴ “As it becomes increasingly costly to

³⁸ The Court started to grapple with this problem in *McConnell* in addressing “the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation.” 540 U.S. at 153.

³⁹ See, e.g., CLIENTELISM, INTERESTS AND DEMOCRATIC REPRESENTATION (Simona Piattoni ed., 2001); Luis Roniger, *Political Clientelism, Democracy, and Market Economy*, 36 COMP. POL. 353 (2004).

⁴⁰ Alex Weingrod, *Patrons, Patronage and Political Parties*, 7 COMP. STUD. IN SCI. & HIST. 377, 379 (1968).

⁴¹ Roniger, at 357 (describing clientelism as endemic in democracy).

⁴² 130 S.Ct. at 910.

⁴³ Roniger, *supra* note ___, at 358.

⁴⁴ Philip Keefer and Razvan Vlaicu, *Democracy, Credibility, and Clientelism*, 24 J.L. ECON. & ORG. 371, 372-73 (2007).

connect with groups of voters, candidates prefer to organize a smaller electorate and target them with larger transfers.”⁴⁵

The pathology of clientelism then rewards incumbent politicians for an expansion of the public sector in a way that facilitates sectional rewards to constituent groups. The phenomenon was described by Mancur Olson in his classic work on the pressures toward the growth of both the size and complexity of government:

The limited incentive the typical citizen has to monitor public policy . . . implies that lobbies for special interests can sometimes succeed where matters are detailed or complex but not when they are general and simple and this increases complexity . . . [In turn, s]omeone has to administer the increasingly complex regulations that result from the lobbying and the related processes . . . This increases the scale of bureaucracy and government.⁴⁶

Olson identifies one of the mechanisms by which public power can be harnessed for private aims. Private gain may abound in large-scale government enterprise which is non-transparent to the public and which resists either monitoring or accountability. The extreme form is the earmark, which does not even require formal identification of its existence.⁴⁷

Unfortunately, any attempt to act on the danger of clientelism runs into the inescapable problem that 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. The American recognition of the risk of legislation in the private interest dates at least to Federalist No. 10, in which Madison identified as a central problem of republican governance the ability to resist "a number of citizens . . . who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."⁴⁸ The Framers appear to have conceptualized corruption as a derogation of the public trust more than as the narrow opportunity for surreptitious gain.⁴⁹ But the distinction between public- and private-regarding legislation is difficult and efforts to try to review legislation on the

⁴⁵ Keefer, *supra* note ___, at 381-82, 387.

⁴⁶ MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 69-71 (1982).

⁴⁷ For an overview of the earmark process, see Rob Porter and Sam Walsh, *Earmarks in the Federal Budget Process* 8-9 (Harvard Law School Federal Budget Policy Seminar, Briefing Paper No. 16, 2006), available at http://www.law.harvard.edu/faculty/hjackson/Earmarks_16.pdf

⁴⁸ THE FEDERALIST NO. 10, 56 (J. Madison) (P. Ford ed. 1898).

⁴⁹ The most ambitious effort to read this definition of corruption cross-textually into the Constitution is found in Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 374 (2009).

basis of its public-regarding character have largely failed⁵⁰ – the debate over whether a political initiative is dominated by public or private purposes proves to be too great an invitation to reargue the politics of legislation that any particular group finds objectionable.⁵¹

Despite the difficulty in drawing clear substantive lines, there are concerns that our political process introduces pathways for private motivations to capture the use of governmental processes – and that these may not be pathways but rather avenues, boulevards, perhaps express lanes. Clientelist pressures erode public institutions with incentives to increase the size, complexity and non-transparency of governmental decisionmaking, with the corresponding impetus simply to increase the relative size of the public sector, often beyond the limits of what the national economy can tolerate. In the first instance, political accountability through a robust and competitive political system may check some pressures toward the excessive rewarding of private constituencies through public authority.⁵² But, if unchecked, clientelism breeds the perception of “systemic corruption, which cripples institutional trust and public confidence in the political system”⁵³ – a parallel to the Court’s concern in *Buckley* over the detrimental effects of the appearance of quid pro quo corruption.

No doubt money is at the root of the problem, but the problem is not limited to the wealthy or the corporations or even the institutional actors such as the unions or Indian tribes. Like the overbroad prohibition on corporate independent expenditures that proved problematic in *Citizens United*,⁵⁴ simply trying to root out money in undifferentiated fashion miscasts the problem of the compromise of public authority. More closely hewn, the issue is not money as such but the potential private capture of the powers of the state. The Supreme Court acknowledged this concern a year prior in *Caperton v. Massey*,⁵⁵ in which the Court ruled unconstitutional a state judge sitting in judgment on a case involving a major campaign supporter. *Caperton* suggests a concern for the ability to use privileged positions in the democratic process to gain control over the exercise of governmental

⁵⁰ The leading effort was signaled in Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127 (1982), which argued for applying different tiers of scrutiny to public and private regarding legislation.

⁵¹ Richard B. Stewart, *Regulation in a Liberal State: the Role of Non-Commodity Values*, 92 YALE L. J. 1537, 1542 (1983) (noting that “regulation is viewed as a self-serving tool, manipulated either by well-organized economic interest groups to increase their wealth, or by ideological factions to impose their partisan values on society”).

⁵² See Alicia Adsera et al., *Are You Being Served?: Political Accountability and Quality of Government* 37 (Inter-Am. Dev. Bank, Working Paper No. 438, 2000). Unfortunately, and paradoxically, the competitive uncertainty of elections may also increase pressures to deliver desired goods to any marginal constituency. See Jonathan Moran, *Democratic Transitions and Forms of Corruption*, 36 CRIME, LAW & SOC. CHANGE 379, 381 (2001).

⁵³ Roniger, *supra* note __, at 367.

⁵⁴ 130 S.Ct. at 911 (finding the prohibition on corporate independent expenditures both under- and overinclusive if the object is to protect shareholder interests).

⁵⁵ 129 S.Ct. 2252 (2009).

authority. Under this view, the problem is not the ability to deploy exceptional resources in election campaigns, but the incentives operating on governmental officials to bend their official functions to accommodate discrete constituencies.

III. Does Money Necessarily Corrupt?

The most striking and perhaps the oddest feature of *Citizens United* is no doubt the extravagant endowment of rights upon corporate actors, a result that appeared to reach beyond what was necessary to strike down an overbroad restriction on contributions. Nor, oddly, did the Court 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 participate in or overwhelm elections with corporate spending is scant. 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 were added 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 business, such as real estate interests, but even they were secondary players overall.⁵⁶

At bottom, corporations are business rivals and there are serious collective action problems preventing them from coordinating in the political arena, except through trade associations such as the Chamber of Commerce. That is why corporations have difficulty overcoming the concentrated pull of public employee unions, even on matters of concern to the business community.⁵⁷ More centrally, for most corporations, elections are noisy events that may prove a poor forum for advancing their interests. Most

⁵⁶ CAL FAIR POLITICAL PRACTICES COMM'N, INDEPENDENT EXPENDITURES: THE GIANT GORILLA IN CAMPAIGN FINANCE 21-23, 85-87 (2008), <http://www.fppc.ca.gov/ie/IEReport2.pdf>

⁵⁷ For example, a recent Oregon referendum proposed using increased payroll taxes to finance public employment. Public employee unions raised almost 50 percent more than employer groups to push the measure through. See Brent Walth and Jeff Mapes, *Public Workers Flex Muscles In Tax Battle*, THE OREGONIAN, Jan. 21, 2010, http://www.oregonlive.com/politics/index.ssf/2010/01/public-employee_unions_flex_mu.html; see also T.W. Farnam, *Unions outspending corporations on campaign ads despite court ruling*, THE WASHINGTON POST, July 6, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/06/AR2010070602133.html?sid%3DST2010070605201&sub=AR>

publicly traded corporations do not want to be associated with controversial positions on social issues such as abortion or capital punishment or foreign military engagements or school prayer, or any of the other hot button social issues that dominate elections. PACs funded from individually pooled funds provide a way to signal support for candidates without opening the corporate treasury to ever ravenous politicians.⁵⁸ But for pursuing direct interests, lobbying is a more effective means of securing desired ends, and the amounts spent on lobbying rather than campaign activities (even in states that permit contributions) reflect corporate understanding that the work of securing compliant government is best carried out in the legislative rather than electoral arena.⁵⁹ Moreover, within the legislative arena, corporations are likeliest to focus on gaining a competitive advantage over rivals or other source of economic challenge and thus, are apt to be further dissuaded from concerted political activity over politics generally.⁶⁰ The corporations that do wish regularly to engage in speech turn out to be either the ideological organizations that have plagued the campaign finance case law (e.g., Massachusetts Citizens for Life,⁶¹ Wisconsin Right to Life⁶²) or closely held companies, including publicly traded corporations still dominated by a founding family (e.g., Wal-Mart). There are exceptions, of course, in local elections, especially judicial elections, but for most corporations, elections are a precarious and indirect means for advancing their interests.

While *Citizens United's* grant of rights to corporations is not particularly significant in terms of clientelist corruption, the facts of *Citizens United* are

⁵⁸ In Australia, corporate contributions to campaigns are legal yet prove to be limited. The leading study company contributions indicated that in the 1995-98 period, all but one of the top ten campaign contributors donated money to both major political parties. I. Ramsay, G. Stapledon & J. Vernon, *Political Donations by Australian Companies*, 29 Fed. L. Rev. 179, 203-4 (2001). Indeed, Professor Ian Ramsay, the author of the most comprehensive study to date on political contributions, indicated that most corporations who do give tend continue to give to the major parties, with some bump up for whichever party is in power. The firms that publicly disclose their contributions report the items on their websites or in their annual reports as “supporting the democratic process” or “strengthening democracy.” Interview with Ian Ramsay, Melbourne, Australia, April 22, 2010. There appears to be no evidence of any party in Australia having readier access to large contributions. See Ann Twomey, *The Reform of Political Donations, Expenditure and Funding*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1299331

⁵⁹ It is difficult to get a precise figure on the amounts spent on lobbying overall, in part a reflection of the complex regulations on what constitutes and does not constitute lobbying. OpenSecrets estimates that between 2006 and 2008, roughly equal amounts were spent on federal election campaigns and on lobbying the federal government. Compare <http://www.opensecrets.org/bigpicture/index.php> (documenting campaign expenditures) with <http://www.opensecrets.org/lobby/index.php> (providing information on lobbying expenditures).

⁶⁰ See generally ROBERT REICH, *SUPERCAPITALISM: THE TRANSFORMATION OF BUSINESS, DEMOCRACY, AND EVERYDAY LIFE* 131-67 (2007) (chronicling the growth of lobbying to secure competitive advantage of firms vis-à-vis other firms).

⁶¹ Fed'l Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238 (1986).

⁶² Fed'l Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).

significant in terms of potential subsequent reforms. At issue before the Court were the BCRA prohibitions on corporate and union contributions to independent expenditure groups during the run-up to federal elections; hence, the Court reached the critical finding that there was no risk of quid pro quo corruption. The Court left untouched not only limitations on contributions,⁶³ but also the broad disclosure requirements currently in force.⁶⁴ The Court did not address the longstanding prohibition on direct contributions by corporations and unions, something that dates back over a century for corporations and more than half a century for unions. In endowing corporations with all the prerogatives of natural persons in terms of independent expenditures, the logic of the Court's holding could even signal a willingness to open the door to allowing corporations to donate directly to candidates and parties. As shocking as such a step would be to century-old settled practice, it is unclear how big a difference even that step would make. Would the world look all that much different if corporations could contribute \$2,400 to a candidate, the current federal contribution limit on individual donations? Perhaps, but likely not all that much.

The logic of Justice Kennedy's majority opinion in *Citizens United* was ultimately that any undue pressures on the body politic will be cleansed by the competitive wash of the electoral process in which more information is a salutary force.⁶⁵ The dissenting response was either that corporations are not entitled to such protections, that their expenditures are not speech, or that Justice Kennedy's emphasis on First Amendment liberty of expression must yield before a countervailing claim to equality in the political arena. The resulting engagement is stark, but given the majority's commitment to the primacy of liberty of expression and the dissent's concern with the appearance of untoward pressures from concentrations of wealth, there is little common ground for engaging whether there are particular pathologies that reforms might address.

a. Funding Politics

For all the attention devoted to campaign finance reform, the challenge remains straightforward: "the need for funding sufficient to enable candidates to mount competitive races without rendering them unduly dependent on large donors."⁶⁶ It is here that the reform impulse to constrict money is most

⁶³ *Citizens United*, at 909 (no suggestion that "the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny").

⁶⁴ In *John Doe No. 1 v. Reed*, 130 S.Ct. 2811 (2010), the Court further rejected a First Amendment facial challenge to disclosure of names on a state petition drive.

⁶⁵ See Saul Zipkin, *The Election Period and the Regulation of the Democratic Process*, 18 WM. & MARY BILL OF RIGHTS J. 533, 591 (summarizing the majority view as, "because Americans can think for themselves, more information cannot hurt them, but can only help them in the voting process").

⁶⁶ Richard Briffault, *Reforming Campaign Finance Reform: A Review of VOTING WITH DOLLARS*, 91 CAL. L. REV. 643, 645 (2003).

problematic. For example, the first effort to offer public funding to candidates for office – the post Watergate presidential election subsidies – set the amount of the public contribution at two-thirds of what George McGovern had spent on his disastrous presidential run of 1972.⁶⁷ Once the cap on expenditures was removed in *Buckley*, the race was on to collect money to satisfy the mounting costs of campaigns, despite the constraints imposed by low contribution limits.⁶⁸ Whatever the failings as a matter of regulatory policy, the Court has weighed in most readily on the side of protecting expenditures.

Thus, the first significant prohibition of BCRA to fail scrutiny was the so-called “Millionaire’s Amendment.” Struck down by *Davis v. FEC*,⁶⁹ the amendment permitted increased hard money fundraising for incumbents challenged by self-financed campaigns. This particular provision appeared to carry none of the anti-corruption logic of the *Buckley* exception and instead carried the redolent whiff of politician self-dealing. In striking down what it perceived to be a penalty on speech, the Court held that BCRA “imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right [to expend lawfully obtained funds. The Act] requires a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations.”⁷⁰

Davis then carried over into the Court’s order upholding an injunction against a longstanding Arizona policy of matching small contributions with state financial support of grassroots-based candidacies, a practice known as “clean money” financing because of the small-donor constituency.⁷¹ At issue, however, was Arizona’s further policy of giving an additional clean-money subsidy to gubernatorial candidates under challenge from self-funded candidates.⁷² Presumably, the same concern would apply to the burdening

⁶⁷ Briffault, *supra note* ___, at 679 n.126. The \$20 million figure in 1974 was also one-third of what Richard Nixon spent in 1972 in winning the election. Translated to recent terms, John McCain received federal funds of \$84 million for the general election cycle in 2008, compared to roughly \$400 million raised independently and spent by the victorious Obama campaign. Michael Lou, N.Y. TIMES, *Obama Hauls in Record \$750 Million for Campaign*, Dec. 5, 2008, A29, available at http://www.nytimes.com/2008/12/05/us/politics/05donate.html?_r=2&ref=us See also Obama and McCain campaign monthly filings to the FEC (Form 3Ps), available at <http://query.nictusa.com/pres/>

⁶⁸ See Issacharoff & Karlan, *supra note* ___, at 1711 (drawing analogy to “giving a starving man unlimited trips to the buffet table but only a thimble-sized spoon with which to eat”).

⁶⁹ *Davis v. FEC*, 128 S. Ct. 2759 (2008) (striking down BCRA § 319(a) – (codified at 2 U.S.C. § 441a-1(a))).

⁷⁰ *Id.* at 2771.

⁷¹ See generally Emily C. Schuman, *Davis v. Federal Election Commission: Muddying the Clean Money Landscape*, 42 LOYOLA L.A. L. REV. 737 (2009) (setting out basic framework of existing clean money schemes).

⁷² *McComish v. Bennett*, 78 U.S.L.W. 3728 (U.S. June 8, 2010). This ruling prompted hyperventilated outcries over the Court seeming to put at risk public finance schemes. See

expenditures by individuals who would, in effect, be putting one dollar in their opponents' coffers for every dollar they themselves spent. The result would be a “drag on First Amendment rights,” as Justice Alito described the concern in *Davis*.⁷³

A careful reading of *Davis*, however, reveals that the Court's concern is not contribution limits or even clean money matching systems, but the implicit efforts to rein in expenditures of individuals who self-finance, and whose expenditures do not readily fall into any theory of corruption – save the now-rejected equality concerns from *Austin*. The logic of *Davis* poses a dilemma for the reform impulse as the Court invites a segregation of the seed money approach of clean money from the reformers' lurking desire to use the public money carrot as a stick to limit expenditures.

There is no constitutional issue raised by the use of matching funds to reward candidates for mobilizing many small donors. For example, there are a number of clean money programs that offer the quid pro quo recognized in *Buckley* by which candidates accept public money and contractually agree to a limit on their own expenditures,⁷⁴ as with presidential matching funds. These programs are all premised on the idea that candidates should be rewarded for engaging the voting public and should get public moneys to the extent that they expand the network of citizens who participate through small donations. Indeed, such programs have generally survived constitutional challenge when they release publicly funded candidates from the expenditure limitation if their opponents threaten to spend in excess of the public limitations.⁷⁵

Editorial, *Keeping Politics Safe for the Rich*, N.Y. TIMES, June 8, 2010, at A24. . The Arizona Act included a “matching funds” provision that increased public funds available to a participating candidate to match the financing levels of self-funded candidates, which arguably has the effect of depressing expenditures. A.R.S. § 16-940 to 16-961. Invariably there is the paradox that the mainstream media, despite being for-profit corporations, has systematically touted restriction on any independent expenditures by corporations, other than those deemed the media. As Justice Kennedy noted in *Citizens United*, the claimed “exemption applies to media corporations owned or controlled by corporations that have diverse and substantial investments and participate in endeavors other than news.” 130 S.Ct. at 906.

⁷³ *Davis*, 128 S.Ct. at 2772.

⁷⁴ *Buckley*, 424 U.S. at 51 n. 65 (affirming that a government may “condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations”).

⁷⁵ See, e.g., *Daggett v. Commission on Gov't Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000) (holding that constraints on participating candidates in Maine outweighed effects of releasing them from contribution limits in face of privately funded challengers); *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998) (upholding Kentucky statute that simply released participating candidates from expenditure and contribution limits in face of heavily financed challenger); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993) (upholding Rhode Island law that released publicly funded candidates from expenditure and contribution limits if facing overly funded candidate. The portion of the Maine statute that provides for additional funds to a candidate challenged by a privately funded opponent, ME. REV. STAT. ANN. tit. 21, § 1121, §1125 (9) (2009), may now fail under *Davis*. The same would apply to another bill before the Congress, Clean Money, Clean Elections Act of 2009, H.R. 2056, Sec. 506(2), 111th Cong. (2009), which would provide “fair fight” funds to candidates who were being outspent.

Davis would call these programs into question to the extent that they couple the inducement to expand the base of popular participation with a heavy-handed effort to dampen expenditures by the opponent. Almost invariably, these clean money programs seek to limit contributions to participating candidates, even below the generally established contribution limits for the office in question. In other words, rather than simply match a low figure (e.g., five-to-one public matching for the first \$100 contributed by any donor), these programs seek to limit the size of contributions candidates may receive, even below the threshold deemed not to risk candidate corruption.⁷⁶ Moreover, most of these programs have been tried in local elections or in states without a history of heavy media expenditures. To the extent that public financing is likely to be successful, it has to provide candidates with enough money to control the agenda of the election campaign, lest candidates be at the mercy of tertiary organizations (PAC's, political committees operating under Section 527 of the tax code, and the panoply of denizens of the "Swift Boat" or "MoveOn.org" side of politics).⁷⁷

Paradoxically, the history of BCRA reforms suggests that the influence of money on policy is diminished when candidates and parties have ample access to fundraising. If anything, the 2008 presidential election should invite a revisiting of the reform premises that money is unrelated to participation and that less money is inherently a good thing. Creating an incentive for candidates to raise more money from more people may actually reduce clientelist pressures to capture political outputs. One of the keys to fundraising in 2008 was an unheralded but significant aspect of BCRA: the significant increase in the amount of hard money available to candidates and parties.⁷⁸ The greater ability to raise money from individuals combined with the eased ability to reach small donors through the internet. As a result, the 2008 Obama campaign was able not only to raise money prodigiously, but also to engage millions of citizens at the same time. In the process, President Obama raised \$745 million and spent \$730 million – figures that surpassed the fundraising and expenditure marks of all prior candidates.⁷⁹ Those

⁷⁶ For example, under one current bill, the Fair Elections Now Act, H.R. 1826, 111th Cong. (2009); S. 752, 111th Cong. (2009), participating candidates in a federal clean money program would have to agree to accept no contribution greater than \$100, even though the current federal limitation on contributions is \$2,400.

⁷⁷ The argument that excessive restrictions on candidate fundraising promote politics dominated by single-issue special interests is central to Issacharoff & Karlan, *supra* note ____.

⁷⁸ BCRA doubled the amount an individual could contribute to a candidate in each campaign cycle from \$1,000 to \$2,000 and raised the amount that could be given to a political party to \$25,000. BCRA § 307(a)(1)-(2) (codified at 2 U.S.C. § 441(a)(1)). Under the BCRA, these limits were also indexed to inflation *Id. at* (441(a)(c)(1)(A) and as of January 2010 stood at \$2,400 to candidates, and \$30,400 to a national party committee. http://www.fec.gov/pages/brochures/fecfecsa.shtml#Contribution_Limits

⁷⁹ President Obama's 2008 fundraising and expenditure totals may be found at Center for Responsive Politics, Barack Obama Summary, at <http://www.opensecrets.org/pres08/summary.php?cycle=2008&cid=N00009638>. Comparing these totals with the historical fundraising and expenditure totals for presidential campaigns

contributions came from more than 4 million unique individual donors, again more than any candidate in American history.⁸⁰ While President Obama also received a record number of contributions of less than \$200⁸¹ -- making up nearly one-quarter of all his fundraising -- the vast majority of money raised was from donors outside of the small donor category.⁸² Yet the breadth of the fundraising base and the sheer quantity of the amounts raised defy any easy story of corruption of democratic politics. Problems arise when there are only a few large donors, not when there are many donors who may be substantial but not critical. Thus, reforms that create incentives for campaigns to solicit money from more sources may actually be more effective at diminishing the distortive effects of money on public policy than those that seek to limit the amount of money in the system.

b. Clientelist Concerns.

An alternative view of corruption, one centered on the ability to command private rewards from public office, yields another prospect both for concern and potentially for reform. The risk of private-regarding legislation is heightened when some groups are able to bypass the normal process⁸³ of interest group bargaining to secure benefits for themselves. Ordinary democratic politics may be a messy and imprecise construct, but the contrast is to the sectional advantage exercised by special groups that have claims both within and without the political process.

Several decades ago, Professors Wellington and Winter tried to develop this intuition with regard to strikes by public sector unions.⁸⁴ In defining

reveals that the Obama campaign spent more in 2008 than the combined total of expenditures in any election prior.

⁸⁰ Tahman Bradley, *Final Fundraising Figure: Obama's \$750M*, ABC NEWS, Dec. 5, 2008, <http://abcnews.go.com/Politics/Vote2008/story?id=6397572&>

⁸¹ Obama received a greater percentage of donations from small contributors than previous candidates. While this difference was marginal, given the greater amount of money raised by Obama, the number of contributions from small donors was significantly greater than past candidates. For a comparison of percentages of contributions from small donors see Michael Malbin, The Campaign Finance Institute, *New Figures Show that Obama Raised About One-Third of His General Election Funds from Donors Who Gave \$200 or Less*, Jan. 8, 2010, http://www.cfinst.org/Press/PReleases/10-01-08/Revised_and_Updated_2008_Presidential_Statistics.aspx

⁸² *See id.*

⁸³ *See* ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 145 (1956) (identifying the “normal” American political process” in terms of “a high probability that an active and legitimate group in the population can make itself heard effectively at some crucial stage in the process of decision”); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 135 (1980) (similarly defining healthy democratic processes as allowing “any group whose members were not denied the franchise could protect itself by entering into the give and take of the political marketplace”).

⁸⁴ Harry H. Wellington and Ralph K. Winter, Jr., *The Limits of Collective Bargaining in Public Employment*, 78 *YALE L.J.* 1107, 1116, 1124-25 (1969). Judge Winter makes a

what it means to have “a disproportionate share of effective power in the process of decision,” Wellington and Winter identified the particular danger of actors with dual mechanisms of influence over political outcomes: “Both the political power exerted by the beneficiaries of the services, who are also voters, and the power of the public employee union as a labor organization, then, combine to create great pressure on political leaders either to seek new funds or to reduce municipal services of another kind.”⁸⁵

If we look beyond campaign finance as such, there are some partial recognitions of the similar problem of clientelist-style double claims on the political process, some of which are reflected in current law. Beginning with a 1940 amendment to the Hatch Act, all federal government contractors were prohibited from “mak[ing] any contribution, to any political party, committee, or candidate for public office or to any person for any political purpose or use,” during the period of contract negotiation or performance.⁸⁶ That prohibition turns not on the form of organization as a corporation, a partnership, or an individual contractor – indeed, the Tillman Act has prohibited corporate contributions to candidates for federal office since 1907⁸⁷ – but rather on the idea that contractors engage the decisionmaking processes of elected officials in dual fashion – the same idea that animated the concern over public employee having a double hold on public policy.⁸⁸ While this provision has never come before the Supreme Court, the Court has twice upheld parallel provisions of the Hatch Act against constitutional challenge.⁸⁹

The prohibition on contractor contributions in federal elections continues in force and was largely integrated into the 1974 election reforms of the Federal Election Campaign Act (FECA), though somewhat weakened by expressly allowing contractors to make contributions to political activities through political action committees.⁹⁰ In its current form, federal election law not only prohibits federal contractors from making contributions for any

significant reappearance in this area of law as counsel to Petitioner Buckley in *Buckley v. Valeo*.

⁸⁵ *Id.* at 1121, 1123.

⁸⁶ Hatch Act Amendments of 1940, Pub.L.No 76-252, § 5(a), 53 Stat. at 722.

⁸⁷ Pub. L. No. 59-36, 34 Stat. 864; 2 U.S.C. § 441b(a). See *FEC v. Beaumont*, 539 U.S. 146, 149 (2003) (upholding constitutionality of Tillman Act, even as applied to not-for-profit corporations).

⁸⁸ A variant on this argument, put forward in the early post-*Buckley* debates, posited that the incentives for incumbents to use the powers of government to create loyalties among potential donors violated the equal protection rights of challengers and their campaign supporters. See Peter Manikus, *Campaign Finance, Public Contracts and Equal Protection*, 59 CHI.-KENT L. REV. 817, 817 (1983).

⁸⁹ *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *United States Civ. Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548 (1973). See also *F.E.C. v. Weinstein*, 462 F. Supp. 243, 249, 249, n. 8 (S.D.N.Y. 1978) (upholding contractor prohibition against constitutional challenge by corporate contractor).

⁹⁰ 2 U.S.C. § 441(c)(b) (1976), repealing Pub. L. No. 76-753, § 5(a), 54 Stat. 772 (1940).

purpose related to a federal elections,⁹¹ but the same statute also makes it illegal for anyone to “knowingly solicit” such contributions.⁹² Whatever the limitations of current law, the core objective remains to try to insulate politics from the demands of those who would use public power for non-public regarding aims. As with the arguments advanced by Wellington and Winter in the context of public employee strikes, the basic intuition is that claims on the decisions of political officeholders should be played out in the political process and that legal means must be sought to shut down the mechanisms by which politicians are induced to contort the outputs of the political process for the gain of the few at the expense of the many.

In light of *Citizens United*, the question arises whether the Constitution allows the government to prohibit parties in contractual relations with public bodies not only from contributing to the campaigns of elected officials, but also from directing independent expenditures to elections for the same officials. There is significant constitutional risk in crossing the divide from contributions to expenditures, and the overwhelming body of doctrine reveals a high barrier to any congressional efforts along this line,⁹³ with only the now-aging Hatch Act cases offering a safe harbor.

Nonetheless, a prohibition on contractor expenditures in connection with the election of public officials with whom they contract would be premised on the risk of improper conduct rather than on the disfavored status of corporations as such. In *Citizens United*, the Solicitor General could offer no substantial argument for the use of corporations as the regulated entity, once she abandoned the distortion rationale of *Austin*.⁹⁴ The proffered justification of protecting management misuse of shareholder wealth not only had no foundation in the legislative record, but prompted the Court to recount that the majority of business entities that fell under the prohibition were sole proprietorships that by definition could not be subject to agency costs imposed by management.⁹⁵ The Court did not address the longstanding view of Justice Rehnquist that a state that charters a corporation might have free rein to condition the grant of corporate benefits on specified conditions,⁹⁶ including an inability to direct corporate funds to politics; that issue had no

⁹¹ 2 U.S.C. § 441c(a)(1) (1976).

⁹² 2 U.S.C. § 441c(a)(2) (1976).

⁹³ On the record presented, *Citizens United* sweepingly condemned any attempt to limit independent expenditures, at least so long as premised on the theory of quid pro quo corruption: “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” 130 S.Ct. at 909.

⁹⁴ *Citizens United*, 130 S.Ct. at 904; *id.* at 924 (Roberts, C.J., concurring).

⁹⁵ *Id.* at 911; *id.* at 924 (Roberts, C.J., concurring).

⁹⁶ *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 823-24 (Rehnquist, J., dissenting) (arguing that corporations are created “only for the limited purposes described in their charters and regulated by state law. . . . [T]he mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons”). Though not addressed on its terms, Justice Rehnquist’s position does contrast with the Court’s more categorical assertion that “First Amendment protection does extend to corporations.” *Citizens United*, 130 S.Ct. at 899.

application so long as the prohibition was one of federal law, rather than the law of incorporation.

While *Citizens United* gave new vitality to the fundamental *Buckley* divide between contributions and expenditures, it did not exhaust the possible range of concerns occasioned by the use of private money in politics. When abstracted from the broader rhetoric on the role of corporations, the majority opinion in *Citizens United* is actually less sweeping than might appear. The Court is concerned only with the inputs to the electoral process, not the outputs of the ensuing legislative process. Thus, in overturning *Austin*, Justice Kennedy concluded that *Buckley* categorically prohibited regulations aimed at “equalizing the relative ability of individuals and groups to influence the *outcome* of elections.”⁹⁷ Similarly, Justice Kennedy distinguishes *Caperton*⁹⁸ as distinctly about post-election conduct, not campaign speech: “*Caperton*’s holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned.”⁹⁹

A tightly drawn prohibition premised on the effects of “pay-to-play” on public policy could potentially survive scrutiny under *Citizens United* as a constitutional first step. Moreover, the regulated bodies might even welcome such a law as a protection against public officials intent on using their position to solicit funds for campaign expenditures. Such a measure would be only a partial inroad into the accompanying world of lobbying and the sector of the economy that does not face incumbent state officials as contracting parties but as subjects of regulation.¹⁰⁰ Likewise, lawmakers may broaden the protections offered by the Hatch Act amendments by prohibiting contractors from expenditures through PACs, 527 groups or bundling efforts without running afoul of the underlying rationale in *Citizens United*. Admittedly, these are partial steps. Nonetheless, such approaches do offer alternative insights into the problem of money, not so much in terms of election outcomes but in terms of public policy. Whether an incumbent Congress would welcome such legislation is another matter.

Conclusion

The aim of using campaign finance law to limit the amount and influence of money on elections has run into two barriers, one constitutional and the other practical. Viewed in retrospect, the Supreme Court’s unsatisfying jurisprudence in this area has actually settled on an organizing logic that grants constitutional protection to the ability to spend money in furtherance of electoral speech. That logic may not appeal to reformers, but its failure is not one of incoherence, no matter how difficult the *Buckley* divide proves to

⁹⁷ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 904, 909 (2010) (emphasis added).

⁹⁸ 129 S.Ct. 2252 (2009).

⁹⁹ *Citizens United*, 130 S.Ct. at 910.

¹⁰⁰ For a new effort by the SEC to combat similar pay-to-play concerns in the regulation of the financial services industry, see 17 C.F.R. §376.206(4)-5 (2010).

be on the implementation side. Modern technology has, if anything, reinforced this constitutional stand because the diffusion of information outlets places a premium on organization and control over content, lest candidates and parties be swamped by well-heeled tertiary organizations and the hysterical poles of the media.

Paradoxically, the most significant reform in lessening the role of special interest money in elections may be the one recent reform that actually facilitated the ability of candidates to raise money. The combination of BCRA's raising of contribution levels and the emergence of internet fundraising did two things. It allowed candidates to raise unprecedented amounts of money in the 2008 election cycle *and* it incentivized them to raise funds from an unprecedented number of citizens. The combination allowed both greater engagement in the election of 2008 and a strengthened ability of the candidate-driven political message to dominate the electoral debate.

On this view of the aim of the electoral process, *Citizens United* is a distraction of limited consequence. Putting aside the elusive leveling aspiration of equality of all individuals in privately funded campaigns, the question is how to use campaign finance regulation to enhance a competitive electoral system and to guard against the corrosive distortion of political decisionmaking as a means toward incumbent entrenchment. This in turn requires rethinking the incentives toward candidate engagement of the electorate as they compete for office, including in the process of fundraising, and a more nuanced understanding of the corrupting influence of incumbent reelection on the outputs of the political process.