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Constitutional Law—Why Amending the Constitution to Overrule Citizens United is the Wrong Way to Fix Campaign Finance in the United States

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CONSTITUTIONAL LAW — WHY AMENDING THE CONSTITUTION TO
OVERRIDE *CITIZENS UNITED* IS THE WRONG WAY TO FIX CAMPAIGN
FINANCE IN THE UNITED STATES

I. INTRODUCTION

Once upon a time, there was a place called “Lesterland.” Lesterland was a lot like the United States. Like the United States, it had a population of about 311 million souls. Of that, like the United States, about 150,000 were named “Lester.” Lesters in Lesterland had a very important power. There were two elections every election cycle in Lesterland – a general election, and a “Lester election.” In the general election, all citizens got to vote. In the Lester election, only the “Lesters” got to vote. But here’s the catch: To run in the general election, you had to do extremely well in the Lester election.¹

Professor Lawrence Lessig, Director of the Edmond J. Safra Center for Ethics at Harvard University, uses the imagined Lesterland to illustrate a hypothetical political system.² This metaphor’s power lies in how closely it resembles the current political system of the United States of America. In fact, the American system of electoral influence is even more distorted than that of Lesterland. In the 2012 election cycle, 132 donors, approximately .000042 percent of the country’s population, contributed 60 percent of the money raised by independent-expenditure only committees, commonly known as Super PACs.³ In turn, Super PACs comprised 47 percent of the independent expenditures for that cycle.⁴ Twenty-nine percent of outside spending came from political parties, traditional PACs, and other groups organized under Section 527 of the Internal Revenue Code.⁵

1. LAWRENCE LESSIG, *LESTERLAND: THE CORRUPTION OF CONGRESS AND HOW TO END IT* 6 (2013).

2. *Id.* at 24.

3. Adam Lioz & Blair Bowie, *Election Spending 2012: Post-Election Analysis of Federal Election Commission Data*, DEMOS (Nov. 9, 2012), <http://www.demos.org/publication/election-spending-2012-post-election-analysis-federal-election-commission-data>.

4. *Id.* fig. 1. For a discussion of political action committees (PACs) and Super PACs, see *PACs, Super PACs, & Dark Money Groups*, CAMPAIGN LEGAL CTR., <http://www.campaignlegalcenter.org/about/pacs-super-pacs-dark-money-groups> (last visited Nov. 3, 2017).

5. *Id.* The other sources of outside spending in the 2012 federal election were “social welfare groups” (21%), business associations (3%), and trade unions (< 1%). *Id.* See I.R.C. § 527 (2012).

To illustrate the distortion in electoral influence created by these disparate funding levels, it is useful to look more closely at data from the 2012 federal election. As an example of this type of spending, the Adelson family contributed a total of \$92.79 million to Super PACs,⁶ which is the equivalent of 261,000 individuals contributing the maximum “small donation” amount of \$200.⁷ In fact, the aggregate of all small donations to major-party candidates in 2012 was equivalent to roughly sixty-one donations from top-tier funders.⁸

The figures for the 2016 election cycle are similarly outstanding, with just over 350 families accounting for more than half of all campaign donations through the first half of 2015.⁹ This represented the highest level of early campaign contributions from the smallest pool of donors in over forty years.¹⁰ Over the course of the entire election, just 100 top donors accounted for 60.8 percent of all Super PAC contributions.¹¹

In a system where campaign funding has a significant impact on political success, such a disproportionate distribution of electoral power can fundamentally alter the relationship between elected officials and the governed public.¹² As politicians grow to depend on a decreasing number of funding sources, their dependence on the public—an essential dynamic of our democracy—begins to erode.¹³

Many scholars, including Professor Lessig, have attributed the widening of this influence gap to the Supreme Court of the United States (the “Supreme Court”) decision in *Citizen’s United v. Federal Election Commission*,¹⁴ which held that limitations on corporate spending in elections violat-

6. *2012 Top Donors to Outside Spending Groups*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=D&type=V&superonly=N> (last visited Jan. 10, 2018).

7. The FEC uses \$200 as a threshold for reporting contributions; a party committee or PAC is not required to disclose the information of an individual or family who donates \$200 or less to the committee in one year. *The FEC and Federal Campaign Finance Law*, FED. ELECTION COMMISSION, <http://www.fec.gov/pages/brochures/fecfeca.shtml> (last updated Jan. 2015).

8. Lioz & Bowie, *supra* note 3.

9. Nicholas Confessore et al., *The Families Funding the 2016 Presidential Election*, N.Y. TIMES (Oct. 10, 2015), <http://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html>.

10. *Id.*

11. *2016 Super PACs: How Many Donors Give?*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/donor_stats.php?cycle=2016&type=B (last visited Aug. 12, 2017).

12. LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 243 (2011).

13. *Id.*

14. 558 U.S. 310 (2010).

ed the First Amendment.¹⁵ In the years following that decision, public debate about how to mitigate its impact has given rise to support for a constitutional amendment regulating corporate speech.¹⁶ The majority of the proposed amendments, however, have the potential to eviscerate essential constitutional rights. This note argues that the proposed amendments to regulate campaign finance represent a dangerous and misguided approach to campaign finance reform.

Part II of this note discusses the development of modern campaign finance jurisprudence, beginning with the regulatory legislation of the 1970s to the *McCutcheon*¹⁷ decision in 2014 and concluding with a discussion of recent proposals for a constitutional amendment.¹⁸ Part III criticizes these proposed amendments for their vagueness and breadth and argues that their implementation would restrict more protected speech than intended, before surveying other options for campaign finance reform.¹⁹ Part IV concludes that, while it may be possible to draft an amendment that would not restrict an undesirable amount of speech, those who seek systemic election reform should instead promote a hybrid solution that incorporates both the enforcement of existing regulations and the implementation of innovative approaches to campaign finance.²⁰

II. BACKGROUND

A. Campaign Finance Law Before *Citizens United* Presented Conflicting Standards for Regulation

1. *Campaign Finance Regulation Became a Major Concern of the Federal Government in the Early Twentieth Century*

Federal campaign finance reform in the United States gained national attention in 1905, when President Theodore Roosevelt called for Congress to pass a law banning corporate spending towards political purposes.²¹ By the early twentieth century, legislators recognized that corporate expenditures in federal elections had become a corrupting force in the American

15. *Id.* at 365.

16. Robert Weissman, *Let the People Speak: The Case for a Constitutional Amendment to Remove Corporate Speech from the Ambit of the First Amendment*, 83 TEMP. L. REV. 979, 980 (2011).

17. *McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434 (2014).

18. *See infra* Part II.

19. *See infra* Part III.

20. *See infra* Part IV.

21. *The FEC and Federal Campaign Finance Law*, *supra* note 7.

electoral system.²² Concerns about the corrupting power of corporate spending in elections led Congress to pass the Tillman Act of 1907,²³ which contained the first federal distinction between political spending by individuals and political spending by corporations.²⁴

Thirty years later, Congress supplemented the Tillman Act's ban on corporate contributions with the Taft-Hartley Act,²⁵ the first federal law regulating the independent expenditures of corporations and unions in support of, or opposition to, a candidate.²⁶ These expenditure limits began a line of regulation that would continue into the twenty-first century and culminate in the landmark *Citizens United* decision.²⁷

2. *The Modern Campaign Finance Regime Began with the Federal Election Campaign Act of 1971*

The modern era of American campaign finance jurisprudence has focused on interpreting provisions of the Federal Election Campaign Act of 1971 (FECA) and its amendments.²⁸ Congress dramatically reshaped the FECA with the adoption of several substantial amendments in 1974 (the "1974 Amendments").²⁹ Spurred by the Watergate scandal and the ensuing

22. See S. REP. NO. 59-3056, at 2 (1906) ("[t]he evils of the use of [corporate] money in connection with political elections are so generally recognized . . ."); *Citizens United v. Federal Election Comm'n*, 558 U.S. at 433 (Stevens, J., dissenting) ("The [Tillman] Act was primarily driven by two pressing concerns: first, the enormous power corporations had come to wield in federal elections, with the accompanying threat of both actual corruption and a public perception of corruption . . .").

23. Pub. L. No. 59-36, 34 Stat. 864 (1907) (codified at 2 U.S.C. § 441b(a) (2012)); see S. REP. NO. 59-3056, at 2 (providing commentary on the motivation for the Tillman Act).

24. See *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 433 (2010) (Stevens, J., dissenting).

25. Labor Management Relations Act, ch. 120, §304, 61 Stat. 136, 159 (1947) (codified as amended in scattered sections of 2 U.S.C.).

26. Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 30 (2012). The term "independent expenditure" refers to "an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents." 11 C.F.R. § 100.16 (2014).

27. 558 U.S. at 434 (Stevens, J., dissenting) ("The Taft-Hartley Act of 1947 is of special significance for this case.").

28. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-455 (2012)); see J. Robert Abraham, *Saving Buckley: Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1081 (2010); Jacob Eisler, *The Unspoken Institutional Battle over Anticorruption: Citizens United, Honest Services, and the Legislative-Judicial Divide*, 9 FIRST AMEND. L. REV. 363, 388-89 (2010).

29. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431-455); see Abraham, *supra* note 28, at 1081 ("The modern era of campaign finance jurisprudence began with the 1974 Amendments to

distrust in campaign finance practices,³⁰ the 1974 Amendments established many of the regulatory mechanisms featured in contemporary campaign finance discourse, including the Federal Election Commission (FEC), contribution limits for individuals and groups, expenditure limits for candidates, and independent expenditure limits.³¹

The next major amendments to the FECA came with the Bipartisan Campaign Reform Act of 2002 (BCRA), commonly called the “McCain-Feingold Act” after the sponsoring legislators, which extended campaign finance regulation to cover areas of concern that arose in the period after the 1974 Amendments.³² The BCRA created the first federal regulations on “soft money,” the subset of money spent in federal campaigns that was previously exempted from both the FECA contribution limitations and the ban on the use of corporate and union treasury funds.³³ Additionally, the BCRA defined a new category of federal campaign activity known as “electioneering communication,” also called “issue advocacy,” which is subject to regulation if it is a broadcast, cable, or satellite communication that:

- (1) refers to a clearly identified candidate for federal office;
- (2) is broadcast within 60 days before a general election or 30 days before a primary; and
- (3) in the case where the communication refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.³⁴

the Federal Election Campaign Act of 1971 and the judicial review of those provisions in the 1976 Supreme Court case of *Buckley v. Valeo*”).

30. See S. REP. NO. 93-689 (1974), as reprinted in 1974 U.S.C.A.N. 5587, 5588 (“It was unfortunate that [FECA] did not become effective until April 7, 1971, because the scramble to raise political funds prior to that date . . . resulted in broad and grave dissatisfaction”); see also J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L. J. 1001, 1003 (1976) (“Congress passed these provisions in response to political abuses . . . commonly called Watergate.”).

31. 2 U.S.C. §§ 431–455; see S. REP. NO. 93-689 (providing background on the 1974 Amendments and their desired impact); see also Eisler, *supra* note 28, at 389 (providing a longer list of regulations established by the 1974 Amendments).

32. Pub. L. No. 107-155, 116 Stat. 81 (invalidated in part by *Citizens United*, 558 U.S. 310) (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C. (2012)) [hereinafter *BCRA*].

33. Kang, *supra* note 26, at 150; see *McConnell v. Federal Election Comm’n.*, 540 U.S. 93, 122–23 (2003), *overruled in part by Citizens United v. Federal Election Comm’n.*, 558 U.S. 310 (2010) (“[P]rior to the enactment of BCRA, federal law permitted corporations and unions, as well as individuals who had already made the maximum permissible contributions to federal candidates, to contribute “nonfederal money”—also known as ‘soft money’—to political parties for activities intended to influence state or local elections.”).

34. *BCRA*, *supra* note 32, at § 201(a)(3)(A).

The BCRA regulated electioneering communication by prohibiting candidates and parties from (1) using soft money to finance issue advocacy, (2) extending the FECA disclosure requirements to apply to independent expenditures that qualify as issue advocacy, and (3) extending the ban on the use of corporate or union treasury funds to prohibit issue advocacy financing.³⁵ The BCRA regulations of soft money and electioneering communication would become the central focus of the *Citizens United* decision.³⁶

3. *The Supreme Court's Campaign Finance Decisions Do Not Present a Consistent Regulatory Framework*

Far from presenting a coherent line of campaign finance jurisprudence, the Supreme Court cases interpreting the FECA and the BCRA represent inconsistent attempts to balance First Amendment protections with various regulatory goals.³⁷ Beginning with the Court's first interpretation of the FECA in *Buckley v. Valeo*,³⁸ campaign finance decisions established shifting precedents through the present day, including the decision in *Austin v. Michigan Chamber of Commerce*,³⁹ which the majority opinion for *Citizens United* characterized as, "not well reasoned," and "interfering with the market place of ideas."⁴⁰

- a. The Court's decision in *Buckley v. Valeo* established the framework for subsequent campaign finance cases by setting distinct standards for expenditures and contributions

The 1974 Amendments faced their first challenge before the Court in 1976, resulting in the key campaign finance decision of the twentieth century.⁴¹ The *Buckley* decision created a bifurcated analysis for limits on campaign expenditures and contributions that became the standard framework

35. BCRA, *supra* note 32, at §§ 101, 201, 203, 311; *See Kang, supra* note 26, at 44.

36. 558 U.S. at 316, 320 (2010).

37. *See* Richard Briffault, *On Dejudicializing American Campaign Finance Law*, 27 GA. ST. U. L. REV. 887, 911 (2011) ("The Supreme Court's campaign finance jurisprudence is a mess"); Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127, 131 (1997) ("[T]hree standards of corruption . . . have been jumbled together in the corpus of campaign finance law"); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 581 (2011) ([T]he Court's campaign finance jurisprudence has swung like a pendulum . . .").

38. 424 U.S. 1 (1976).

39. 494 U.S. 652 (1990).

40. *Citizens United*, 558 U.S. at 314–15.

41. *See Abraham, supra* note 28, at 1078.

applied in campaign finance decisions for decades to come.⁴² This two-tiered approach is based on the differentiation between expenditures, defined as money spent independently for promoting a political end, and contributions, defined as money given to a candidate or group for subsequent allocation.⁴³ The *Buckley* Court's interpretation of the FECA provisions restricting expenditures and contributions hinged on those provisions curtailing free speech rights protected by the First Amendment.⁴⁴ Limiting speech to this extent would only be permissible if the governmental interest served by the expenditure ceiling was adequately significant to justify curbing a constitutional right.⁴⁵ The *Buckley* Court, however, determined that the governmental interest regarding campaign finance regulation was limited to the prevention of quid pro quo corruption or the appearance thereof, an objective for which the FECA expenditure ceiling was not sufficiently tailored.⁴⁶ Because expenditure limitations represent a direct restriction on the quantity of political communication, the Court explained that they must be subjected to the stringent level of "strict scrutiny" which is applied to regulations of "basic constitutional freedoms."⁴⁷ Contribution limits, however, should be subjected to a lesser standard of "exacting scrutiny," because the transformation of a campaign contribution into political debate, "involves speech by someone other than the contributor."⁴⁸

b. The Court first addressed corporate campaign expenditure in *FEC v. Massachusetts Citizens for Life*

The Court confronted the issue of corporate campaign spending limits in 1986, holding in *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)* that a state law restricting independent expenditures was overbroad as applied to nonprofit, ideological corporations.⁴⁹ Justice Brennan, writing for the majority in *MCFL*, asserted that regulation of corporate political activity should be aimed at restricting the "unfair deployment of wealth for political purposes."⁵⁰ From this perspective, legislation intended to mitigate the dan-

42. *Buckley*, 424 U.S. at 19–21; see Burke, *supra* note 37, at 131–32; Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 384 (2009).

43. *Buckley*, 424 U.S. at 21.

44. *Id.* at 14 ("The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities.").

45. *Id.* at 45.

46. *Id.*

47. *Id.* at 25.

48. *Id.* at 21.

49. *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 263–64 (1986); Burke, *supra* note 37, at 133–34; Hasen, *supra* note 37, at 583–84.

50. *MCFL*, 479 U.S. at 259.

ger of corruption posed by profit-seeking corporations should not be so broad as to apply to a nonprofit organization.⁵¹ Although the decision in *MCFL* did address the issue of corporate campaign spending, the majority limited its discussion of regulating corporate expenditures to a distinction between that aim and the restriction of nonprofit political activity.⁵² The Court would not directly consider the constitutionality of restricting corporate expenditures for another four years, when the decision in *Austin* departed even further from *Buckley*'s anti-corruption jurisprudence.⁵³

- c. The Court's argument for preventing distortion in *Austin v. Michigan State Chamber of Commerce* would later be overturned by *Citizens United*

In *Austin*, the decision that would bear the brunt of the judicial scorn in the *Citizens United* decision, the Court first articulated the concept of distortion as a form of corruption to be targeted through campaign finance regulation.⁵⁴ Although the *Austin* Court recognized that restricting corporations' rights based on their wealth is not justifiable, the Court also acknowledged corporate wealth can unfairly influence elections when it is deployed through independent expenditures.⁵⁵ This unfair influence provided a sufficiently compelling rationale for enforcing restrictions on such expenditures.⁵⁶

- d. The Court continued to depart from the *Buckley* standards in *Nixon v. Shrink* and *McConnell v. FEC*

The Court's decision in *Nixon v. Shrink Missouri Government PAC* represented a further departure from the *Buckley* approach by upholding a relatively low contribution limit and stating that corruption concerns extend "to the broader threat from politicians too compliant with the wishes of large contributors."⁵⁷ Three years later, in the *McConnell v. FEC*⁵⁸ decision, the Court continued to apply *Austin*'s broad definition of corruption in its deci-

51. *Id.*

52. Hasen, *supra* note 37, at 587.

53. *Id.*

54. *Austin*, 494 U.S. at 660–61; Burke, *supra* note 37, at 134; Robert Weissman, *Let the People Speak: The Case for a Constitutional Amendment to Remove Corporate Speech from the Ambit of the First Amendment*, 83 TEMP. L. REV. 979, 990 (2011).

55. *Austin*, 494 U.S. at 660.

56. *Id.*

57. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000); Briffault, *supra* note 37, at 903; Hasen, *supra* note 37, at 586–87.

58. *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), *overruled in part by Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

sion upholding regulations for issue advocacy advertisements.⁵⁹ The dissents of Justices Kennedy, Scalia, and Thomas in *McConnell* would form the basis for much of the majority opinion in *Citizens United*.⁶⁰

B. The Decisions in *Citizens United* and *McCutcheon* Overturned Precedent and Narrowed the Court's Definition of Corruption

The current standard of campaign finance jurisprudence is reflected in the Court's decisions in *Citizens United*, which overturned *Austin* and parts of *McConnell* by declaring corporate expenditure limits unconstitutional, and *McCutcheon*, which struck down aggregate contribution limits for individuals.⁶¹

1. *The Citizens United Decision Signaled a Return to the Buckley Court's Narrow Definition of Corruption*

The *Citizens United* case dealt with the airing of a ninety-minute documentary titled *Hillary: The Movie*, which was produced by Citizens United, a nonprofit organization that derives most of its funds from donations by individuals and for-profit corporations.⁶² The film, an electioneering communication as defined by the BCRA, focused on then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 presidential primary elections at the time of the film's release.⁶³ Citizens United planned to release the film through video-on-demand services free of charge, a fact that was advertised through ten and thirty-second promotional videos run on broadcast and cable television.⁶⁴

Citizens United brought a suit for injunctive relief against the FEC, seeking declarative exemption from the application of the BCRA restrictions on the use of corporate treasury funds to finance publicly broadcasted issue advocacy.⁶⁵ When the District Court denied Citizens United's motion for a preliminary injunction, Citizens United appealed to the Supreme Court, which asked the parties to file supplemental briefs addressing whether the Court should overrule either or both *Austin* and the part of *McConnell* which

59. Hasen, *supra* note 37, at 589; Haley S. Peterson, *McCutcheon v. FEC: Sacrificing Campaign Finance Regulation in the Name of Free Speech*, 74 MD. L. REV. ENDNOTES 23, 33 (2015).

60. See *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 337, 351, 354 (2010).

61. *Id.* at 365; *McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434, 1462 (2014); Hasen, *supra* note 37, at 591; Peterson, *supra* note 59, at 23–24.

62. *Citizens United*, 558 U.S. at 319–21.

63. *Id.*

64. *Id.*

65. *Id.* at 321.

addresses the facial validity of the FECA.⁶⁶ At rehearing, the Court recognized that *Austin* contradicted previous case law, and the question before the Court was whether that decision should be overruled.⁶⁷

To decide whether to apply the doctrine of *stare decisis* in the case, the Court analyzed three arguments in support of *Austin*.⁶⁸ The first argument rested on an interest in combatting distortion of information and influence in elections, but the Court reasoned that acknowledging such an interest could just as easily justify the banning of books and other non-campaign communications.⁶⁹ This rationale is comparable to promoting the equalization of speech across the electorate, which would run counter to the *Buckley* decision and other First Amendment jurisprudence.

The second major argument that the Court addressed in *Citizens United* identified a governmental interest in “anticorruption.”⁷⁰ To explain its understanding of corruption, the Court invoked *Buckley*’s definition of a narrow governmental interest in preventing quid pro quo corruption or the appearance thereof.⁷¹ Furthermore, the Court stated that, “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy,” and emphasized that actual corruption could be prevented by prohibiting coordination between funders utilizing independent expenditures and the candidates that those funders were supporting.⁷²

The Court then analyzed the final argument in support of *Austin* which was based on shareholder protection—that dissenting shareholders of a corporation would feel compelled to fund corporate political speech against their will.⁷³ The Court dismissed this argument on the primary grounds that, like the anti-distortion rationale, a protected governmental interest in shielding the shareholders of corporations could be used to ban political speech, including the political speech of media corporations whose expressions are vital to political debate in a healthy democracy.⁷⁴ The Court did recognize that shareholders may feel unfairly compelled to support speech with which they disagree, but did not find sufficient evidence that such a situation could not be corrected through the procedures of corporate democracy.⁷⁵

The *Citizens United* Court recognized that overturning precedent was a grave decision that should only be undertaken if “the most convincing of

66. *Id.* at 322.

67. *Id.* at 329.

68. *Citizens United*, 558 U.S. at 349.

69. *Id.*

70. *Id.* at 357.

71. *Id.*

72. *Id.* at 360.

73. *Id.* at 361.

74. *Citizens United*, 558 U.S. at 361.

75. *Id.* at 362.

reasons demonstrates that adherence puts us on a course that is sure error.”⁷⁶ In light of this gravity, the Court emphasized that it would only overrule *Austin* after lengthy consideration of its implications for the contemporary system of federal elections and the surrounding political campaigns.⁷⁷

Ultimately, however, the Court overruled *Austin* and returned to the campaign finance jurisprudence of *Buckley*, stating that, “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”⁷⁸ This declaration, that corporations held the same constitutionally protected right to political speech as individuals, sparked the development of several approaches to campaign finance reform by both private actors and public officials in the years following the *Citizens United* decision.⁷⁹

2. *The Court Continued Its Line of Reasoning from Citizens United in the McCutcheon Decision*

Four years after the *Citizens United* decision abolished corporate expenditure limits, the Court struck down the BCRA aggregate limits on campaign contributions, holding in its *McCutcheon* decision that such limits violated the constitutional guarantee of free speech.⁸⁰ The aggregate limits of the BCRA permitted an individual to contribute a total of \$48,600 to federal candidates and \$74,600 to political committees, creating a contribution ceiling of \$123,200 per two-year election cycle.⁸¹ In making this decision, the Court once again relied upon *Buckley*’s narrow definition of corruption as the quid pro quo exchange of money for an official act and reasoned that the government’s only interest in preventing corruption should be prohibiting such an exchange or the appearance thereof.⁸² The *McCutcheon* decision did not, however, strike down all limits for contributions to federal candidates. The BCRA contribution limit of \$5,200 per election cycle per candidate remains intact,⁸³ though the possibility of diffusing unlimited contributions through party committees renders that restriction virtually meaningless.⁸⁴

76. *Id.*

77. *Id.* at 364–65.

78. *Id.* at 365.

79. See Richard L. Hasen, *Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL’Y REV. 21, 22 (2014).

80. *McCutcheon v. Federal Election Comm’n*, 134 S. Ct. 1434, 1462 (2014).

81. *Id.* at 1442–43.

82. *Id.* at 1451 (citing *Buckley*, 424 U.S. at 26 (1976)).

83. *Id.* at 1442.

84. Robert K. Kelner, *The Practical Consequences of McCutcheon*, 127 HARV. L. REV. F. 380, 380 (2014) (“[I]n the absence of an overall cap on spending, the donor could, in theo-

Joint Fundraising Committees (JFCs) illustrate the impotence of the remaining limitations to political contributions. JFCs allow a group of candidates, party committees, or PACs to solicit donations as a group and then allocate the jointly raised money at the group's discretion.⁸⁵ This allows an individual donor to support multiple candidates and committees with a single donation, with a *de facto* limit established by multiplying the \$5,200 cap mentioned above by the number of candidates within the JFC.⁸⁶ Although the *McCutcheon* Court's plurality expressed skepticism about the potential for JFCs as vehicles for circumventing contribution limits, Justice Breyer noted in his dissent, "[a]fter today's decision, [an individual donor] could write a single check to the Joint Party Committee in an amount of about \$1.2 million."⁸⁷ Indeed, within two weeks of the *McCutcheon* decision, all three Republican national party committees formed a JFC called the Republican Victory Fund, which could solicit more than \$97,000 in one check.⁸⁸

Though the *McCutcheon* and *Citizens United* decisions impacted different areas of campaign finance law, they both had the effect of enhancing the capacity of wealthy donors to spend large sums of money on federal elections.⁸⁹ Although campaign spending from outside groups had begun to increase significantly as early as 2004,⁹⁰ public dissatisfaction with campaign finance has grown considerably in the wake of these two important decisions.⁹¹

C. The Years Following *Citizens United* Have Seen a Proliferation of Proposed Constitutional Amendments

In the past four years, American legislators have proposed fifty-four resolutions that would amend the Constitution to counter the effects of *Citizens United* on campaign finance regulation.⁹² Over the same period, multiple organizations formed with the purpose of proposing and promoting con-

ry, spend millions of dollars before running out of federal candidates and committees to support.⁹³)

85. *Id.* at 382.

86. *Id.*

87. *McCutcheon*, 134 S. Ct. at 1472 (Breyer, J., dissenting). The "Joint Party Committee" in Justice Breyer's example is a JFC joining all the state and national committees of a particular political party. *Id.*

88. Kelner, *supra* note 84, at 383; Liz Kennedy & Seth Katsuya Endo, *The World According to, and After, McCutcheon v. FEC, and Why It Matters*, 49 VAL. U. L. REV. 533, 537 (2015). This represented a 20% increase from the maximum donation before *McCutcheon*. *Id.*

89. See Kennedy & Endo, *supra* note 88, at 566.

90. Kelner, *supra* note 84, at 385–86.

91. Kennedy & Endo, *supra* note 88, at 566.

92. See *Constitutional Amendments*, UNITED FOR PEOPLE, <http://united4thepeople.org/amendments> (last visited Mar. 17, 2016) (providing a list of proposed amendments for each congressional term).

stitutional amendments to overturn the *Citizens United* and *McCutcheon* rulings.⁹³ This movement to amend the constitution has garnered the support of 18 state legislatures and 144 members of the 115th United States Congress.⁹⁴

III. ARGUMENT

A. The Proposed Amendments Run Counter to Established First Amendment Jurisprudence

The protection of free expression in the First Amendment to the Constitution is justified by its promotion of fundamental values such as self-governance, the discovery of truth, advancing autonomy, and promoting tolerance.⁹⁵ Any law that regulates speech may be facially unconstitutional if it is either unduly vague or overbroad.⁹⁶ Though the proposed amendments to overturn *Citizens United* and *McCutcheon*, if ratified, would be inherently constitutional and therefore not subject to invalidation for vagueness or overbreadth, the concerns underlying those doctrines of First Amendment jurisprudence are relevant to examining the proposals' potential impact.

B. The Proposed Amendments Are Vague and Overbroad

1. *The Proposed Amendments Are Unduly Vague if a Reasonable Person Cannot Tell Which Speech Is Prohibited and Which Is Permitted.*

The Supreme Court's void-for-vagueness doctrine seeks to avoid the violation of due process that occurs when a statute either forbids or requires a certain behavior in terms so vague "that men of common intelligence must necessarily guess at its meaning and differ as to its application."⁹⁷ Several proposed amendments contain vague language that would violate notions of

93. See, e.g., MOVE TO AMEND, <https://movetoamend.org> (last visited Mar. 17, 2016) (proposing specific language for a constitutional amendment); FREE SPEECH FOR PEOPLE, <http://freespeechforpeople.org> (last visited Mar. 17, 2016) (advocating for a constitutional amendment and promoting current legislative proposals); DEMOCRACY IS FOR PEOPLE, <http://www.democracyisforpeople.org> (last visited Mar. 17, 2016) (building a movement to counteract the decisions in *Citizens United* and *McCutcheon* as a project of Public Citizen).

94. For a complete list of endorsements, see *Congress*, united4thepeople.org, <http://united4thepeople.org/congress> (last visited Mar. 2017) (providing a complete list of endorsements).

95. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1208–12 (3rd ed. 2006).

96. *Id.* at 1213.

97. *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926).

fair play and leave both corporate and state actors guessing as to whether particular behavior constitutes a violation of the constitution.⁹⁸

The amendment proposed by the organization Move to Amend provides an example of such problematically vague language. The proposal's second article contains the following provision:

Federal, State, and local government shall regulate, limit, or prohibit contributions and expenditures, including a candidate's own contributions and expenditures, to ensure that all citizens, regardless of their economic status, have access to the political process, and that no person gains, as a result of their money, substantially more access or ability to influence in any way the election of any candidate for public office or any ballot measure.⁹⁹

The requirement that all levels of government shall regulate campaign contributions to ensure equality of access and influence for all citizens creates a constitutional standard for regulatory behavior without adequately defining what that behavior would entail.¹⁰⁰

To illustrate the potential danger of the vague language contained in this proposed amendment, it is helpful to consider hypothetical situations in which the amendment, if enacted, would put unintended actors in the crosshairs of constitutional challenges. For example, when a local government enacted campaign finance regulations, as it would be required to do under the proposed language, the regulation would have to "ensure that . . . no person gains, as a result of their money, substantially more access or ability to influence in any way the election of any candidate."¹⁰¹ Under this regime, a party with appropriate standing could bring a suit against the local government for violating the Constitution if any wealthy person was reasonably perceived to have gained access or influence of a local candidate. This concern has equal application for media organizations that convey political messages—imagine if courts had to decide whether the Washington Post had an unequal ability to influence a candidate due to its financial resources. The adoption of this amendment would result in either an inordinate outburst of lawsuits against state and local governments, or the enforcement of draconian electoral regulations that would force equalization of speech across the respective electorate.

This hypothetical scenario may seem extreme, but it is representative of many scenarios that might develop following the adoption of a danger-

98. See, e.g., *Move to Amend's Proposed 28th Amendment to the Constitution*, MOVE TO AMEND, <https://movetoamend.org/wethepeopleamendment> (last visited Mar. 26, 2017).

99. *Id.*

100. *Id.*

101. *Id.*

ously vague constitutional amendment intended to overturn the ruling of *Citizens United*.

2. *The Proposed Amendments Are Overbroad if Other Areas of Protected Speech Are Significantly Compromised*

The Supreme Court's overbreadth doctrine holds that a statute restricting speech can result in a "continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview."¹⁰² This standard applies to overbroad laws that regulate substantially more speech than the Constitution allows to be regulated.¹⁰³

The amendment proposed by Senator John Tester and Senator Chris Murphy provides an example of the overbreadth that typifies language in the proposed amendments, stating the following in its second section:

The words people, person, or citizen as used in this Constitution do not include corporations, limited liability companies, or other corporate entities established by the laws of any State, the United States, or any foreign state, and such corporate entities are subject to such regulation as the people, through their elected State and Federal representatives, deem reasonable and are otherwise consistent with the powers of Congress and the States under this Constitution.¹⁰⁴

Not only would this amendment redefine corporate rights across the entire Constitution, but it would restrict substantially more speech than it aims to curb in its attempt to regulate campaign finance.

One could imagine that removing all constitutional protections from corporate entities would open the door for many restrictions on the activities of both nonprofit and for-profit corporations. Churches and other charitable organizations could have their legal protections dismantled, opening them to a variety of regulations based on the content of their activities. Alternatively, if a proposed amendment only stripped away the speech rights of corporations, media outlets would face constitutionally sanctioned repercussions for expressing political opinions. This would have particularly severe consequences for the news media, which have traditionally served as key institutions in the American political process. Even the practice of newspaper endorsements for local candidates would violate the Constitution. These scenarios seem to belong in a dystopian imagining of America's future, but

102. *Broadrick v. Oklahoma*, 413 U.S. 601, 629 (1973).

103. See CHEMERINSKY, *supra* note 95.

104. S.J. RES. 18, 113TH CONG. (2013); Move to Amend's proposal contains a similar provision stating that, "artificial entities established by the laws of any State . . . shall have no rights under this Constitution and are subject to regulation by the People, through Federal, State, or local law." MOVE TO AMEND, *supra* note 98.

they represent a very real weakness of what has so far been the most popular approach to overturning the *Citizens United* decision.

Some groups have anticipated this challenge to potential amendments by including language that explicitly preserves freedom of the press.¹⁰⁵ The amendment proposed by Senator Bernie Sanders, for example, includes the simple language, “Nothing in this Article shall be construed to alter the freedom of the press.”¹⁰⁶ The same resolution, however, seems to propose broad regulations that could easily impinge on a media corporation’s activity during an election, stating:

Nothing in this Constitution shall be construed to restrict the power of Congress and the States to protect the integrity and fairness of the electoral process . . . which may include . . . the imposition of requirements to ensure the disclosure of contributions and expenditures made to influence the outcome of a public election by candidates, individuals, and associations of individuals, and the imposition of content neutral limitations on all such contributions and expenditures.¹⁰⁷

The “imposition of content neutral limitations” on the political speech of “associations of individuals” has the potential, if not the explicit aim, to circumscribe the activity of organizations that create or distribute campaign-oriented content. Similar to the limitations on media activity discussed in the paragraphs above, this language could easily be construed as supporting restrictions on institutions of the press. Additionally, even if the limiting language were sufficient to protect the freedom of the press, cases determining whether particular communications constituted protected press behavior rather than electioneering would overwhelm the courts.

3. *Even Carefully Worded Proposals, Like Other Constitutional Amendments, Lack Detail Needed for Effective Guidance in Campaign Finance*

At least one proposed amendment goes even further to ensure the protection of constitutional rights, stating that “[n]othing in this Constitution shall be construed to limit the rights enumerated in this Constitution and other rights retained by the people, which are unalienable.”¹⁰⁸ Though this

105. See, e.g., S.J. RES. 5, 114TH CONG. § 3 (2015) (“Nothing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press.”); S.J. RES. 4, 114TH CONG. § 3 (2015) (“Nothing in this Article shall be construed to alter the freedom of the press.”); S.J. RES. 7, 113TH CONG. § 4 (2014) (Nothing in this Constitution shall be construed to limit the rights enumerated in this Constitution and other rights retained by the people, which are unalienable.”).

106. S.J. RES. 4 at § 3.

107. *Id.* at § 2.

108. S.J. RES. 7 at § 4.

language attempts to create a firewall between the proposed power to regulate campaign finance and the civil liberties already guaranteed by the Constitution, it does not provide any guidance as to how a court would balance these constitutional provisions if and when they conflict.¹⁰⁹

The lack of detailed language to guide courts in applying these proposals is not unique to campaign finance amendments. In fact, differing interpretations of existing amendments to the Constitution have formed competing visions of civil liberties for centuries. An obvious way to combat the problematic vagueness and breadth that plagues the foregoing proposals would be to include detailed commentary and illustrations, similar to the guiding language in the American Law Institute's Restatements.¹¹⁰ This approach, besides departing from federal constitutional norms, would require a burdensome process; the drafting of a Restatement, for example, may involve coordination and consultation between the American Bar Association, the Association of Trial Lawyers of America, the Defense Research and Trial Lawyers Association, and the Product Liability Advisory Council—all before the preparation of a second draft.¹¹¹ If this is the degree of time and effort put into detailing the proper interpretation of a non-binding legal authority, certainly a comparable level of attention should be paid to the more consequential and historic task of amending the Constitution.¹¹²

The most common method for constitutional change in the United States is incremental and informal amending through a strong judiciary, which is a more fluid and responsive process than the path to formal amending.¹¹³ Because this typical process of constitutional change has failed to produce a consistent standard for evaluating campaign finance restrictions,¹¹⁴ activists seek to formally amend the Constitution.¹¹⁵ Even with the inclusion of detailed commentary, however, an amendment to the Con-

109. Modern campaign finance cases have primarily dealt with this precise conflict, and the resulting jurisprudence has been inconsistent and contentious. *See supra* Part II.A.3.

110. *See generally* RESTATEMENT (SECOND) OF CONTRACTS (AM. LAW INST. 1981). Each section of the Restatements provides painstakingly detailed examples of how its persuasive authority should be applied in various situations. These illustrations are often longer than the section itself. *See id.* at § 1 cmt. e, illus. 1.

111. Aaron D. Twerski, *Inside the Restatement*, 24 PEPP. L. REV. 839, 840 (1997).

112. The inclusion of detailed commentary is not part of the American constitutional tradition, a thorough discussion of which is outside the scope of this paper. For an in-depth examination of amendment-drafting practices at the state and federal level, *see* Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355 (1994).

113. Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 925 (2014). In the field of comparative law, this is referred to as the “evolutionary model” of constitutional change, though there remains controversy as to whether informal amendments are legitimate. *Id.*

114. *See supra* Part II.A.3–4.

115. *See supra* Part II.C.

stitution is not the ideal tool for reforming the current system of campaign finance.

C. Amending the Constitution Is Not the Most Effective Means of Campaign Finance Reform

Campaign finance experts like Richard Hasen suggest that amending the Constitution is not the ideal means for overturning *Citizens United* and *McCutcheon*, or for effecting campaign finance regulation more broadly.¹¹⁶ Even if a proposed amendment could avoid the problems identified in the foregoing hypothetical scenarios, there are additional concerns about the effectiveness of an approach that focuses only on overturning *Citizens United*. For instance, an amendment written simply to reverse the decision in *Citizens United* would leave undisturbed the system of massive campaign contributions that allows a small group of wealthy donors to have access to and influence over American politicians at the state and federal levels.¹¹⁷ Lawrence Lessig has expressed similar concerns about the ineffectiveness of an amendment overturning *Citizens United*, as well as doubts as to whether such an amendment could even withstand the process required for adoption.¹¹⁸ Additionally, considering the improbability of an amendment adoption and the uncertainty of the impact such an amendment might have, Lessig argues that harnessing the significant popular energy required to pursue a constitutional amendment would be a disastrous misdirection of a mobilized electorate.¹¹⁹

Despite widespread disapproval of *Citizens United*, it is not clear that overturning that decision is the most effective approach to reform. It may be prudent to first explore the toolkit of unenforced legal mechanisms for regulation, along with the various alternative approaches to campaign finance reform that have proliferated in recent years.

1. *Public Finance Could Provide an Alternative Funding Source for Federal Candidates*

The system of public financing for federal candidates, created by the 1974 amendments to FECA, was used to significant effect by presidential candidates for nearly two decades after its adoption.¹²⁰ After the 2008 election and the subsequent decision in *Citizens United*, however, this method of

116. See, e.g., Hasen, *supra* note 79.

117. *Id.*

118. See LESSIG, *supra* note 12.

119. *Id.*

120. Federal Election Campaign Act Amendments of 1974, *supra* note 29; See LESSIG, *supra* note 12.

funding has been largely discarded in favor of Super PAC financing and other novel approaches to soliciting money from large donors.¹²¹ It is possible that the public finance system built for the political reality of forty-years ago is not equipped to combat the influence and allure of today's multibillion-dollar campaigns.

Professor Lessig is among those who have called for an updated version of public finance mechanisms to address the influx of money in recent federal elections.¹²² His proposal, named the "Grant and Franklin Project," would give each taxpayer a fifty-dollar rebate in the form of a "Democracy Voucher," which could be contributed in whole or in part to any candidate who has agreed to finance his or her campaign exclusively through this program.¹²³ By Lessig's estimate, this process could double the amount of public funding available to federal candidates, effectively countering the appeal of Super PACs and other popular finance mechanisms.¹²⁴ This proposal's viability, however, is undercut by the Court's decision in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,¹²⁵ which would prevent Congress from implementing a voluntary voucher plan that increases the amount of public financing for candidates facing large independent spending against them.¹²⁶ Still, Lessig's approach has promise if it could be implemented within constitutional limits.

2. *Enforcing Existing Disclosure Laws Could Allow Voters to Make Informed Decisions About the Candidates That They Support*

Missing from many contemporary discussions of campaign finance is the lacking enforcement of disclosure laws that were deliberately left intact by the *Citizens United* Court.¹²⁷ In the 2012 election cycle, undisclosed funders were responsible for 37 percent of all electioneering communica-

121. Lioz & Bowie, *supra* note 3.

122. Ganesh Sitaraman, *Contracting Around Citizens United*, 114 COLUM. L. REV. 755, 764 (2014); see LESSIG, *supra* note 12, at 268.

123. Lawrence Lessig, *The Grant and Franklin Project*, LESSIG BLOG (Dec. 17, 2011), <http://lessig.tumblr.com/post/14357153028/the-grant-and-franklin-project>. The proposed system makes Democracy Voucher financing available to candidates who agree to take money exclusively from vouchers and individual contributions of \$100 or less. *Id.*

124. LESSIG, *supra* note 12, at 268–9. Lessig estimates that the program could raise around seven billion dollars per year, which he compares to the roughly three billion dollars raised in all 2010 elections. *Id.*

125. 131 S. Ct. 2806 (2011).

126. Richard L. Hasen, *Fixing Washington Republic, Lost: How Money Corrupts Politics - and a Plan to Stop It*, by Lawrence Lessig. New York, N.Y., and Boston, Mass.: Twelve Press. 2011. Pp. Xiii, 383. \$26.99. *Capitol Punishment: The Hard Truth*, 126 HARV. L. REV. 550, 575 (2012).

127. 558 U.S. at 368–69.

tions.¹²⁸ Secret funding is often accomplished by channeling private money through the relatively unregulated category of nonprofit organizations known as “social welfare” corporations, organized under Section 5.01(c)(4) of the tax code.¹²⁹ Under current FEC standards, these organizations are not required to disclose the sources of their funds if they are predominantly engaged in activities that promote social welfare.¹³⁰ Although political expenditures, such as the publication of electioneering communications, do not qualify as the promotion of social welfare, organizations can remain exempt from FEC regulations as long as those expenditures make up 49 percent or less of all organizational spending.¹³¹ The adoption of current proposals to amend IRS and FEC policy towards currently exempt organizations would close many of these loopholes in the contemporary campaign finance system.

In addition to the existing disclosure rules, legislators in both houses of Congress have recently advanced proposals to enhance transparency in campaign finance.¹³² These bills, however, have failed to gain the necessary support for adoption into law, underscoring the lack of political will for enacting additional regulations for campaign finance.¹³³

3. *Eliminating Limits on Hard Money Contributions to Candidates Could Detangle the Campaign Finance Regime That Has Led to Current Spending Norms*

Building on the idea of transparency, another option for campaign finance reform is for Congress to remove all restrictions on contributions to candidate campaigns, regardless of the donor’s personhood or nonprofit status.¹³⁴ This approach would “unwind the path that has led to this point in the nation’s campaign finance history,” and, “disregard the various distinctions [that *Buckley*] drew between political campaign contributions and independent expenditures in the course of upholding amount limits on the former but not the latter.”¹³⁵ In addition to tidily resolving many of the First Amendment concerns associated with current campaign finance regulations, this approach has the potential to improve the tone of modern campaign

128. Hasen, *supra* note 126, at 575.

129. I.R.C. § 501(c)(4) (2012).

130. Kim Barker, *How Nonprofits Spend Millions on Elections and Call It Public Welfare*, PROPUBLICA (Aug. 18, 2012), <https://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public-welfare>.

131. *Id.*

132. H.R. 148, 113th Cong. (2013); S. 3369, 112th Cong. (2012).

133. Sitaraman, *supra* note 122, at 765.

134. Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 168 (2010).

135. *Id.*

advertisements by allowing voters to hold candidates, rather than Super PACs, accountable for negative content.¹³⁶ Though this idea has not been advanced legislatively, it is likely that an ambitious rollback of campaign finance restrictions would face backlash from the vocal advocates and politicians who have made overturning *Citizens United* a key plank of their platforms.

4. *Promoting Intra-Candidate Contracts That Disincentivize Outside Spending Could Provide a Private Sector Solution to Campaign Finance Problems*

Perhaps the most creative, and unorthodox, approach to campaign finance reform promotes the institution of “private ordering” agreements between candidates.¹³⁷ This option involves opposing candidates submitting to a binding agreement that would penalize each campaign for outside spending by groups that support the candidate.¹³⁸ Because this form of self-regulation operates as a private contract, it is not subject to the constitutional concerns that mark the other campaign finance approaches discussed above.¹³⁹ Similarly, a private ordering option would not depend on the political viability of particular legislation, which has proven to be a significant hindrance to other methods of regulation.¹⁴⁰

The private ordering approach is, however, susceptible to critiques from those who support the First Amendment jurisprudence of *Citizens United*, as such agreements may be seen as restricting both the amount of speech and the type of speaker that would be allowed in campaigns.¹⁴¹ Private ordering is also vulnerable to attack from the other side of the campaign finance debate, particularly if the efficacy of private arrangements is used as an argument against universally enforceable regulation.¹⁴² Regardless of the ultimate sufficiency of a private ordering option, a contract-based approach

136. *Id.* at 170 (“If the dirty work of negative advertising is left to corporate sponsors running independent ads because candidates do not want to be muddied by the backslash from running such ads themselves, then redirecting political money to candidates will also tend to elevate the tenor of political campaigns.”).

137. See Sitaraman, *supra* note 122. This approach is based on the model of The People’s Pledge, adopted by Elizabeth Warren and Scott Brown in their 2012 Senate race. *Id.* at 805–06.

138. *Id.* at 757 (“[I]f an outside group spends money on television advertisements supporting a candidate or attacking her opponent, the candidate that benefits from the advertisements must pay . . . [b]ecause the penalty reduces the candidate’s own funds, outside supporters will restrain themselves from spending on the candidate’s behalf.”).

139. *Id.* at 767.

140. *Id.*

141. *Id.* at 800–01.

142. Sitaraman, *supra* note 122, at 801.

provides a model for self-regulation that avoids many of the pitfalls facing proposed amendments and other potential methods for campaign finance reform.

IV. CONCLUSION

Citizens of the United States who are able to marshal large quantities of money for campaign contributions, either as individuals or corporations, are able to gain access to political influence that is not available to the vast majority of the population. This influence leads to policy outcomes that align primarily with the interests of a narrow segment of the population rather than producing policies aligning with the values and goals of Americans more broadly.¹⁴³

Though the focus of many election reform activists has been on overturning *Citizens United* through a constitutional amendment, there are several reasons that this is not the most productive approach for campaign finance regulation. The language of proposed amendments risks restricting vital constitutional rights, and drafting the proposals more carefully would run counter to the dominant method of constitutional change in the United States.¹⁴⁴ Additionally, the political viability of passing a constitutional amendment is low enough to suggest that other, more practical methods should take priority for reformers.

Other popular approaches to campaign finance reform have drawbacks as well, such as the inefficacy of disclosure regimes and the dubious constitutionality of public financing vouchers.¹⁴⁵ Either of those approaches, however, has the advantage of being based in existing campaign finance strategies,¹⁴⁶ avoiding the extraordinary maneuvers required to adopt a constitutional amendment. Furthermore, the fact that several promising options have yet to be widely explored¹⁴⁷ underscores the inefficiency of putting significant reformist energy towards what would certainly be a long and controversial battle to amend the Constitution.¹⁴⁸

Moving forward, activists and politicians who wish to create a more open and equitable political system should aim to combine enforcement of existing regulations with the promotion of innovative campaign finance

143. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSP. ON POLS.* 3, 567–68 (2014).

144. See Albert, *supra* note 113, at 925.

145. See Sitaraman, *supra* note 122, at 766.

146. See *supra* Part III.C.1–2.

147. See *supra* Part III.C.3–4.

148. Note that, of the fifty-four amendment proposals advanced since 2012, none have succeeded in garnering sufficient Congressional support. See *generally Constitutional Amendments*, *supra* note 92; Sitaraman, *supra* note 122, at 765.

methods. This tactical approach would be the most effective means towards the strategic goals of campaign finance reformers, and its implementation could lead to the emergence of increased transparency and fairness in American elections.

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