Campaign Finance and American Democracy

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Abstract

This article considers the vast academic literature on campaign finance regulation in the United States, drawing on the fields of political theory, American politics, election law, constitutional law, and economics. The scholarly treatment of campaign finance regulation has become increasingly focused on fundamental questions about democratic governance and democratic values, and it has generated profound debates about participation, representation, free speech, political equality, liberty, and the organization and distribution of political power in government and society. This article reviews the original debate about campaign finance regulation and traces its evolution in both political theory and constitutional law, identifying current areas of inquiry and new directions in research. In particular, the article focuses on corruption, political equality and representation, electoral exceptionalism, and the post–*Citizens United* landscape. It also surveys empirical findings from political science and economics.

INTRODUCTION

Campaign finance regulation has emerged as one of the most contentious issues in contemporary politics. The focus on campaign finance is fueled in part by the dramatic increase in the amount of money spent on elections. In the 2012 federal election cycle, for instance, the total amount of money spent reached almost $6.3 billion (Tokaji & Strause 2014). In addition, the legal framework governing campaign finance is in constant flux as a result of highly controversial court decisions that have struck down various aspects of the regulatory scheme.

The scholarly treatment of campaign finance regulation has become increasingly focused on fundamental questions about democratic governance and democratic values. Although the connection between campaign finance regulation and the nature of democracy has always been a subject of study, in recent years this relationship has become the predominant focus of several fields of inquiry. The topic of campaign finance regulation has generated profound debates about democratic participation, representation, free speech, political equality, liberty, and the organization and distribution of political power in government and society.

The academic literature on campaign finance regulation is vast. An additional challenge for the reviewer is that there is no one field to review. The fields of political theory, American politics, election law, constitutional law, and economics all contribute to our knowledge about campaign finance. In particular, it is impossible to discuss the literature on campaign finance without reference to the work of scholars in election law and constitutional law, many of whom hold joint degrees in political science and law.

This article charts the original debate about campaign finance regulation and its subsequent evolution in both political theory and constitutional law. It also identifies current areas of inquiry and new directions in research. In addition, it surveys some of the findings within the empirical literature in political science and economics. Given the breadth of the available scholarship, the discussion that follows includes only a representative sampling of the literature from each field. The article focuses exclusively on campaign finance in the United States and does not review the extensive literature on comparative campaign finance (Scarrow 2007).

THE DEBATE OVER CAMPAIGN FINANCE REGULATION

This section sets out the main arguments of those who support campaign finance regulation and those who oppose it. It then identifies some of the central topics that have been addressed in the literature, which are taken up in the remainder of this article.

The debate over campaign finance regulation addresses the following question: Should there be any limits on the giving and spending of private money for political campaigns? An important feature of the electoral process in the United States is that political parties and candidates are largely dependent on private donations to fund their campaigns. These campaign contributions are made by individuals, corporations, and special interests. In addition to donating to political campaigns, private individuals and groups can also spend money to support or oppose a candidate or political party by, for example, purchasing political advertising. A significant part of campaign finance law is concerned with regulating the private contributions and expenditures of individuals, corporations, and special interests. Although a public financing scheme exists for presidential elections, most presidential candidates choose to opt out of public financing because the amounts available do not cover their campaign costs. A few states provide public financing, but the Supreme Court has in recent years struck down public financing schemes that provide matching funds or that provide additional funding to candidates who are being outspent by non-publicly-financed candidates.

With respect to whether the government should impose limits on campaign contributions and expenditures, there are two main approaches: libertarian and egalitarian (Sunstein 1995). According to the libertarian approach, the state should not restrict electoral speech by imposing limits on campaign contributions and expenditures. A preliminary assumption is that such limits amount to limits on constitutionally protected speech. People communicate ideas by donating money to candidates and political parties who support their political viewpoints or by spending money on political advertising. The idea that money amounts to speech, however, has itself been the subject of debate (Wright 1976, Hellman 2011). Freedom of speech is essential for democracy; indeed, some would argue that free speech is a prerequisite for democratic governance (Meiklejohn 1948). Free speech enables citizens to criticize the government without fear of reprisal. Democracy and liberty are threatened if the government has the power to regulate speech. Under the libertarian approach, the constitutional protection of free speech means that there is a presumption against the state's regulation of campaign contributions and expenditures.

The egalitarian approach, by contrast, holds that the state regulation of speech is required in some instances to prevent the wealthy from monopolizing political discourse. Because the dissemination of viewpoints is expensive, those with the greatest wealth could monopolize the means of communication. Concentrations of private power may mean that the speech of those less powerful is never heard, and consequently, that the marketplace of ideas does not represent the full range of views and speakers. For Rawls (1999, pp. 197–98), the "liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate." Rawls posits that these inequalities ultimately enable the wealthy to exert greater influence on the development of legislation. Once this happens, the well-to-do "are likely to acquire a preponderant weight in settling social questions, at least in regard to those matters upon which they normally agree, which is to say in regard to those things that support their favored circumstances" (pp. 197–98). Informed public debate may therefore require that the government restrain certain voices in order to ensure that all points of view have a roughly equal opportunity of being heard (Sunstein 1992, 1994). Campaign finance restrictions prevent the electoral process from translating wealth into political influence (Sunstein 1994, 1995). By constraining the voices of the wealthy, such restrictions equalize the power of all citizens to affect the outcome of an election.

The debate over campaign finance regulation is often framed as a debate between liberty and equality. Fiss (1996a,b) argues that it is impossible to find a way to choose between liberty and equality, and moreover that the Constitution provides no guidance about how the conflict ought to be resolved. Fiss's elegant solution to the unsolvable conflict between liberty and equality is to recast it as a choice between two understandings of liberty: one in which the freedom of speech is impeded by the regulation of campaign finance and one in which the freedom of speech is protected by the regulation of campaign finance. The regulation of speech can be defended in the name of liberty because of the silencing effects of unregulated speech. In the absence of campaign finance regulation, the voices of the wealthy would dominate the public discourse and drown out the voices of the less affluent. The advantage to this formulation, according to Fiss, is that the problem of regulating speech is placed within a common matrix. Fiss's theory is based in part on a particular theory of the state. For Fiss, the conventional view of the state as the enemy of free speech is incomplete. Private wealth also poses a threat to the freedom of speech and hence it has to be regulated by the state. The state thus plays a crucial function of protecting free speech from private aggregations of power.

One response to Fiss's argument is that the conflict between liberty and liberty is not necessarily more determinate than the conflict between liberty and equality (Moon 1998). Other scholars have defended the regulation of campaign finance on equality grounds. For example, according

to Dworkin's (2000) "equality of resources" theory, liberty is simply another resource that ought to be equally distributed. For Dworkin, the regulation of campaign finance is acceptable when the legislation does not favor any ideology, party, or policy, and when it improves political discourse by making participation equally available to all citizens. Another response is that the conflict between liberty and equality in the campaign finance context is inevitable, and instead of reconciling these values, it is preferable from a democratic standpoint to instantiate the conflict in law (Dawood 2013).

Although opponents of campaign finance regulation are mainly concerned about the impairment of First Amendment freedoms (BeVier 1994; Smith 1997a, 1998; Redish 2001), they have a number of additional criticisms. Critics have argued that despite numerous reforms, the system is still viewed as corrupt and unequal (Smith 1997b, Redish 2001). Because there are always loopholes to the campaign finance rules, reforms are ineffective and counterproductive. Critics have also questioned the assumption that such regulations have a democratizing effect by preventing inequalities in wealth from being translated into inequalities in political power. Campaign finance restrictions may have the unintended effect of shifting political power to an even smaller subset of elites (Smith 1996). There are also nonfinancial inequalities in political influence (BeVier 1994).

Another problem with campaign finance regulations is that they can help to entrench the power of officeholders (Samples 2006). Elected officials, while purporting to rid politics of the influence of money, may in fact be protecting their offices from potential challengers. In a general sense, rules that make fundraising more difficult are detrimental to challengers and therefore beneficial for incumbents (BeVier 1985, Smith 1996). Incumbents have a larger base of supporters, as well as other advantages including a free staff, free mailings to their constituents, name recognition, and press coverage. Smith (2001) has argued for the elimination of all restrictions on contributions and expenditures on the grounds that campaign finance regulation undermines the right to free speech and the power of citizens. He argues in addition that there is little evidence that political giving and spending corrupt the legislative process.

The remainder of this article focuses more closely on some of the central themes that have emerged in the literature. As I suggested in the Introduction, the literature on campaign finance regulation has become increasingly concerned with large-scale questions about democratic functioning and governance, the meaning of representation, theories of influence and accountability, and the distribution of power. Although such issues have always been studied, they have gained new prominence in light of the increasing sums of money raised and spent in elections. It is fair to say that any theory of campaign finance regulation is ultimately based on a theory of democracy (Dawood 2006). For this reason, debates over campaign finance regulation inevitably involve conflicting approaches to fundamental democratic values and competing theories of how power ought to be distributed in a representative system (Dawood 2006).

The next section situates some of the literature on campaign finance by reference to the main developments in law. Much of the literature in the field has been in response to the constantly changing legal framework that governs money in politics. There are several excellent summaries of the legal landscape (Gardner & Charles 2012, Issacharoff et al. 2012, Lowenstein et al. 2012, Tokaji & Strause 2014). The article then focuses on four topics: corruption, political equality and representation, electoral exceptionalism, and the post–*Citizens United* landscape. The final section considers the empirical literature on campaign finance.

THE LEGAL FRAMEWORK FOR CAMPAIGN FINANCE REGULATION

The legal framework for campaign finance regulation is highly complex. In addition to legislation at both the federal and state levels, there are also multiple court decisions that have fundamentally

altered the legislative rules. The contemporary framework of campaign finance regulation was ushered in by the Supreme Court's landmark ruling in *Buckley v. Valeo*.[1] In *Buckley*, the Court considered the constitutionality of the Federal Election Campaign Act (FECA). The Court found that restrictions on the giving and spending of money for political campaigns did in fact impose restrictions on the First Amendment rights of speech and association. At the same time, the Court held that limits on contributions were justified by the government's interest in preventing corruption and the appearance of corruption. The electoral process must be protected from quid pro quo exchanges in which contributors provide cash to officeholders in exchange for political favors. However, the Court struck down FECA's limits on expenditures on the basis that these limits consisted of direct restraints on speech in violation of the First Amendment. The Court's decision in *Buckley* has been criticized for the bifurcation of contributions and expenditures (Issacharoff & Karlan 1999), for enhancing the role of money in politics (Wright 1982, Sorauf 1988, Sorauf 1992, Sunstein 1994, Baker 1998), and for usurping Congress's proper role in determining whether a libertarian or egalitarian approach ought to be followed (Foley 1998).

In subsequent decisions, the Court broadened its anticorruption rationale to include the concept of "antidistortion." In *FEC v. Massachusetts Citizens for Life*,[2] for example, the Court observed that the "corrosive influence of concentrated corporate wealth" may make "a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas." A few years later, in *Austin v. Michigan State Chamber of Commerce*,[3] the Court recognized a new kind of corruption distinct from quid pro quo corruption. This new kind of corruption arose from the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." The *Austin* decision set forth the Court's antidistortion understanding of corruption.

In 2002, Congress enacted the Bipartisan Campaign Reform Act (BCRA) in order to address long-standing concerns about the use of soft money and issue advertising to circumvent campaign finance laws. In *McConnell v. FEC*,[4] a five-member majority of the Supreme Court upheld the constitutionality of BCRA's soft money and issue advertising provisions. The majority expanded the definition of corruption beyond cash-for-votes exchanges to encompass the "undue influence on an officeholder's judgment, and the appearance of such influence." According to the majority, undue influence was apparent in the way that political parties sold special access to federal candidates and officeholders. By selling access to officeholders, political parties created the perception that money buys influence. The majority concluded that because undue influence is hard to detect and criminalize, Congress was justified in regulating soft money contributions. The majority also held that BCRA's new restrictions on the financing of issue advertising were necessary to counteract actual and apparent corruption.

At this point, the Court's definition of corruption encompassed several concepts: quid pro quo corruption, antidistortion, and undue influence. Yet the Court dramatically narrowed its understanding of corruption in *Citizens United v. FEC*.[5] In *Citizens United*, a majority of the Court struck down the provisions of BCRA that prevented corporations and unions from engaging in independent spending on electioneering communications. The Court held that the only

[1] 424 U.S. 1 (1976).

[2] 479 U.S. 238 (1986).

[3] 494 U.S. 652 (1990).

[4] 540 U.S. 93 (2003).

[5] 30 S. Ct. 876 (2010).

governmental interest strong enough to overcome First Amendment concerns is preventing quid pro quo corruption or the appearance thereof. In a departure from its earlier decision in *McConnell*, the Court found that access and influence do not amount to corruption. As Issacharoff (2010) observes, the narrowing of corruption to mean only quid pro quo corruption had significant implications for campaign finance. The Court's new position was also in tension with prior decisions that had justified contribution limits on a broader understanding of corruption (Hasen 2011a,b). In addition, the majority held that independent expenditures, in the absence of prearrangement and coordination, do not give rise to quid pro quo corruption, nor do they create the appearance of corruption—a position that has received considerable scholarly criticism (Kang 2010, Hasen 2011b, Karlan 2012). Scholars also note that the Court's position on corporate spending did not amount to a drastic change because earlier decisions had already struck down various rules that applied to corporations (Briffault 2011a, Dorf 2011, Kang 2012). As expected, the decision had a dramatic impact on independent corporate expenditures (Spencer & Wood 2014).

In the most recent campaign finance decision, *McCutcheon v. FEC*,[6] a five-member majority of the Supreme Court struck down the aggregate contribution limits established by FECA. These limits placed caps on the total amount an individual could contribute to federal candidates, political parties, and political action committees (PACs). The Court found that the aggregate limits were not closely drawn to prevent corruption or the appearance of corruption, in violation of the First Amendment. In addition, the Court limited corruption to quid pro quo corruption and defined it as "a direct exchange of an official act for money." It also stated that access and influence are not corruption. Kang (2014) finds the demise of aggregate limits troubling because such limits serve as a base contribution limit to the party. Campaign finance runs through the major parties, and high-level donors transact with the party directly. For this reason, Kang argues that corruption should be conceived not only at the individual level but also at the level of the party.

THE PROBLEM OF CORRUPTION

As a result of the Supreme Court's decisions, corruption has become a central concept in the literature on campaign finance. Scholars have categorized the Court's various definitions of corruption (Hasen 2004, Issacharoff 2010). They have also developed categorizations of their own. Burke (1997) has distinguished among three kinds of corruption: quid pro quo, monetary influence, and distortion. Teachout (2009) has identified five categories: criminal bribery, inequality, drowned voices, a dispirited public, and a lack of integrity. Hellman (2013) has described three principal kinds of corruption: the deformation of judgment, the distortion of influence, and the sale of favors. Dawood (2014a) has identified two general approaches to conceptualizing the "wrong" of corruption: first, that corruption amounts to an abuse of power, and second, that corruption violates the principle of political equality.

At a basic level, corruption takes place when public power is being used to realize private gains (Thompson 2005). For Issacharoff (2010), the real problem is clientelism, under which special interests capture the power of government to exchange their political support to realize private gains. For Warren (2004), corruption results in "duplicitous exclusion" because it excludes those who have a right to be included in democratic decision making, and does so in a manner that cannot be publicly justified. The appearance of corruption is also important because it provides citizens with the means by which to judge if trust in their elected officials is warranted (Warren 2006).

[6] 572 U.S. __ (2014).

Any discussion of corruption is necessarily based on a theory of democracy, equality, or representation. As scholars have observed, it is impossible to speak of corruption in political life without implicitly referring to an ideal state (Cain 1995, Lowenstein 1995, Burke 1997). For Strauss (1994), corruption is a derivative concept because it is actually a concern about inequality and/or the dangers of interest group politics. Burke (1997) contends that the concept of corruption implies a theory of representation. Hellman (2013) describes corruption as derivative because it is based on a theory of the institution or official involved.

A central problem, however, has been precisely delineating the line between corruption and ordinary democratic politics (Dawood 2014a). The classic approach is to view quid pro quo corruption as wrong either because it involves an exchange of political favors for campaign finance donations (Sunstein 1994) or because it involves a conflict of interest (Lowenstein 1989). Yet as Strauss (1994) argues, there is an important distinction between bribery and quid pro quo corruption. Bribery involves the use of public office for private gain, whereas quid pro quo corruption involves the use of public office for political gain. It is not obviously wrong for an elected official to use her office to remain in office longer. Indeed, elected officials are supposed to be motivated by the prospect of political gain. It is difficult to identify the precise point at which the use of public office for political gain transforms into corruption. Corrupt activity overlaps with conduct that is expected in politics (Thompson 1995).

Thompson (1995) draws an important distinction between individual corruption and institutional corruption. Individual corruption refers to bribery, extortion, and simple personal gain. Institutional corruption takes place when the gain received by the officeholder is political and the service provided by the officeholder damages the democratic process. Yet if corruption is the use of public office to forward private interests, is it permissible for elected officials to enact legislation that serves the interests of a particular corporation or individual? On one view, the fact that citizen preferences have been enacted into law is not on its own evidence of corruption. Thompson (1995) argues that private interests can become legitimated through the process of deliberation. Private interests can be transformed into public purposes provided that these private interests are subjected to the democratic process. The difficulty with this approach is that special interests routinely insert their interests into the democratic process, and these interests are enacted into law. Yet such cases are often held up as examples of corruption. An underlying problem is that it is very difficult to distinguish private interests from the public interest (Sachs 2011, Dawood 2014a).

A related challenge is determining when legislative responsiveness to constituent wishes transforms into corruption (Strauss 1995). Pitkin (1967) contrasts the independence (trustee) model, under which legislators make decisions solely on the basis of an objective view of what the public interest demands, with the mandate model, under which legislators are responsive to the views of their constituents. Under the independence model, any influence by constituents would be improper (Lowenstein 1985). Under the mandate approach, by contrast, legislators are responsive to the views of their constituents. On this view, the problem is not that legislators are responsive to citizen demands, because this responsiveness is the hallmark of democratic accountability.

The distinction between responsiveness and corruption is both critically important and unusually difficult to discern. One possibility is that satisfying the wishes of large donors is corruptive, whereas satisfying the wishes of constituents is not. Levitt (2010) observed that when a corporation secures favorable legislation as a reward for election expenditures, that outcome is viewed as pernicious when the legislation is harmful to the voting constituency but is viewed as unremarkable when the legislation benefits the voting constituency. Yet as Rosenblum (2008) argues, advocates of reform often evince a generalized "anxiety of influence," which treats as suspect any kind of political influence and views the influence of political parties as particularly sinister. This antiparty tenor is misplaced, in part because political influence is after all required for political parties to

be representative of and responsive to their constituents, and in part because parties help to dilute the influence of narrower groups such as special interests (Rosenblum 2008). Notably, Chief Justice Roberts, in the Supreme Court's recent *McCutcheon* decision, recast what earlier decisions had deemed "corruption" by referring to the same activities as "responsiveness" on the part of politicians and as "participation" on the part of wealthy donors (Dawood 2014b). The challenge for the field is to develop measures by which it is possible to distinguish between legitimate and illegitimate political influence and responsiveness.

In recent years, the impact of corruption on democratic governance has reached a new prominence in public debate as a result of the work of Lessig (2011, 2013a) on dependence corruption. According to Lessig, dependence corruption arises when a political institution has become corrupted because individuals within the institution are no longer operating under the proper influence. Lessig relies on the influential work of Teachout (2009, 2014a), who argues that the concept of corruption was central for the Framers. Concerns about corruption informed the theory, substance and structure of the Constitution, and for this reason, the Constitution should be understood as containing an anticorruption principle. According to Lessig's originalist argument, the Framers intended for Congress to be "dependent on the people alone" as provided for in Federalist No. 52. This dependence on the people gets corrupted when Congress becomes dependent on another set of political actors, namely contributors and lobbyists. Dependence corruption does not take place via bribery or quid pro quo transactions but is instead rooted in a complex set of relationships and mutual obligations. This kind of corruption arises as a result of a gift economy based on the giving and receiving of political favors. Dependence corruption operates at the level of the institution; political actors themselves need not be corrupt in order for dependence corruption to operate. Lessig's work has sparked debates within the academic literature. One debate focuses on whether dependence corruption is ultimately based on a concern about political equality (Hasen 2013, Lessig 2013b) or participation (Charles 2014, Lessig 2014a). Other scholars argue that the concept of dependence corruption is not fully consistent with the Framers' understanding of corruption or their understanding of the functioning of government (Cain 2014, Dawood 2014a, Tillman 2014).

POLITICAL EQUALITY AND REPRESENTATION

As described above, campaign finance regulation is often justified on the basis of the principle of political equality (Sunstein 1994, Ortiz 1998, Thompson 2002, Dotan 2004, Pasquale 2008). Foley (1994) advances an "equal dollars per voter" approach, under which the government would provide all voters with the same sum of money. In addition, Foley (1994) argues for an antiplutocracy principle, under which a citizen's wealth ought to have no bearing on her opportunity to participate in the electoral process. Neuborne (1999b) holds that wealth-based political equality is different from the inevitable inequality that flows from differences in personal attributes. Alexander (2003) argues that money in politics is the driving force of political inequality and should thus be treated as a modern version of vote dilution. Kuhner (2014) maintains that money in politics has corrupted both democracy and capitalism, leading to plutocracy.

In contrast to such arguments, the Supreme Court did not use the justification of equality to uphold restrictions on contributions in its *Buckley* decision. Indeed, the Court in *Buckley* expressly rejected the equality argument, stating in a key phrase that "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." The only acceptable justification for restricting contributions was the prevention of corruption and the appearance of corruption. As described above, the Court broadened the definition of corruption in later cases to include the concepts of

antidistortion and undue influence. Many scholars have pointed out that the antidistortion interest was ultimately based on an equality rationale (Gottlieb 1989, Eule 1990, Sullivan 1997, Hasen 2003). By focusing on distortion, the Court was responding to the problem that concentrated corporate wealth gives certain voices far greater political influence than others for the simple reason that speech is expensive (Cole 1991). Although equality arguments have a conceptual overlap with anticorruption arguments, one challenge in the field is that corruption as a violation of the principle of political equality has several forms (Dawood 2014a). The antidistortion argument in *Austin*, for example, is concerned with inequities in speech capacities that skew electoral outcomes, whereas the undue influence standard in *McConnell* is concerned with the skew in legislative outcomes.

Hasen (1996, 2003, 2008, 2011a, 2012a, 2013) has developed an extensive argument for political equality as a central value in campaign finance. In Hasen's (2012a) account, money skews legislative priorities because it enables large donors and lobbyists to gain access to legislators. Although access does not necessarily result in legislative action or inaction, it is often a prerequisite to influence and in certain circumstances may be determinative. The undue influence standard from *McConnell* is ultimately concerned with an inequality in political influence. The wrong of undue influence from an equality perspective is that elected officials are disproportionately responsive to the wishes of large donors as compared to other constituents. Hasen (1999) explores the complexities of political equality, noting for instance that contribution restrictions may provide greater political influence to wealthy individuals who own media corporations. In addition, Hasen (1996) has developed a proposal for equalizing political influence by providing vouchers to voters. The use of vouchers, or variations thereof, is supported by other scholars in the field (Ackerman & Ayres 2004, Lessig 2011). Other proposals include rendering campaign donations anonymous (Ayres & Bulow 1998, Ackerman & Ayres 2004) or making all elections publicly funded (Raskin & Bonifaz 1994).

Supporters of campaign finance regulation have also focused attention on such issues as representation, participation, and political influence. For Blasi (1994), a central problem with the current system is that elected officials spend far too much time soliciting donations when they should instead be focused on governing. Overton (2001, 2004) observes that the current regime disproportionately impacts the participation and representation of people of color and ordinary citizens more generally. It is often argued that increasing the number of small donations will help to equalize political influence, and indeed, the research suggests that the option to contribute over the internet increased the number of small donations to candidates in the 2008 elections (Schlozman et al. 2012). A number of scholars have also argued that the current system warps the legislative process so that the interests of the wealthy have a disproportionate influence (Cain 1995, Briffault 1999, Issacharoff 2010, Lessig 2011). Stephanopoulos (2014) advocates for the concept of alignment: the congruence between the views of the median voter and the views and enacted policies of elected representatives. Stephanopoulos draws extensively from empirical studies to show that politicians' policy positions reflect the preferences of their donors but do not correspond with the preferences of the public at large. The concept of alignment provides a promising new way to assess both the problem of legislative skew and the efficacy of campaign finance regulations in remedying it.

It appears, however, that equality or representation arguments in any form are unlikely to be recognized by the current majority of the Supreme Court. As mentioned above, the majority in *Citizens United* expressly rejected the antidistortion justification that was recognized in the *Austin* decision. According to Justice Kennedy, *Austin*'s antidistortion rationale was an equalization rationale that was inconsistent with *Buckley*'s central tenet that the First Amendment prevents government from restricting the speech of some in order to enhance the voice of others. In his dissenting opinion, Justice Stevens defended a version of the antidistortion rationale under which campaign finance regulations protect officeholders from improper influences that undermine the

democratic process. Although Justice Stevens avoided the language of equalization, his arguments were ultimately based on principles of political equality (Hasen 2011a). As noted by Sullivan (2010), the majority and dissenting opinions in *Citizens United* closely track the libertarian and egalitarian approaches to free speech, with the libertarian approach now garnering a majority of support among the justices. The Court's rejection of the antidistortion rationale has weighted the scales definitively in favor of liberty. Scholars have criticized the rejection of antidistortion because this has effectively barred the consideration of political equality within campaign finance regulation (Alexander 2011, Briffault 2011b, Gardner 2011a, Hasen 2011a, Tokaji 2011, Dawood 2013).

In a subsequent case, the Court confirmed its hostility to equality arguments. In *Arizona Free Enterprise v. Bennett*,[7] the Court struck down a state law that provided matching funds to publicly financed candidates on the grounds that the law impermissibly leveled the playing field in violation of the First Amendment. In an earlier decision, *Davis v. FEC*,[8] the Court struck down on First Amendment grounds a federal statute that raised contribution limits for non-self-financed candidates who were running against wealthy self-financed opponents (the so-called Millionaire's Amendment).

ELECTORAL EXCEPTIONALISM

Schauer & Pildes (1999) argue for "electoral exceptionalism," which means that elections should be treated as a distinct domain of democratic activity. According to this approach, it would be permissible for different rules to apply in the electoral realm than in other areas covered by the First Amendment. Indeed, the existing campaign finance framework requires that a line be drawn between election-related spending and other political spending (Briffault 1999). Campaign speech should be distinguished from political speech because elections are a part of the governmental apparatus (Baker 1998, Neuborne 1998). The Court has already recognized other arenas in which First Amendment principles do not apply, such as speech in the courtroom or the classroom (Stone 2011). In addition, there are already restrictions in elections, such as content-based regulations of electoral speech, which would not be allowed in public discourse (Pildes 2011). Various democracies employ the device of an election period to set out specific rules for elections (Issacharoff 2009). The election period concept would allow for the regulation of political speech (Thompson 2004, Zipkin 2010). Campaign finance regulation could thus be reframed as an effort to protect the proper functioning of elections (Post 1999, 2011). Alternatively, the First Amendment could be viewed as not only forwarding individual autonomy but also enhancing democracy on a collective level (Neuborne 1999a). Finally, there is ample evidence suggesting that electoral campaigns are not, in any event, a forum for persuasion (Gardner 2009).

Post (2014) sets forth a justification of campaign finance regulations that is consistent with First Amendment principles. The theory, which he terms "electoral integrity," holds that "a primary purpose of First Amendment rights is to make possible the value of self-government, and that this purpose requires public trust that elections select officials who are responsive to public opinion. Government regulations that maintain this trust advance the constitutional purpose of the First Amendment" (Post 2014, p. 4). In addition, Post distinguishes between two conceptions of self-government. The first conception, which dates back to the founding, is the republican tradition of government through representative institutions. The second conception, which emerged in the twentieth century, is based on democratic participation and discourse. The theory

[7] 131 S. Ct. 2806 (2011).

[8] 554 U.S. 724 (2008).

of electoral integrity provides a way to bridge these two conceptions of self-government. A number of commentators have responded to Post's theory (Karlan 2014, Lessig 2014b, Michelman 2014, Urbanati 2014). Critics have argued that the electoral integrity concept is essentially a variation of a long-standing public confidence argument, namely that campaign finance regulations are required for citizens to have confidence in the democratic system (Hasen 2014c, Karlan 2014, Levitt 2014). In *Buckley*, the Supreme Court used the "appearance of corruption" concept to capture the government's interest in maintaining public confidence in the democratic system, yet in its most recent decision, the Court significantly scaled back the scope and usage of the appearance-of-corruption justification. Critics also point out that the public confidence argument is not supported by social science research (Hasen 2014c, Karlan 2014, Levitt 2014).

Contrary to the position that electoral speech should be exempted from ordinary First Amendment principles is the view that the government has no power to regulate election campaigns. Smith (2013) argues that the government should not be entangled in campaigns. The power of Congress to regulate the time, place, and manner of elections under Article I, section 4 of the Constitution does not extend to the political debate that precedes elections. On this view, there ought to be a wall of separation between elections and campaigns.

THE AFTERMATH OF *CITIZENS UNITED*: NEW QUESTIONS AND NEXT STEPS

Recent scholarship has focused on the role of new institutions in campaign finance, particularly in the wake of *Citizens United*. Campaign finance regulations often have the effect of rerouting money to other channels, what Issacharoff & Karlan (1999) call the "hydraulics" of campaign finance. As Kang (2005) observes, however, campaign finance regulations also result in the creation of new institutional forms through which money flows in response to regulatory rules. In the wake of the 2004 election, for example, scholars focused on the activities of so-called section 527 organizations (Briffault 2005, Polsky & Charles 2005, Mayer 2007). "Section 527" refers to those organizations that are subject to section 527 of the Internal Revenue Code (which exempts political committees from taxation) but are not political committees under FECA (and hence are exempt from regulation). In another example, the *Citizens United* decision paved the way for the creation of Super PACs. One important feature of *Citizens United* was the Court's determination that independent expenditures do not give rise to the appearance or reality of quid pro quo corruption. In a subsequent case, *SpeechNow.org v. FEC*,[9] a lower court struck down contribution limits to PACs that engaged exclusively in independent spending and did not contribute to candidates. These entities are now called Super PACs, and under Federal Election Commission (FEC) rules they can accept unlimited contributions provided they engage in independent expenditures. Super PACs now play an important role in campaign finance (Briffault 2012b), and they raise difficult questions about coordination with candidates (Briffault 2013, Hasen 2014a) and the influence of wealth and outside groups (Kang 2013a).

Since *Citizens United*, scholars have focused attention on whether corporations should be treated as citizens with respect to speech in the political sphere (Batchis 2012). Other questions are whether corporate political spending should be prevented in the absence of shareholder approval (Winkler 2004, Bebchuk & Jackson 2010) or disclosed to shareholders (Bebchuk & Jackson 2013), or accompanied by opt-out rights similar to those afforded to employees with respect to the political activities of unions (Sachs 2012).

[9] 599 F.3d 686 (D.C. Cir. 2010), *cert. denied sub nom* Keating v. FEC, 131 S. Ct. 553 (2010).

Gerken (2014) sheds light on the important role played by "shadow parties" and "dark money" in campaign finance. Shadow parties are groups that have been organized to support candidates for office, and the term dark money refers to the activities of nonprofit corporations organized under section 501(c) of the Internal Revenue Code, which are not required to provide information about their donors. These new developments have received qualitative empirical analysis (Tokaji & Strause 2014). Current scholarship has also examined the relationship between campaign finance and lobbying (Briffault 2008, Gerken 2011, Hasen 2012c, Teachout 2014b). Gerken & Tausanovitch (2014) argue for a public finance analog for lobbying, which would address the problem of private actors playing too great a public role in the democratic process.

Another area of inquiry concerns the rules governing disclosure of giving and spending for political campaigns (Garrett 2002, 2004; Garrett & Smith 2005). The Court in *Citizens United* upheld the disclosure and disclaimer rules on the basis that the government has an interest in providing information to voters. Scholars have considered how disclosure can be used to police campaign contributions and expenditures, in addition to focusing attention on the flaws and limitations of the current system and the place of anonymity in public life (Briffault 2010, 2011c, 2012a; Gardner 2011b; Mayer 2011; Tobin 2011; Torres-Spelliscy 2011; Hasen 2012b; Johnstone 2012; Kang 2013b; Heerwig & Shaw 2014). At the same time, critics claim that disclosure rules violate privacy and render donors vulnerable to retaliation, an argument that the Court has so far resisted. Gilbert (2013) writes that disclosure presents an information tradeoff because it both informs voters and chills speech.

The academic literature has also considered the next steps that campaign finance reform ought to take. Hasen (2014b) criticizes proposals to amend the Constitution, pay lip service to reform, or give up on reform entirely. Instead, it is important to preserve the existing state and federal campaign finance laws from further erosion and to lay the groundwork for a change in the Supreme Court's membership. Reformers should develop arguments that expand the meaning of corruption or further develop a political equality approach (Hasen 2014b). Gerken (2011) observes that money will inevitably be a part of the electoral process; hence, it is important to harness politics to monitor politics. Charles (2014) argues that we should resist "corruption temptation," which he describes as the urge to refract all campaign finance issues through the lens of corruption. Instead, we should be talking about the real issue, which is the problem of political participation. Hellman (2013) cautions that the Court should be wary of defining corruption because to do so inevitably involves defining democracy—a task that the Court has rightly avoided in other election law contexts. Briffault (2011b) advocates reducing the role of courts in campaign finance regulation. Alexander (2003) contends that the Court should defer to Congress because protecting a republican form of government is a compelling governmental interest that satisfies strict scrutiny under the First Amendment. Other scholars argue for congressional ethics codes to regulate campaign finance (Mazo 2014) or self-enforcing contracts among candidates to limit third-party spending (Sitaraman 2014).

EMPIRICAL FINDINGS

This review examines only some of the topics that have been addressed by the extensive empirical literature on campaign finance. It has long been acknowledged that campaign finance regulation has implications for both electoral and legislative outcomes, but these implications are not necessarily the same (Schlozman & Tierney 1986). Some studies are more directly concerned with the impact of campaign finance on electoral outcomes, and other studies focus on the impact of campaign finance on legislative outcomes.

A central area of inquiry is whether or not campaign contributions buy political influence. The main argument against large contributions is that they would enable the purchase of legislative

votes. For the most part, the empirical literature does not show such a connection. Sorauf's (1988) review of the literature finds little systemic evidence of the influence of money on legislative decision making. However, the studies reviewed trace the connection between campaign contributions and floor votes. It is possible that campaign contributions influence policy formation at other times during the legislative process, yet these data are hard to obtain or measure. In addition, donations may be given to quash legislation and maintain the status quo. There is also the challenge of establishing whether incumbents' positions inspire contributions or whether contributions inspire incumbents' positions (Stratmann 2005). In other words, do incumbents who receive donations from special interests then respond to their wishes, or do they receive donations because they are already in agreement with special interest positions? Ensley (2009) finds that candidate ideology is an essential factor in explaining fundraising from individual citizens. Individual citizens are the largest source of contributions for congressional candidates, and such contributions are dependent on the ideological positions of the candidates.

Another theory is that a large campaign contribution "likely buys access, small favors, energy in casework, intercession with regulators, and a place on the legislative agenda" (de Figueiredo & Garrett 2005, p. 611). Contributions are also viewed as political investments. Snyder (1992) posits that PACs establish long-run investment relationships with legislators. The motive of buying access is substantiated by the finding that large contributors also engage in extensive lobbying (Milyo et al. 2000, Ansolabehere et al. 2002). Research on state legislatures suggests that features of the institutional design and political context have an impact on when donations do have influence on policy outcomes (Powell 2012). Kang & Shepherd (2011) find that elected judges are more likely to decide in favor of business interests the more they receive contributions from them.

Ansolabehere et al. (2003) offer an alternative to the political investment model. They conducted a meta-analysis of nearly 40 studies that examined donors' influence in legislative politics. They conclude that campaign contributions have no statistically significant effects on legislation. PAC contributions show relatively few effects on the voting behavior of legislators. In addition, they argue that campaign spending, as a percentage of gross domestic product, does not appear to be increasing. Although most campaign finance money is donated by individuals instead of PACs, neither individuals nor PACs donate the full amount they are able to under the limits. Considering the value of the political benefit to be achieved, a relatively small amount of money is being spent. This discrepancy between the value of the policy outcome and the amounts actually contributed suggests that firms and other interests see little value in giving more. The reason that money has little leverage is that it is only one of many factors that politicians consider when engaging in political calculations about reelection. For this reason, Ansolabehere et al. (2003) conclude that donations should not be viewed as an investment in future benefits but should instead be viewed as a type of consumption good. They point out that almost all the money in the existing campaign finance system comes ultimately from individuals donating relatively small sums. These individuals donate to politics because of the consumption value associated with participation rather than because they expect or receive direct benefits. At the same time, campaign contributions make it more likely that a donor will have the opportunity to see a legislator about a policy concern. Another study using a meta-analysis, however, found some empirical evidence of a link between donations and votes (Stratmann 2005).

Studies have also examined the effect of campaign finance regulation on voter participation, trust, and political efficacy (Primo & Milyo 2006). Persily & Lammie (2004) conclude that there is no solid evidence of a connection between campaign finance laws and public confidence in the electoral process. This is a very significant finding because campaign finance regulation is often justified on the basis that it is required to protect citizens' confidence in the democratic system.

Another area of inquiry is focused on the link between candidate spending and the identity of the winning candidate. Both incumbents and challengers put a great deal of effort into fundraising, which suggests that they think that raising money is required for winning elections. The academic literature, however, has not been able to conclusively establish a causal connection between incumbent spending and electoral success (Milyo 1999, Stratmann 2005). Incumbent reelection rates are at sky-high levels, and because incumbents outspend challengers by approximately a three-to-one ratio, one might think that campaign spending provides an electoral advantage. The puzzle, though, is that incumbent spending does not appear to be effective (Jacobson 1990, Abramowitz 1991, Milyo 1999, Jacobson 2003). Campaign spending by US House incumbents does not affect vote shares, although challenger spending does increase vote shares (Levitt 1994). Spending limits thus hurt challengers because they need to raise a great deal of money to win (Jacobson 2003). If incumbent spending is ineffective in increasing vote shares but challenger spending is effective in decreasing incumbent vote shares, then spending limits may not level the playing field between incumbents and challengers (Stratmann 2005). Research on the Senate, however, shows that incumbent spending does have an effect on vote shares (Abramowitz 1988, Gerber 1998). Other research also suggests that incumbents benefit from increased spending (Green & Krasno 1988, Thomas 1989). These findings suggest that spending caps can increase, rather than decrease, the chance of victory by challengers. Research on states with public funding finds that the reelection rates of incumbents decline (Mayer et al. 2006), but other research finds that public funding with spending limits does not make elections more competitive (Malbin & Gais 1998).

Scholars have also looked more broadly to questions of democracy and inequality (Schlozman et al. 2012). This arena of research is broad, and not all of it focuses specifically on campaign finance regulation. Although the research does not establish a direct connection between campaign contributions and political influence, scholars have found that the positions adopted by elected representatives are more responsive to the preferences of the affluent than to the preferences of low-income and middle-income individuals (Bartels 2008, Ellis 2012, Gilens 2012). Other research, however, has found a moderately strong link between public opinion and legislative policy (Tausanovitch & Warshaw 2013). Recent research also indicates an ideological congruence between donors and members of Congress (Bafumi & Herron 2010). In addition, the wealthiest Americans (the top 0.01%) are responsible for more than 40% of campaign contributions (Bonica et al. 2013). Not only are individuals the main source of donations, but individual donors are increasingly ideological in their political positions, and more extreme candidates tend to raise more money from individual donors (Ensley 2009, Johnson 2010, La Raja & Wiltse 2011). Stephanopoulos (2014) provides an extensive analysis of these empirical findings and shows how they provide evidence of misalignment between the views of most Americans and the members of Congress.

CONCLUSION

It is almost impossible to draw any conclusions from a body of scholarship that spans several fields. It is notable, though, that regardless of the field, scholars have become increasingly focused on highly complex questions involving democratic representation, political equality, corruption, political influence, and governance. Not surprisingly, there is little consensus on these issues. There is, however, a concern shared by many scholars that the role of money has warped not only the electoral process but also the political system as a whole. Although the empirical literature has not shown that money buys influence, there is evidence that the influx of money is correlated with the kinds of policy outputs that emerge from the legislative process. But even as scholars have drawn increasingly sophisticated connections between campaign finance and democratic governance, the

courts have allowed ever greater sums of money to enter politics. The study of campaign finance is a moving target, inviting future research into the evolving nature of democratic institutions and values in a climate of deregulation.

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