Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform

*Richard L. Hasen**

I. Introduction

Times are tough for progressives who support campaign finance reform. The Supreme Court has taken key steps towards deregulating campaign finance through a series of cases, most importantly *Citizens United v. Federal Election Commission*.[1] Since *Citizens United*, outside spending in federal elections has increased markedly—as much as 245% in presidential elections, 662% in House elections, and 1338% in Senate elections[2]—raising dangers of corruption and increasing political inequality. The Supreme Court could well move further toward deregulation this Term, as it considers the constitutionality of aggregate limits on campaign contributions.[3] While *Citizens United* leaves ample constitutional space for the enactment of effective disclosure laws, disclosure is a poor substitute for more serious and effective campaign regulation including limits on outside spending and ample public funding.[4]

Even worse, Congress has not fixed holes in our second-best disclosure laws, which clever campaign finance lawyers continue to exploit. These defects not only increase the danger of corruption but also deprive the public of information important to making intelligent voting decisions. The prospects for legislative responses in the near term are bleak, when Democrats cannot even get Republicans to sign on to disclosure fixes.[5] The Federal Election Commission has become mired in ideological struggle, with three Republican commissioners marching lockstep to disable what remains of campaign finance enforcement.[6] Although he campaigned as a reformer, President Obama has done nothing significant to help the cause of reasonable cam-

* Chancellor's Professor of Law and Political Science, University of California, Irvine School of Law. Thanks to Bruce Cain, Anthony Johnstone, Tom Mann, Norm Ornstein, and Mark Schmitt for useful comments and suggestions.

[1] *See* Citizens United v. FEC, 558 U.S. 310 (2010); FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).

[2] Daniel H. Lowenstein, Richard L. Hasen, & Daniel P. Tokaji, Election Law: Cases and Materials 44–45 (5th ed. Supp. 2013).

[3] *See* McCutcheon v. FEC, No. 12-536 (U.S. argued Oct. 8, 2013).

[4] *See* Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & Pol. 683, 715–19 (2012).

[5] *See* Eliza Newlin Carney, *DISCLOSE Advocates Renew Fight*, Roll Call (Jan. 4, 2013, 11:50 AM), http://atr.rollcall.com/disclose-advocates-renew-fight.

[6] *See* Christopher Rowland, *Deadlock by Design Hobbles Election Agency; The FEC Was Born of Idealism After Nixon Era Excesses, but Its GOP Members Have All But Shut It Down*, Bos. Globe, July 7, 2013, at A1.

paign regulation. In fact, his own new 501(c)(4), Organizing for Action, will help to further expand the influence of money in politics.[7]

The current reality is far from the progressive ideal of campaign finance regulation for the twenty-first century. Such an ideal begins with strong protections for robust political debate, a free press, and multi-dimensional partisan competition. Progressives should recognize that campaign finance laws that would squelch political competition are unhealthy for the political system and normatively undesirable. The ideal progressive reform requires creative design to maximize diverse voices in the political community: for example, voucher-based public financing fosters the voice and power of all voters. Finally, core campaign finance regulation remains necessary, including a strong disclosure regime, which deters corruption and provides valuable information to voters, and sensible limits on contributions and spending, which inhibit political corruption and promote political equality.

What are progressives to do to move from the bleak reality closer to this ideal? In this short essay, I argue against three misguided approaches to reform: seek to amend the U.S. Constitution to overrule *Citizens United*; pay lip service to the cause of reform but take no concrete steps against the worst problems with the system; and throw in the towel, giving up the fight to limit money in politics. Each of these approaches likely will make things worse rather than promote the progressive ideal. Instead, I argue that progressives should seek to preserve and protect what remains of campaign finance law today, especially contribution limitations, public financing, and disclosure laws, and progressive thinkers and lawyers should lay the intellectual groundwork for effective campaign reform proposals and constitutional arguments to be presented to a future, more progressive Supreme Court majority.

II. Bad Idea I: Seek to Amend the Constitution

One of the immediate responses to the Supreme Court's controversial *Citizens United* decision has been a call to amend the Constitution to "reverse" *Citizens United*. For example, Senator John Tester (D-Mont.) and Senator Chris Murphy (D-Conn.) recently proposed a constitutional amendment (Tester-Murphy) that would remove any constitutional protections for corporations and allow for "reasonable" state and federal regulation of corporations.[8] Consider also this proposed amendment supported by Move to

---

[7] *See, e.g.*, Justin Elliott, *Obama's Flip-Flops on Money in Politics: A Brief History*, Pro Publica (Jan. 30, 2013, 3:00 PM), http://www.propublica.org/article/obamas-flip-flops-on-money-in-politics-a-brief-history; Eliza Newlin Carney, *Rules of the Game: Obama's Ethics Agenda Backfires*, Roll Call (Jan. 20, 2013, 10:30 AM), http://www.rollcall.com/news/rules_of_the_game_obamas_ethics_agenda_backfires-220898-1.html.

[8] S.J. Res. 18, 113th Cong. (2013); *see also* Lachlan Markay, *Constitutional Amendment Would Gut Rights for Organizations*, Wash. Free Beacon (Jun. 19, 2013, 1:10 PM), http://freebeacon.com/constitutional-amendment-would-gut-rights-for-organizations.

Amend, one of the most prominent organizations working to reverse *Citizens United*:

> **Section 1. [Artificial Entities Such as Corporations Do Not Have Constitutional Rights]**
> The rights protected by the Constitution of the United States are the rights of natural persons only.
> Artificial entities established by the laws of any State, the United States, or any foreign state shall have no rights under this Constitution and are subject to regulation by the People, through Federal, State, or local law.
> The privileges of artificial entities shall be determined by the People, through Federal, State, or local law, and shall not be construed to be inherent or inalienable.
>
> **Section 2. [Money is Not Free Speech]**
> 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.
> Federal, State, and local government shall require that any permissible contributions and expenditures be publicly disclosed.
> The judiciary shall not construe the spending of money to influence elections to be speech under the First Amendment.[9]

It may well be that these proposed amendments are not serious policy recommendations, but rather are political theater aimed at riling up the Democratic and progressive base. I address this "lip service" possibility in Part II of this Essay. In the remainder of this Part, however, I take the amendment proposals at face value and evaluate them against progressive ideals, because I have heard from many members of the public who are dissatisfied with *Citizens United* and have clamored for a constitutional amendment. I conclude that a constitutional amendment such as Tester-Murphy or Move to Amend is a bad idea for many reasons, but to understand why, we need to back up to consider the state of campaign finance law before *Citizens United*.

First Amendment jurisprudence surrounding campaign finance law is complicated, too complicated to completely describe in this brief Essay.[10] But at the risk of caricature, here is where things stood before the emergence

---

[9] H.R.J. Res. 29, 113th Cong. (2013); *see also Move to Amend's Proposed 28th Amendment to the Constitution*, MOVE TO AMEND, https://movetoamend.org/wethepeopleamendment (last visited Dec. 8, 2013).

[10] For a full picture, see generally DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN, & DANIEL P. TOKAJI, ELECTION LAW: CASES AND MATERIALS 641–882 (5th ed. 2012).

of the Roberts Court and Justice Alito's replacement of Justice O'Connor, which turned campaign finance law around 180 degrees:[11] limits on contributions to candidates and committees in candidate elections were constitutionally permissible on anti-corruption grounds,[12] although very low contribution limitations could raise constitutional questions.[13] In contrast, limitations on spending by individuals supporting or opposing candidates, or by the candidates themselves, violated the First Amendment's protections of speech and association.[14] The Court held that independent spending cannot corrupt candidates because of the absence of coordination, and that political equality was an impermissible governmental interest in light of the First Amendment.[15] Nonetheless, the Court later held that the government could bar direct corporate and labor union spending (from their treasury funds) on elections, likely so long as the corporation or union could form a separate political committee and solicit donations from certain persons to the committee.[16] The Court held that Michigan could justify its corporate limits to prevent a "different" kind of corruption, one which looked very much like a political equality rationale.[17] Although corporate spending limits were constitutionally permissible, such limits need not (and perhaps constitutionally could not) have been extended to media corporations engaged in producing bona fide news stories and editorial content. News media, including corporate news media, serve important educational and democratizing functions.[18] Further, the Court held that it was unconstitutional to bar direct corporate spending of treasury funds by nonprofit corporations that were not conduits or agents of for-profit corporations or labor unions.[19]

The pre-Alito regime was not entirely coherent, for example, in its treatment of media corporations compared to other corporations—a point that opponents of regulation pointed to as a reason to scuttle the whole sys-

---

[11] On the change wrought by Justice Alito, see generally Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 Mich. L. Rev. 581 (2011) [hereinafter Hasen, *Illusion of Coherence*]; Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in* FEC v. Wis. Right to Life, 92 Minn. L. Rev. 1064 (2008).

[12] *See* Buckley v. Valeo, 424 U.S. 1, 24–38 (1976).

[13] *See* Nixon v. Shrink Mo. Gov't. PAC, 528 U.S. 377, 389 (2000).

[14] *See Buckley*, 424 U.S. at 38–59.

[15] *Id.*

[16] *See* McConnell v. FEC, 540 U.S. 93, 104–05 (2003); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 655 (1990).

[17] *See* Citizens United v. FEC, 558 U.S. 310, 381 n.2 (2010) (Roberts, C.J., concurring) ("*Austin* represents the first and only case [before *McConnell*] in which a majority of the Court accepted, in deed if not in word, the equality rationale as a permissible state interest.") (quoting Richard L. Hasen, The Supreme Court and Election Law, Judging Equality from *Baker v. Carr* to *Bush v. Gore* 114 (2003)) (internal quotation marks omitted).

[18] *See Citizens United*, 558 U.S. at 417 (Stevens, J., dissenting) (noting the "unique role played by the institutional press in sustaining public debate"); *Austin*, 494 U.S. at 668 ("A valid distinction . . . exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public."); *see also McConnell*, 540 U.S. at 208 (quoting *Austin*).

[19] *See* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 241 (1986).

tem.[20] Looming questions about what counted as "the press" in the Internet era complicated things.[21] The pre-Alito regime also left room for large independent spending, although by individuals acting alone and not through political action committees (or "PACs") thanks to a $5000 cap on contributions to such committees.[22] Such independent spending was relatively rare in federal elections. But the jumble of rules did, albeit inadvertently, strike a delicate balance between free speech rights and anti-corruption and political equality interests.[23] The state of campaign financing after the enactment of the Bipartisan Campaign Reform Act of 2002 (the McCain-Feingold law) but before the Roberts Court was not the progressive ideal, but it was not a nightmare either.

Citizens United reversed two Supreme Court holdings allowing the government to limit the spending of corporate treasury funds on elections, a ruling which no doubt applied to labor unions as well.[24] Following *Citizens United*, lower courts struck down the limits on individual contributions to PACs used to fund independent spending.[25] The Federal Election Commission thereafter held that corporations and unions could donate unlimited sums to these PACs as well,[26] leading to the creation of PACs that engaged solely in independent spending, entities which came to be known as "Super

---

[20] Former Judge and now-Professor Michael McConnell has defended *Citizens United* precisely on the basis that it is impossible to separate the institutional press from everyone else. *See* Michael W. McConnell, *In Defense of* Citizens United, 123 YALE L.J. 412 (2013).

[21] *See* Richard L. Hasen, *Lessons from the Clash Between Campaign Finance Laws and the Blogosphere*, 11 NEXUS L.J. 23, 24–25 (2006).

[22] The point is somewhat controversial. *See* Matt Bai, *How Did Political Money Get This Loud?*, N.Y. TIMES, July 22, 2012, at MM14; Richard L. Hasen, *The Numbers Don't Lie: If You Aren't Sure Citizens United Led to the Emergence of Super PACs, Just Follow the Money*, SLATE (Mar. 9, 2012, 2:56 PM), http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending_.html; Rick Hasen, *What Matt Bai's Missing in His Analysis of Whether Citizens United is Responsible for the Big Money Explosion*, ELECTION LAW BLOG (Jul. 18, 2012, 10:41 AM), http://electionlawblog.org/?p=37108. Under the old regime, some individual money went into 527 organizations, but the FEC fined some of these organizations after the 2004 elections for not registering as political committees (subject to the $5000 cap) and it is not clear whether they would have played a significant role going forward.

[23] *See* Bob Bauer, *Progressive Reform and Progressive Politics,* MORE SOFT MONEY HARD LAW (July 16, 2013), http://www.moresoftmoneyhardlaw.com/2013/07/progressive-reform-and-progressive-politics. As Bob Bauer notes, I have been quite critical in the past of the doctrinal incoherence of the pre-Alito regime. The result struck a relatively fair balance even if it took a convoluted jurisprudential route to do so. But Bob is right that I might be guilty of some unwarranted nostalgia for days gone by.

[24] LOWENSTEIN, HASEN, & TOKAJI, *supra* note 10, at 756 (asking rhetorical question about application to labor unions).

[25] *See, e.g.*, SpeechNow.org v. FEC, 599 F.3d 686, 698 (D.C. Cir. 2010), *cert. denied sum nom* Keating v. FEC, 131 S. Ct. 553 (2010).

[26] *See FEC Adv. Op. 2010–09*, FED. ELECTION COMM'N (July 22, 2010), http://saos.nictusa.com/saos/searchao;jsessionid=2679A122DBE458093E3CE1E306EE6B82?SUBMIT=ao&AO=3067; *see also FEC Adv. Op. 2010–11*, FED. ELECTION COMM'N (July 22, 2010), http://saos.nictusa.com/saos/searchao;jsessionid=2679A122DBE458093E3CE1E306EE6B82?SUBMIT=ao&AO=3069.

PACs."[27] While Super PACs took unlimited donations, the PACs disclosed the identity of donors to the Federal Election Commission. Some activity then shifted to political groups that organized under section 501(c)(4) of the Internal Revenue Code. These groups, which are defined as "social welfare organizations" in the Internal Revenue Code, do not disclose their donors.[28] Thanks to the IRS's failure to police the line between social welfare groups and election-related groups using the 501(c)(4) forms,[29] outside spending exploded in the 2012 elections, as corporate and union spending limits disappeared along with contribution limits and source limitations to fund independent spending.[30]

No doubt a constitutional amendment could be written simply to "reverse" *Citizens United*. Such an amendment could say that Congress has the power (and perhaps state and local governments also have the power) through appropriate legislation to ban corporations (and presumably labor unions) from spending their treasury funds in candidate elections. However, it is not clear that such an amendment would make much difference. Under such an amendment, Sheldon Adelson or George Soros could still give millions of dollars, much of it anonymously, to groups seeking to influence federal elections. *Citizens United* and the development of Super PACs seem to have had a psychological effect in freeing individuals to give obscenely large sums to these outside groups. Even with Super PACs outlawed, we could expect the very rich to engage in direct independent spending.

Even putting aside huge individual spending, an amendment, depending on how it is written, could allow for a great deal of corporate-funded "issue advocacy" intended to influence the outcome of elections but falling outside its coverage.[31] It might be ineffective even in reining in corporate spending in elections. On the flip side, it is not clear that language in a constitutional amendment "reversing" *Citizens United* would adequately protect the incorporated press (such as the *New York Times* or FOX News) and nonprofit ideological corporations, which the Supreme Court had protected before *Citizens United*. The concern is *not* about ads running in these media outlets;[32]

---

[27] On the emergence of Super PACs, see LOWENSTEIN, HASEN, & TOKAJI, *supra* note 10, at 818–25.

[28] *See id.* at 825, 919–20.

[29] On the differences and similarities among Super PACs, 501(c)(4) organizations, and other organizations, see Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1646–50 (2012).

[30] *See* Hasen, SLATE, *supra* note 22.

[31] If the amendment is drafted more broadly, it runs the risk of interfering with genuine issue advocacy by corporations mentioning the names of federal candidates.

[32] *Cf.* Victor Tiffany, *Taking on Amendment Critics XVIII: Richard Hasen*, AMENDMENT GAZETTE (Aug. 8, 2013), http://www.amendmentgazette.com/2013/08/08/taking-on-amendment-critics-part-xviii-richard-hasen ("Campaign regulations could with regulations proscribe Fox News Inc. from running campaign ads for the Republican candidate for president or Congress on CBS, ABC, CNN or any other television channel. Likewise, MSNBC, Inc. would not be free to run campaign ads for the Democratic candidate for president or Congress on other channels. Paid staff members and consultants of these channels could, as individuals of the press, appear on another channel to make their case for a candidate, but all corporate spending on electioneering communication could be outlawed after the We the People Amend-

instead the concern is whether the outlets themselves, if incorporated, could continue to endorse candidates and give favorable or unfavorable treatment to candidates before the election.

Given the proliferation of Super PACs and the use of 501(c)(4)s for electioneering, and given other progressive concerns with the state of campaign finance law beyond problems with corporate spending, proposed amendments such as Tester-Murphy and Move to Amend have proposed going much further than simply "reversing" *Citizens United*. Tester-Murphy would take away all corporate rights—for all corporations (including, presumably, media corporations and nonprofit corporations) for all purposes.[33] For example, the government might be able to take property from corporations without paying just compensation, which would otherwise violate the Fifth Amendment. New York State might be able to prevent the publication of the *New York Times*, which is a corporation; note that Tester-Murphy guarantees freedom of the press only for "people," and the amendment expressly excludes corporations from the definition of "people."[34]

Move to Amend in one way goes even further than Tester-Murphy, seeming to mandate limitations upon, or at least some regulation of, campaign spending. "Federal, State, and local government *shall* regulate, limit, or prohibit contributions and expenditures, including a candidate's own contributions and expenditures . . . ."[35] A local government that failed to adequately "regulate" campaign spending could be sued for violating the Constitution. Courts would have to decide what type and extent of regulation would be sufficient to meet the constitutional floor.

Conservatives have condemned the anti-speech aspects of these broad proposed amendments,[36] and progressives should join in the condemnation. *Citizens United* might be bad for our democracy, but these approaches look like a cure worse than the disease. Changing the Constitution is no small feat, and it is a terrible idea to change it with broad language that could squelch healthy political debate, limit press freedoms, and muzzle nonprofit

---

ment is ratified by the 38th state without any impact on the individual freedom of the press as it has been traditionally understood.").

[33] S.J. Res. 18, 113th Cong. §§ 2–3 (2013).

[34] *Id. Cf.* S.J. Res. 11, 113th Cong. (2013). Senator Bernie Sanders's proposed amendment also protects "freedom of the press" but holds that only "natural persons" may make "contributions and expenditures to influence the outcome of public elections." It is not clear how these two provisions are reconciled in the case of the corporate press.

[35] H.R.J. Res. 29, 113th Cong. (2013) (emphasis added). *See* MOVE TO AMEND, *supra* note 9.

[36] *See generally* Eugene Volokh, *Sens. Tester & Murphy's Constitutional Amendment Would Strip Rights From Corporate Owned Newspapers, Advocacy Groups, Etc.*, VOLOKH CONSPIRACY (Jun. 19, 2013, 1:41 PM), http://www.volokh.com/2013/06/19/sens-tester-murphys-constitutional-amendment-would-strip-rights-from-corporate-owned-newspapers-advocacy-groups-etc; JOHN SAMPLES, *Move to Defend: The Case Against the Constitutional Amendment Seeking to Overturn Citizens United*, CATO INST. (2013), *available at* http://www.cato.org/publications/policy-analysis/move-defend-case-against-constitutional-amendments-seeking-overturn. *But see* Mark Schmitt, *The Wrong Way to Fix Citizens United*, NEW REPUBLIC (Jan. 20, 2012), http://www.newrepublic.com//article/politics/99833/constitutional-amendment-citizens-united (providing a rare progressive condemnation).

ideological corporations (not to mention limit corporations in other ways outside the campaign finance area that should make progressives squirm).

The problem goes beyond drafting to the larger issue of placing broad power to control political speech in the hands of Congress and state and local governments. A constitutional grant of broad, speech-limiting power will be risky now, because it is hard to cabin, and riskier later, in light of uncertainty over future generations' political, religious, social, and moral beliefs and preferences. In contrast, the pre-Alito incremental constitutional development of campaign finance jurisprudence through the Supreme Court struck a broad compromise between those interests for and against campaign finance regulations. That common law court-centric approach to campaign regulation is more nimble than a blanket grant of power to Congress and state and local governments in a constitutional amendment to do whatever they wish with campaign finance law or corporate rights.

Given the hydraulic nature of campaign regulation, in which campaigns, parties, individuals, and groups adapt their strategies and organizational forms in an effort to circumvent regulatory frameworks, the task of enshrining durable rules into a single constitutional provision seems unlikely. Certainly none of the many attempts at drafting constitutional amendments that I have seen come close to dealing with loopholes, unintended consequences, and an appropriate balance between speech and robust debate concerns on the one hand, and anticorruption and political equality concerns on the other.

In short, drafters will either write a narrow constitutional amendment "reversing" *Citizens United*, which would not address many of the evils within our current campaign finance regime, or a very broad amendment, which would raise speech-squelching dangers and the potential for unintended consequences across a variety of social and political issues.

III. Bad Idea II: Pay Lip Service to the Cause of Reform

There is good reason to believe that many of these proposed constitutional amendments to "reverse" *Citizens United*, especially those coming from elected Democratic officials, are political theater and not serious attempts to deal with problems of campaign finance regulation. Groups like Move to Amend, in contrast, seem well-intentioned but poorly conceived. These proposed amendments are part of a broader Democratic strategy, most notoriously pursued by President Obama, to talk broadly against the Supreme Court and Republican refusal to enact regulations while failing to take concrete steps toward fixing campaign finance problems.

The constitutional amendment route is not a serious policy proposal. Democrats cannot even get Republicans in the Senate to agree on legislation to fix the holes in federal disclosure law, which became glaringly obvious in the 2012 elections. Consider how much harder it would be to pass a mea-

sure taking away all corporate rights or mandating that every jurisdiction in the country enact at least some campaign finance regulations.

A constitutional amendment would require not just a supermajority in the Senate (where Senator McConnell would lay his body down to block it), but also a supermajority in the Republican House and in three-quarters of the states. With polarization in Congress, amendments to overturn *Citizens United* are going nowhere.[37] Unfortunately, campaign finance has devolved, especially since *Citizens United*, into a partisan issue, and it is simply impossible to believe that Republican state legislatures would even consider an amendment such as Tester-Murphy or Move to Amend.

But bashing *Citizens United*, the Republican-appointed Supreme Court, and Republicans in Congress is good business for Democrats and helps with fundraising. President Obama has been the Basher-in-Chief, controversially going after the Supreme Court's *Citizens United* decision in a State of the Union address in the presence of Supreme Court Justices. When the President falsely claimed that the decision allows foreign corporations to spend money in elections (an issue the Court specifically reserved in *Citizens United* and later—and inconsistently—decided against foreign campaign spenders[38]), cameras showed Justice Alito shaking his head and saying "not true."[39]

President Obama may otherwise be a progressive President (I leave that judgment to others), but his record on campaign finance reform has been all talk and no action.[40] The President was the first general election candidate to refuse to participate in the presidential public funding program,[41] a program that is now dead in part thanks to his decision. He promised a plan to fix the program and never offered one. He promised a program to fix the Federal Election Commission and never offered one. He has been slow to nominate FEC commissioners. He has never presented legislative alternatives to mitigate the effects of *Citizens United* and he has never led on congressional efforts to improve campaign finance disclosure.

In the meantime, hiding behind the rhetoric opposing *Citizens United*, he has taken advantage of increasing deregulation. Aside from opting out of the public funding program and aggressively using joint fundraising committees with Democratic Party organs, he has transformed his campaign organization, "Obama for America," into "Organizing for Action" (OFA), a 501(c)(4). OFA has increased the number of avenues for large donors to

---

[37] *See* Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CALIF. L. REV. 205, 211 (2013).

[38] *See* Bluman v. FEC, 132 S. Ct. 1087 (2012) (mem.), *aff'g* 800 F. Supp. 2d 281 (D.D.C. 2011); LOWENSTEIN, HASEN, & TOKAJI, *supra* note 10, at 756–57.

[39] *See* Louis Jacobson, *Why Alito Shook His Head: Obama Exaggerates Impact of Supreme Court Ruling on Foreign Companies*, POLITIFACT (Jan. 27, 2010), http://www.politifact.com/truth-o-meter/statements/2010/jan/27/barack-obama/obama-says-supreme-court-ruling-allows-foreign-com (rating President Obama's statement "mostly false").

[40] *See* Elliott, *supra* note 7; Carney, *supra* note 7.

[41] *See* LOWENSTEIN, HASEN, & TOKAJI, *supra* note 10, at 845–49.

seek to curry favor with the President and the executive branch.[42] Once again, President Obama has blazed a fundraising trail that has done great damage to the cause of campaign finance reform.

Even with a Republican Congress blocking much legislation, and a Supreme Court that has limited the options on the table, there is much that the President could have done. He could have led more publicly on disclosure, as some Republicans seemed interested in a deal to fix disclosure problems in exchange for raising some of the campaign contribution limits (which looks like a good deal given the alternative of less accountable money). He could have tried to recess-appoint reformers to the FEC and propose legislation to fix the FEC[43] and put pressure on Republicans in Congress to do something. He could have required more disclosure through executive orders. He could have at least used his bully pulpit to present a progressive vision of what campaign finance reform in the *Citizens United* era should look like.

A cynic might say that the President rails so loudly against *Citizens United* so that he can inoculate himself against criticism for the unprecedented campaign finance steps he has taken. It should be no surprise that Obama advisor David Axelrod recently tweeted in favor of unlimited campaign contributions to candidates.[44] The President can proclaim a desire to fix the system, while making the reasonable point that rather than unilaterally disarm Democrats must fight political battles under the rules as they exist at the time. But he has done more than fight under existing rules; his actions have helped accelerate the pace of deregulation. His lip service has been worse than silence.

IV. Bad Idea III: Throw in the Towel

Arguments for constitutional amendments to "reverse" *Citizens United* are not serious, and much of what comes out of Democrats' mouths on campaign finance these days is lip service or worse. But there is a more serious

---

[42] Frank James, *Watchdogs Not Celebrating Obama Group's Switch on Big Donors*, NPR (Mar. 7, 2013, 6:08 PM), http://www.npr.org/blogs/itsallpolitics/2013/03/07/173748542/watchdogs-not-celebrating-obama-groups-switch-on-big-donors.

[43] On the problems with the FEC, see Richard L. Hasen, *The FEC Is as Good as Dead*, Slate (Jan. 25, 2011, 10:13 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/01/the_fec_is_as_good_as_dead.html.

[44] David Axelrod, Twitter (Feb. 20, 2013, 7:57 AM), https://twitter.com/davidaxelrod/status/304258408058601472 ("Campaign finance system is a mess. Limits have just created a cottage industry for lawyers who devise schemes to circumvent them. 1/3"); David Axelrod, Twitter (Feb. 20, 2013, 7:57 AM), https://twitter.com/davidaxelrod/status/304258430296813568 ("Too much money in politics. But if it's inevitable, let it flow directly to candidates and demand full disclosure, with stiff penalties. 2/3"); David Axelrod, Twitter (Feb. 20, 2013, 7:57 AM), https://twitter.com/davidaxelrod/status/304258450307833856 ("And end the SuperPac and faux SuperPac game that too often allows donors to elude detection and candidates to deny responsibility. 3/3.").

argument from progressives Ezra Klein[45] and Jonathan Bernstein[46] that the time has come to at least partially throw in the towel on campaign finance reform and move on to other issues. After all, in the first presidential election cycle since *Citizens United*, a Democrat was re-elected President and Democrats kept control of the Senate. So far there have been no great revelations of scandal calling into account the integrity of our governmental system stemming from the sloshing around of so much campaign money (although I still expect them to come).

While both lip service and throwing in the towel are defeatist strategies, they differ in important ways. "Lip service" avoids honest discussion about the costs and benefits of campaign regulation and the impediments to reform. It can only lead to disappointment on the part of progressive reformers. "Throwing in the towel" seeks to engage in honest dialogue on those costs and benefits and to reorient progressive politics in a different direction. While there is not much good that can be said about "lip service," progressives should listen and seriously consider the "throwing in the towel" argument.

Klein has not fully called for throwing in the towel. He wrote that pundits and campaign reformers overrate money as determinative in the outcome of races.[47] He argued that plans to harness the power of small donors are likely to increase political polarization, as small donors tend to be ideological donors whose views will push Democrats to the left and Republicans to the right.[48] He is almost wistful about corporate and other large funding of elections, seeing that money as more moderating than small donor money.[49]

It is not clear whether Klein was being deliberately provocative in his writings—and he is clearly right that many overrate the importance of money in determining election outcomes—but after being pushed on some of his more controversial points, he backed off.[50] In response to criticism

---

[45] *See* Ezra Klein, *We Got Way Too Excited About Money in the 2012 Elections*, WASH. POST (May 6, 2013, 11:00 AM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/06/we-got-way-too-excited-over-money-in-the-2012-elections; *see also* Ezra Klein, *Big Money Corrupts Washington. Small Donors Polarize It*, WASH. POST (May 10, 2013, 11:53 AM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/10/big-money-corrupts-washington-small-donors-polarize-it [hereinafter Klein, *Big Money*].

[46] Jonathan Bernstein, *How to Stop the Next IRS Scandal*, AM. PROSPECT (May 17, 2013), http://prospect.org/article/how-prevent-another-irs-scandal.

[47] *See* Klein, *Big Money*, *supra* note 45.

[48] *Id.* ("Big money often wants the two parties more or less to get along; no one gets a tax break if legislation dies on the floor. Small money will turn on you if you dare cut a deal with the other side. Big money erodes what little trust Americans still have in their political system. Small money attacks the bipartisanship that, for better and worse, is required for the system to function.").

[49] *See id.*

[50] *See* Ezra Klein, *Did I Get the Money-and-Politics Debate All Wrong?*, WASH. POST, (May 28, 2013, 11:18 AM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/28/did-i-get-the-money-and-politics-debate-all-wrong.

from Mark Schmitt,[51] Klein conceded that obtaining enough money is necessary to be taken seriously as a candidate (the so-called "money primary").[52] In response to criticism from Lee Drutman,[53] he conceded that large corporate money, especially that now flowing into Super PACs and (c)(4)s, also tends to be polarizing, and he agreed with Drutman that providing small donor matches for in-district contributions might make sense and not be polarizing.[54] In response to Jonathan Backer,[55] Klein conceded that the problem with money in politics is not necessarily how it affects *electoral* outcomes but how it affects *legislative* outcomes (although he thought Backer offered a poor example to prove his point).[56] In the end, Klein's criticism was modest and he expressed his willingness to sign on to a campaign reform program. Klein concluded: "I'd take anything from the mild disclosure laws that Republicans filibustered in 2012 to much more aggressive public financing bills, or small-donor matching bills."[57] Klein adds much-needed skepticism to the issue of campaign finance reform, but seems unsure of his ultimate position.

Jonathan Bernstein goes further than Klein. His solution to the problem of money in politics is further deregulation: "Lift the limitations on contributions. If someone wants to give a million dollars or three to a House candidate or $20M to the Republican National Committee, let 'em. No ceilings at all."[58] Bernstein favors better disclosure and partial public financing to provide a floor for competitors to run in House elections, but no limits:

> Floors-not-ceilings with strong disclosure is a campaign-finance approach that can work. It's much easier to regulate than today's complex landscape, thus making future regulatory scandals less likely; it promotes accountability; and it helps ensure minimally competitive House races without hurting competitiveness of other federal elections. If big money is inherently corrupt—and I don't believe it is—then at least this plan makes that corruption visible. And it has the chance to be stable, which is good for healthy parties, and healthy parties are good for the political system.[59]

---

[51] Mark Schmitt, *Now We Are Way Too Excited About Campaign Finance Skepticism*, Next New Deal (May 13, 2013), http://www.nextnewdeal.net/now-we-are-way-too-excited-about-campaign-finance-skepticism.

[52] Klein, *supra* note 50.

[53] Lee Drutman, *What Ezra Klein Gets Wrong About Big vs. Small Money in Politics*, Sunlight Found. (May 10, 2013, 1:41 PM), http://sunlightfoundation.com/blog/2013/05/10/big-vs-small-money-in-politics.

[54] Klein, *supra* note 50.

[55] Jonathan Backer, *Why Big Money Still Won in 2012*, Huffington Post (May 8, 2013, 10:51 AM), http://www.huffingtonpost.com/jonathan-backer/why-big-money-still-won-i_b_3237762.html.

[56] Klein, *supra* note 50 (calling Backer's sequestration example "ill chosen").

[57] *Id.*

[58] Bernstein, *supra* note 46.

[59] *Id.*

Bernstein's proposal would be a disaster for the progressive vision of campaign finance reform. The main problem of campaign money on the federal level—aside from the huge time commitment for Members of Congress, who spend so much time dialing for dollars that there is little time for legislative business—is that it skews legislative priorities.[60] The main argument is that large donors, lobbyists, and others who bundle contributions are able to obtain much broader access than others to legislators and staffers to make the case for legislative action (or inaction). Access does not guarantee legislative success, but it is usually a prerequisite. On issues about which there is little public salience, support on an issue by large donors or lobbyist bundlers can be outcome determinative. The political science literature on access and rent-seeking, especially through hired gun lobbyists, is pretty convincing, whether Bernstein would call this phenomenon "corruption" or not.

Deregulation of campaign financing has only exacerbated the problem of money buying access and influencing outcomes. Now Members of Congress feel compelled either to do the bidding of those who would donate millions of dollars to Super PACs and 501(c)(4)s acting against them or to curry favor with supporters to do more fundraising (or encourage supportive outside groups to do so) to fend off the outside attack. Contrary to Bernstein's view, there is still an anti-corruption, anti-skew virtue of keeping politicians and money supporting them separate. To put it another way, $20 million in a Super PAC supporting Member of Congress X is less bad (but still bad) than $20 million in Member X's campaign account.[61]

If Members of Congress already feel beholden to large donors, bundlers, and outside money players, how much greater would the pressure be to respond to the interests of the $1 million or $20 million donors? A skewed politics would become much more skewed.

V. One Good Idea: Building Ideas and Preserving What Remains While Biding Time

Progressives face few good choices when it comes to campaign finance law in this environment, and if my analysis in the first three Parts of this Essay is correct, the few paths progressives have been pursuing or suggesting are counterproductive. So what options are left? Here I propose three: fighting to keep current state and federal campaign finance laws in place, implementing creative state-based solutions, and laying the groundwork for overturning *Citizens United*.

---

[60] *See* Richard L. Hasen, *Lobbying, Rent-Seeking and the Constitution*, 64 Stan. L. Rev. 191 (2012).

[61] Norman Ornstein, Citizens United*: Corrupting Campaign Clarity*, Roll Call (June 15, 2011, 12:00 AM), http://www.rollcall.com/issues/56_139/citizens_united_corrupting_campaign_clarity-206476-1.html.

To begin with, it is important to defend what remains of campaign finance law, and to continue pursuing and defending legislation within the confines of Supreme Court precedent. Consider, for example, how defenders of campaign finance law beat back attempts in a number of jurisdictions to strike down laws banning direct corporate contributions to candidates.[62] The Supreme Court recently declined to hear one of these challenges,[63] and to this point direct corporate bans remain valid. Work preserving what remains of campaign finance law, such as that undertaken by the Campaign Legal Center, remains vital. Laws imposing contribution limitations on candidate elections, closing loopholes to those limitations, and improving disclosure regimes are all constitutional and must continue to be pursued and defended. Voluntary public financing plans are still constitutional, although thanks to the Supreme Court's decision in a recent Arizona case barring triggers that would give additional public financing to candidates facing wealthy opponents or large outside spending campaigns,[64] it is very difficult to design systems that are both constitutional and attractive enough to candidates that they will participate. Creative campaign finance solutions, especially those using market-based campaign finance vouchers, remain constitutional and should be a key part of the agenda.[65] Under voucher systems, voters get a chance to dole out public financing to candidates, parties, and—in at least some proposals—interest groups to fund campaigns. Progressives need to think creatively about institutional design which furthers all the goals of progressive campaign financing, from protecting robust free speech to deterring corruption and promoting equality.

With federal action to fix campaign financing apparently off the table for at least the near term, action turns to the states. States are no doubt hamstrung by the Supreme Court's money-in-politics decisions, especially recent decisions barring corporate and labor union spending limits[66] and removing a key tool for making public financing systems attractive to candidates.[67] But states and localities can still take important steps, such as the expansion of small donor matching programs[68] or voucher plans, imposition of campaign finance limits on candidates and parties, and greatly improved

---

[62] *See* Thalheimer v. City of San Diego, 645 F.3d 1109 (9th Cir. 2011) (challenging the City of San Diego's campaign finance limits).

[63] United States v. Danielczyk, 683 F.3d 611 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 1459 (2013).

[64] *See* Arizona Free Enter. Club's Freedom PAC v. Bennett, 131 S. Ct. 2806 (2011).

[65] On campaign finance vouchers, see generally Bruce Ackerman & Ian Ayres, Voting with Dollars: A New Paradigm for Campaign Finance (2004); Lawrence Lessig, Republic, Lost (2011); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 Calif. L. Rev. 1 (1996).

[66] Citizens United v. FEC, 558 U.S. 310 (2010).

[67] Arizona Free Enter. Club's Freedom PAC v. Bennett, 131 S. Ct. 2806 (2011).

[68] *See* Michael J. Malbin et al., *Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States*, 11 Election L.J. 3 (2012).

disclosure.[69] No doubt many of these measures will provoke lawsuits, and these laws need to be carefully crafted and a strong legislative record built to allow the laws to sustain constitutional challenge.

But more work needs to be done in the jurisprudence arena. The key is to lay the groundwork for the Supreme Court to reverse *Citizens United* and other cases, returning to its role of carefully balancing rights and interests in this very difficult arena. There will come a time in the not-too-distant future when Justice Scalia or Justice Kennedy will leave the Court, and if a Democratic President appoints their successors, the Court's campaign finance jurisprudence easily could turn back 180 degrees to its pre-Alito days.[70]

Reformers must demonstrate to the new Court that reasonable limits on corporate, and potentially even individual, spending would not squelch political competition or inhibit robust political debate. Even progressive Justices will need some convincing,[71] and they should demand it in any case: true progressive campaign finance reform does not favor squelching debate, especially of those with whom progressives disagree. Further, reformers must show how to continue exemptions for the corporate press in an era in which the definition of the press is in tremendous flux. Allowing the corporate press exemption makes the law less coherent (though no more incoherent than current law which tolerates limits on foreign spending on elections but not corporate spending). But the corporate press exemption plays a key role in protecting democratic institutions and free debate.[72]

In addition, scholars must do more work defining and defending governmental interests that justify reasonable (but only reasonable) campaign finance regulations. One possibility is to seek to expand or redefine the meaning of "corruption" the Supreme Court uses in its campaign finance balancing. The Court's understanding of the term corruption has vacillated over time, and with it so has the constitutionality of campaign finance laws. Recently, the Supreme Court in *Citizens United* contracted the meaning of corruption down to something akin to bribery.

---

[69] On the use of states to further campaign finance goals, see Anthony Johnstone, *Foreword: The State of the Republican Form of Government in Montana*, 73 MONT. L. REV. 5, 13–21 (2013); William Marshall, *The Constitutionality of Campaign Regulation: Should Differences in a State's Political History and Culture Matter?*, 73 MONT. L. REV. 79 (2013).

[70] *See* Richard L. Hasen, *After Scalia: Don't Give Up on Campaign Finance Reform, However Hopeless It Seems Now*, SLATE (Feb. 21, 2013, 11:49 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/02/campaign_finance_reform_when_scalia_leaves_the_supreme_court.html.

[71] *See* Richard L. Hasen, *The Big Ban Theory? Does Elena Kagan Want to Ban Books? No, and She Might Even Be a Free Speech Zealot*, SLATE (May 24, 2010, 12:16 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/05/the_big_ban_theory.html.

[72] On this point, I have changed some of my earlier views on press exceptionalism. *Cf.* Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627 (1993). In part my views changed upon seeing the incoherence of the *Citizens United* regime in relation to foreign spending limits. *See* Hasen, *Illusion of Coherence*, *supra* note 11.

The Court could simply return to the broader pre-*Citizens United* understanding of corruption. Another possibility is that it could accept Professor Lawrence Lessig's arguments for a "dependence corruption" rationale to justify new regulations.[73] Professor Lessig and I have been debating whether his "dependence corruption" argument really is something new, or whether it represents a variation upon a political equality argument for campaign finance regulation.[74] Even though I am unconvinced that Professor Lessig's argument is something distinct from political equality, a new Supreme Court majority might be convinced, or at least accept his argument as a doctrinal hook to reach a result consistent with political equality principles without overturning earlier precedent rejecting political equality as a permissible rationale for regulation.[75]

Alternatively, progressives need to develop a full and complete vision of what it would mean for the Supreme Court to accept a political equality interest which could justify reasonable (but not unreasonable) campaign finance regulation, consistent with progressive values. Justice Breyer sketched a view of what this might look like in his concurring opinion in a 2001 case[76] and in a book that discusses participatory self-government.[77] I also explored the issue in some depth in a book chapter.[78] Judge Guido Calabresi, in an important concurring opinion in a recent Second Circuit case, defended political equality ideals in unusually direct terms and urged reconsideration of the jurisprudence:

> I agree completely with the Supreme Court that the First Amendment protects each person's right to express political beliefs through money. Where I disagree with the Court is in its repeated insistence that any recognition of the "level playing field" interest (elsewhere referred to as the "antidistortion interest," *Citizens United*) is inconsistent with this right. To the contrary, the antidistortion interest promotes this right in two important ways. First, it prevents some speakers from drowning out the speech of others.

---

[73] *See* LESSIG, *supra* note 65, at 15–20, 230–46.

[74] *See* Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 552 (2012) (reviewing LAWRENCE LESSIG, REPUBLIC, LOST (2011) and JACK ABRAMOFF, CAPITOL PUNISHMENT (2011)); Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. F. 61 (2012); Richard L. Hasen, *Is "Dependence Corruption" Distinct From a Political Equality Rationale for Campaign Finance Regulation? A Reply to Professor Lessig,* 12 ELECTION L.J. 305 (2013); Lawrence Lessig, *What an Originalist Would Understand "Corruption" to Mean*, 102 CALIF. L. REV. 1, (2014).

[75] *See* Bruce E. Cain, *Is Dependence Corruption the Solution to America's Campaign Finance Problems?*, 102 CALIF. L. REV. 37 (2014); Guy Charles, *Corruption Temptation,* 102 CALIF. L. REV. 25, (2014). Lessig responds to Cain and Charles in Lawrence Lessig, *A Reply to Professors Cain and Charles*, 102 CALIF. L. REV. 49 (2014).

[76] *See* Nixon v. Shrink Mo. Gov. PAC, 528 U.S. 377, 401–03 (2000) (Breyer, J., concurring).

[77] *See generally* STEPHEN J. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

[78] HASEN, *supra* note 17, at 101–38.

> And second, it safeguards something of fundamental First Amendment importance—the ability to have one's protected expression indicate the intensity of one's political beliefs. These values, moreover, have not gone unrecognized in underlying First Amendment jurisprudence.[79]

The idea common in all of this writing is to continue to provide strict scrutiny to police campaign finance laws for pro-incumbent and anti-speech bias, but to accept political equality as a compelling interest for reform that can justify egalitarian and speech-enhancing programs. It is a tough and delicate balance. Much more work needs to be done on this question.

Opponents of campaign finance laws have looked at this issue with a long time horizon. Justice Scalia and Justice Kennedy first dissented in the 1990 *Austin* case upholding limits on corporate spending in elections.[80] They had to wait two decades for a reversal, and they never stopped dissenting in cases inconsistent with their vision of a free market in campaign finance. Noted campaign finance lawyer Jim Bopp had a ten-year plan for attacks on campaign laws.[81] With a sympathetic Supreme Court so far he has gotten some, but not all, of what he has wished for.

Progressive campaign finance reform supporters need to be just as patient as their conservative opponents, and ready to move forward when the moment is right.

---

[79] Ognibene v. Parkes, 671 F.3d 174, 197–98 (2d Cir. 2011) (Calabresi, J., concurring) (citation omitted).

[80] *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) (Scalia, J., & Kennedy, J., dissenting).

[81] David D. Kirkpatrick, *A Quest to End Spending Rules for Campaigns*, N.Y. Times (Jan. 24, 2010), http://www.nytimes.com/2010/01/25/us/politics/25bopp.html ("'We had a 10-year plan to take all this down,' [Bopp] said in an interview. 'And if we do it right, I think we can pretty well dismantle the entire regulatory regime that is called campaign finance law.'").