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## MONEY AND SPEECH: PRACTICAL PERSPECTIVES

*Nicholas W. Allard*

*President, Joseph Crea Dean and Professor of Law*

My assignment, as Professor Gora described it to me, is to offer practical perspectives on the topic of money, politics, and free speech based on over three decades of my experience in lobbying, campaigns, and public policy.<sup>1</sup> After the erudite, scholarly, and sometimes abstract theoretical presentations that have preceded this panel, and before those that will follow, this is the point in our program, if it were a Shakespeare play, that it would be time for Bottom the Weaver and his pals, or Falstaff and his cronies, or maybe bombastic Welsh Captain Fluellen wearing a leek in his helmet outside the gates of Agincourt, to appear and offer both a common touch and some comic relief. Professor Gora, I can handle this role, it is not a reach. However, given what is at stake, in light of the sad state of politics and elections in America, there is little relief and even less humor in the topic. In this season of political discontent, I am reminded of Adlai Stevenson's telling quip upon losing his bid for the Presidency in 1952: "It hurts too much to laugh,

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<sup>1</sup> This essay is adapted from my remarks given at the "Money and Speech" panel during the Brooklyn Law School Journal of Law & Policy Symposium: Free Speech under Fire: The Future of the First Amendment (Feb. 26, 2016).

but I am too old to cry.”<sup>2</sup> Indeed, if you are not upset about the state of politics in America, well, you are not paying attention.<sup>3</sup>

Before going any further, I wish to embrace the observation of my colleague and friend of more than four decades, our own distinguished visiting Professor of Law, Judge Andrew Napolitano, who said earlier today that when it comes to campaign finance reform and the First Amendment, often the cure seems worse than the disease.<sup>4</sup> With that in mind, I will offer a few observations about how to diagnose and treat political problems so that, first, we do no harm.

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<sup>2</sup> After losing the presidential election by the embarrassing margin of 442 to 89 electoral votes, the self-proclaimed “egghead” and one-term Illinois Governor Adlai Stevenson quoted Abraham Lincoln in his concession speech, saying: “It hurts too much to laugh, but I’m too old to cry.” *Presidential Also-Rans*, TIME, [http://content.time.com/time/specials/packages/article/0,28804,1856570\\_1856573\\_1856527,00.html](http://content.time.com/time/specials/packages/article/0,28804,1856570_1856573_1856527,00.html) (last visited Nov. 16, 2016). He lost by an even larger margin in his second race against Eisenhower, 457 to 73. *Id.* Nevertheless, Stevenson remained highly regarded as a candidate who elevated the political dialogue and who lost graciously. *Id.* President John F. Kennedy appointed him the Chief U.S. Representative to the United Nations where he served until his death in 1965. *Id.*; see also Adlai E. Stevenson, *The Verdict – We Pray as One*, 4 THE PAPERS OF ADLAI E. STEVENSON 187, 188 (Walter Johnson, ed., 1974) (referring to the Concession Speech at Leland Hotel in Springfield, Illinois in November 5, 1952); c.f. 1 JOHN T. MORSE, JR., ABRAHAM LINCOLN 149 (1893) (referring to Lincoln’s comments after his defeat by Senator Stephen Douglas in the 1858 senatorial campaign in Illinois where he stated, “[h]e said that he felt like the boy that stubbed his toe, it hurt too bad to laugh, and he was too big to cry”).

<sup>3</sup> While there is widespread agreement that American politics is in a state of disarray, there are strikingly unique different views by thoughtful, knowledgeable observers about causes and solutions. Compare THOMAS FRANK, LISTEN, LIBERAL (2016) (arguing that partisan divide is a phony problem and to instead address inequality and the unresponsiveness of the meritocratic elite), with LAWRENCE LESSIG, REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS AND A PLAN TO STOP IT 2, 7 (2011) (indicating that ridding our government of corruption will resolve campaign finance issues, as corruption is “the thread that ties [our country’s many problems] all together.”), and THOMAS E. MANN & NORMAN J. ORNSTEIN, IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM, at xiii–xiv, 80 (2013) (advising not to focus too narrowly on campaign finance and instead fix the party system and other structural problems).

<sup>4</sup> Andrew P. Napolitano, Judge, Remarks at the Brooklyn Law School Journal of Law & Policy Symposium: Free Speech Under Fire: The Future of the First Amendment (Feb. 26, 2016); see also Andrew P. Napolitano, *Protecting Hatred Preserves Freedom: Why Offensive Expressions Command Constitutional*

Let us start off with some historical perspective. The very first federal campaign finance law was the Navy Appropriations Act of 1867 which prohibited elected officials and appointees from asking naval workers—the lower level Navy yard workers in Brooklyn and other Navy yards—to pay part of their salaries to the party as reimbursement for getting them jobs.<sup>5</sup>

So, our scripture reading for my brief remarks here today is Ecclesiastes 1:9: “[T]here is no new thing under the sun.”<sup>6</sup> It is the conceit of every age to believe, to use the Latin phrase, “Oy vey, I’ve never seen anything like this before,” but the fact is that way back in 1757 even George Washington faced charges that he had rigged an election by buying off electors in his campaign for the House of Burgesses in Virginia with a massive banquet, which the records show included thirty-seven gallons of wine and thirty-six gallons of hard cider, more than a quart of alcoholic beverages for each of the 391 voters in his district.<sup>7</sup> Andrew Jackson started the patronage practice where party loyalists would be given jobs, but then were expected to pay back part of their wages into the party coffers.<sup>8</sup> This was then carried forward to such excess and abuse to the point where in 1867, first Navy workers were let off the hook and freed from pressure to pay kickbacks to the party,<sup>9</sup> then, in 1883

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*Protections*, 25 J. L. & POL’Y 161, 177–84 (2016) (stating that allowing the expression of hate is not nearly as bad as censoring it would be).

<sup>5</sup> Naval Appropriations Bill, ch. 172, sec. 3, 14 Stat. 492 (1867); KURT HOHENSTEIN, COINING CORRUPTION: THE MAKING OF THE AMERICAN CAMPAIGN FINANCE SYSTEM 16 (2007).

<sup>6</sup> *Ecclesiastes* 1:9.

<sup>7</sup> See Victor W. Geraci, Ph.D., *Campaign Finance Reform Historical Timeline*, CT-N CONN. NETWORK, [http://www.ctn.state.ct.us/civics/campaign\\_finance/Support%20Materials/CTN%20CFR%20Timeline.pdf](http://www.ctn.state.ct.us/civics/campaign_finance/Support%20Materials/CTN%20CFR%20Timeline.pdf) (last visited Nov. 16, 2016); Jaime Fuller, *From George Washington to Shaun McCutcheon: A Brief-ish History of Campaign Finance Reform*, WASH. POST (Apr. 3, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/04/03/a-history-of-campaign-finance-reform-from-george-washington-to-shaun-mccutcheon/>.

<sup>8</sup> See Ronald N. Johnson & Gary D. Libecap, *Courts, A Protected Bureaucracy, And Reinventing Government*, 37 ARIZ. L. REV. 791, 795 (1995); Burt Neuborne, *Felix Frankfurter’s Revenge: An Accidental Democracy Built by Judges*, 35 N.Y.U. REV. L. & SOC. CHANGE 602, 647 (2011).

<sup>9</sup> See HOHENSTEIN, *supra* note 5, at 16; Neuborne, *supra* note 8, at 647.

the Pendleton Act<sup>10</sup> let everybody off the hook, and that was later perfected with the Hatch Act.<sup>11</sup> Fast-forward to the twentieth and twenty-first century, especially in the post-Watergate era, campaign finances have been a constant source of political debate, legislative and judicial activity, and we have a proliferation of campaign finance laws.<sup>12</sup>

Building on the *Buckley v. Valeo* Fortieth Anniversary program held here at Brooklyn Law School on January 26, 2016, I think where we ended up was that if you are going to be talking about campaign finance reform, and if you are going to be talking about

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<sup>10</sup> The Civil Service Reform Act of 1883, known as the Pendleton Act, applied the Naval Appropriations Bill to all government workers. *See* Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403 (1883); Neuborne, *supra* note 8, at 647. It made it illegal for government officials to solicit contributions from any civil service worker, or to award those positions based on anything but merit. Michael G. Miller, *Campaign Finance, Federal Elections*, in *ENCYCLOPEDIA OF U.S. CAMPAIGNS, ELECTIONS, AND ELECTORAL BEHAVIOR* 74 (Kenneth F. Warren ed., 2008). It was enacted two years after James Garfield was assassinated by a disappointed office seeker. *Id.*

<sup>11</sup> Originally enacted in 1939 to limit the political activities of federal, state, and local employees, the Hatch Act was amended in 1940 to include state and local government employees involved in federally financed activities and limited individual annual political contributions to \$5,000. *See* Act of July 19, 1940, ch. 640, 54 Stat. 767 (amending the 1939 Act to prevent pernicious political activities).

<sup>12</sup> *See generally* Geraci, *supra* note 7 (discussing the historical significance of events that affected campaign finance reform); Fuller, *supra* note 7 (discussing the historical significance of events that affected campaign finance reform, focusing particularly on the events leading up to and the impact of *McCutcheon v. Federal Election Commission*). From the 1947 Taft-Hartley Act ban on union, corporate, and interstate bank contributions to federal campaigns, to the 1971 Federal Elections Campaign Act, to the 1974 creation of the Federal Election Commission, to the 2002 Bipartisan Campaign Reform Act (the McCain-Feingold Act), to the 2007 enactment of the Honest Leadership and Open Government Act (HLOGA); from *Buckley v. Valeo*, 424 U.S. 1 (1976), to *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), and *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014) to mention a few key developments, the question of the role of money in politics has been a subject of almost constant and intense interest and public policy debate. *See* ROBERT KAISER, *SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT* 4–6, 17–20 (2009); LESSIG, *supra* note 3, 252; MANN & ORNSTEIN, *supra* note 3, at 67–80.

the impact of money in politics, one overarching principle is that it is important to be forward-looking. I feel that too often the debate over money and politics is looking through the rearview mirror, and when you are driving and looking through the rearview mirror you can miss the turn or go over the cliff; either way, that is not good. I will just mention a few examples of what I am talking about.

Number one is how advanced digital communications technology is revolutionizing the way that candidates raise money and campaign. President Obama was one of the first to do this very successfully in his campaigns,<sup>13</sup> and Senator Bernie Sanders has taken the cyber campaign to a new level.<sup>14</sup> Donald Trump tweets.<sup>15</sup> Yet much of the discussions about campaign finance are stuck on conventional fundraising methods focusing on big donors and expensive fundraisers. They involve questions about raising money for ads on broadcast television and radio, which are very expensive and have driven the demand for campaign funds since the dawn and hey days of the broadcast era of American politics, most notably marked by the Kennedy-Nixon presidential debate in 1960 and “gavel-to-gavel” coverage of the party presidential nominating conventions.<sup>16</sup>

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<sup>13</sup> Jeff Zeleny & Michael Luo, *Obama Raises a Record \$66 Million in a Month*, N.Y. TIMES (Sept. 14, 2008), <http://nyti.ms/2bCoDkY>.

<sup>14</sup> Nancy Scola, *Inside Bernie Sanders' Vast, Virtual Ground Game*, POLITICO (Apr. 11, 2016), <http://www.politico.com/story/2016/04/bernie-sanders-virtual-ground-game-221748>.

<sup>15</sup> Michael Barbaro, *Pithy, Mean and Powerful: How Donald Trump Mastered Twitter for 2016*, N.Y. TIMES (Oct. 5, 2015), <http://nyti.ms/1L1ePHJ>.

<sup>16</sup> Interestingly, while the major broadcast networks have abandoned gavel-to-gavel coverage, C-Span continued this practice for political junkies, and ABC is combining with Facebook to resurrect the practice in a new way. *ABC News Partners with Facebook for Live, Gavel-to-Gavel Coverage of the 2016 Conventions*, ABC NEWS (July 18, 2016), [http://abcnews.go.com/Press\\_Release/abc-news-partners-facebook-live-gavel-gavel-coverage/story?id=40662516](http://abcnews.go.com/Press_Release/abc-news-partners-facebook-live-gavel-gavel-coverage/story?id=40662516). Ralph Nader's latest book has a devastating critique of the usefulness of contemporary Presidential debates. RALPH NADER, *BREAKING THROUGH POWER: IT'S EASIER THAN WE THINK* 46–52 (2016). Yet more than eighty million Americans viewed their first Clinton-Trump debate at Hofstra University on September 26, 2016. David Bauder, *Debate Reaches 84 Million Viewers, Toppling Record*, MCCLATCHY DC (Sept. 27, 2016), <http://www.mcclatchydc.com/news/politics-government/national-politics/article104481336.html>.

The conventional way of engaging in politics has been turned upside down. This phenomenon is largely because of disruptive new technology, because new media now has scale, and many people know how to use, and do use, this new digital communications and advanced connected mobile technology.<sup>17</sup> Whether we realize it or not, we are already well into a new chapter of how campaigns are conducted. Current disruption of what we think of as the traditional political system is actually something that happens every couple of generations. As Yogi Berra said, but not with respect to presidential campaigns in America, “change is nothing new.”<sup>18</sup> Consider that for a long time, starting from the earliest days of the Republic, presidential candidates essentially did not campaign at all.<sup>19</sup> Then, after the rise of mass inexpensive newspapers there was the relatively laid-back, passive “front porch” approach to campaigning, followed by the “whistle stop” barnstorming by train approach, and finally came the radio and broadcast television eras, with the techniques of each era working to the advantage or disadvantage of different candidates depending on their strengths.<sup>20</sup> Most recently, I

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<sup>17</sup> See MANN & ORNSTEIN, *supra* note 3, at 58–59 (citing Adam Thierer, *Submission to Participants in Knight Foundation/AEI Workshop on the Information Needs of Communicating in the Digital Age*, Paper Presented at AEI Discussion and Working Lunch (Apr. 12, 2010) (showing statistics on explosion in scale of new media).

<sup>18</sup> *C.f.* Victor Mather & Katie Rodgers, *Behind the Yogi-isms: Those Said and Unsaid*, N.Y. TIMES (Sept. 23, 2015), [http://www.nytimes.com/2015/09/24/sports/yogi-berra-yogi-isms-quotes-explored.html?\\_r=0](http://www.nytimes.com/2015/09/24/sports/yogi-berra-yogi-isms-quotes-explored.html?_r=0) (“New York Yankee catcher Yogi Berra was renowned throughout his career, not only for his hitting and skills behind the plate, but also for his oxymoronic quips, such as: Nobody goes there anymore, it’s too crowded”); see also Nate Scott, *The 50 Greatest Yogi Berra Quotes*, USA TODAY: FORTHEWIN (Sept. 23, 2015) <http://ftw.usatoday.com/2015/09/the-50-greatest-yogi-berra-quotes> (showing more examples of famous “Yogi-isms”).

<sup>19</sup> See, e.g., *Modern Campaigning Origins*, HAUENSTEIN CTR. GRAND VALLEY ST. U., <http://hauensteincenter.org/modern-campaigning-origins/> (explaining that “there was a time when it was considered poor form for a candidate to campaign openly for the presidency”) (last updated Nov. 1, 2013).

<sup>20</sup> For example, it may be surprising to some to learn that Calvin “Silent Cal” Coolidge was an extremely effective communicator using the relatively new media of radio, much more so than the more bombastic orators of the previous era. On December 6, 1923, Coolidge delivered the first presidential address on the radio, a speech now known as the State of the Union. *December 6, 1923 | Calvin*

was particularly bemused, for example, when Senator Sanders, after winning the New Hampshire primary, said in his victory speech what amounted to: “And we’re not going to be raising money from Wall Street, and if you like that, you can make a contribution at [Berniesanders.com](http://Berniesanders.com),”<sup>21</sup> and then overnight his campaign raised an enormous total amount of money in a record period of time, but with small individual donation amounts.<sup>22</sup> The moment was a wickedly droll signal, delivered without so much as an eyewink, of major change in the way campaigns are financed and conducted.

Candidates now have the ability to exploit the power of advanced mobile digital technology and new media, and I think that is actually a very interesting and largely a good development. That is because the more you make fundraising democratic, and if everybody is contributing (small amounts), you are beholden to no one in a sense. Also, more people are engaged and feel directly invested in the outcome of elections in a very real, tangible way. So, it is not a bad trend. Consequently, when we are talking about problems and about how to improve politics, rather than rely on old techniques, we should focus on these new techniques for campaigning and fundraising to determine what so-called reforms are actually needed.

Second, you hear in the campaign finance debates a lot of assumptions about the evils of money, but it does not necessarily look like the huge amounts of money that are available correlate with the results, and I just cite the failed Jeb Bush 2016 presidential

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*Coolidge Delivers First Presidential Address on Radio*, N.Y. TIMES: LEARNING NETWORK (Dec. 6, 2011), <http://nyti.ms/2crCufp>. He was the first President to use the new medium of radio to his advantage and gave regular radio speeches. *Id.* Of course, the President most associated with radio is Franklin D. Roosevelt who delivered thirty “fireside chats” between 1933 and 1944. *Id.*

<sup>21</sup> See Paul Blumenthal, *Bernie Sanders Raises Millions After Call for Donations in New Hampshire Victory Speech*, HUFFINGTON POST (Feb. 10, 2016), [http://www.huffingtonpost.com/entry/bernie-sanders-fundraising\\_us\\_56bb9581e4b08ffac123b28f](http://www.huffingtonpost.com/entry/bernie-sanders-fundraising_us_56bb9581e4b08ffac123b28f); Washington Post Staff, *The Transcript of Bernie Sanders’s Victory Speech*, WASH. POST (Feb. 10, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/02/10/the-transcript-of-bernie-sanders-victory-speech/>.

<sup>22</sup> See Blumenthal, *supra* note 21.

campaign as one of many examples.<sup>23</sup> So, I think we must really take another hard look, try to document with good research, and try to measure exactly, in a sophisticated way, what the impact of money is on campaigns and results. Moreover, it is also important to try to connect the dots and determine whether, and to what extent, campaign contributions impact policy. Interestingly, there are very impressive recent studies that do just that.<sup>24</sup>

Another aspect of the money conversation that arose in the 2016 presidential campaign that needs more attention is the impact of free media, free political advertising if you will. At least running up to the nomination, candidate Donald Trump was not paying for most, if any, of his media. I watch—and I am probably losing IQ points for this—the *Today Show* every single day. It seemed as if there was

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<sup>23</sup> There are many examples of spending by well-heeled candidates not prevailing. For example, there has been significant commentary about the poor success rate of candidates backed by the Koch brothers, George Soros, and Adelman, to mention a few, and in an earlier day Texas Governor John Connolly who won only one delegate after spending millions in presidential primaries. See Tim Alberta & Eliana Johnson, *Exclusive: In Koch World 'Realignment,' Less National Politics*, NAT'L REV. (May 16, 2016), <http://bit.ly/23UXJEW>; Kenneth Vogel & Isaac Arnsdorf, *Trump Rewrites Campaign Cash Rules*, POLITICO (Feb. 21, 2016), <https://politico.tumblr.com/post/139720290567/trump-rewrites-campaign-cash-rules>. I and others have made similar points with respect to the impact of money on big policy fights. See, e.g., Nicholas W. Allard, *Lobbying is an Honorable Profession*, 19 STAN. L. & POL'Y 23, 32–33 (2008) [hereinafter Allard, *Lobbying is an Honorable Profession*].

<sup>24</sup> For example, consider the work of Frank R. Baumgartner, Jeffrey M. Berry, Marie Hojnacki, David C. Kimball and Beth L. Leech summarized in Frank R. Baumgartner et al., *Money, Priorities, and Stalemate: How Lobbying Affects Public Policy*, 13 ELECTION L. J. 194 (2014) [hereinafter Baumgartner et al., *Money, Priorities, and Stalemate*], <https://www.unc.edu/~fbaum/articles/ELJ-2014-Lobbying.pdf>; BAUMGARTNER ET AL., *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* (July 19, 2008) (unpublished manuscript), [http://www.unc.edu/~fbaum/books/lobby/Advocacy\\_July\\_19\\_2008.pdf](http://www.unc.edu/~fbaum/books/lobby/Advocacy_July_19_2008.pdf); Baumgartner et al., *Advocacy and Public Policy Making* (Jan. 2011), <http://lobby.la.psu.edu> [hereinafter Baumgartner et al., *Advocacy and Public Policy Making*]; see also LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING* (Oct. 11, 2016), [https://techliberation.com/wp-content/uploads/2012/12/business\\_of\\_america\\_is\\_lobbying.pdf](https://techliberation.com/wp-content/uploads/2012/12/business_of_america_is_lobbying.pdf); Maggie McKinley & Thomas Groll, *The Relationship Market: How Modern Lobbying Gets Done*, CTR. FOR ETHICS (Feb. 13, 2015), <http://ethics.harvard.edu/blog/relationship-market-how-modern-lobbying-gets-done>.

hardly a day when Trump was not calling in and being heard on the *Today Show* for free. And this is true for other programs too.<sup>25</sup> Bernie Sanders, I think, had some of this going for him, and others did as well—so old models that we are discussing about campaign spending are not necessarily applying as much.

I am not saying there is not money involved in campaigns and politics. Without a doubt, campaigns at all levels are awash with money at record levels.<sup>26</sup> The impact of money might also be indirect and somewhat hidden. For example, for us to understand what is going on, it may be that we should consider whether it is deemed to be commercially valuable for the networks to carry certain politicians to draw in eyeballs for entertainment or commercial reasons. I have this nagging idea that this phenomenon has something to do with the further blurring of what used to be a pretty sharp line between the news and business functions of broadcast media. My point is that we need to be continuously forward-looking and not just come up with solutions to yesterday's

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<sup>25</sup> See Vogel & Arnsdorf, *supra* note 23 (“[Trump’s] finance reports show a campaign that relies more on splashy rallies that drive television coverage than on ground organizing.”). An interesting issue of fairness and media bias arises because not all candidates are afforded the same opportunity to be covered by major media. It is also worth examining the motivation for this skewed coverage: whether it reflects, as might be too easily supposed, a left/right or liberal/conservative bias, or whether it reflects, say, a commercial bias toward airing figures who attract viewers, thus supplanting journalistic objectivity with the profit motive. The more persistent theory is that our political woes are the direct result of a corrupt campaign finance system and conflicts of interest created by the so-called revolving door. LESSIG, *supra* note 3, at 158–59; KAISER, *supra* note 12, at 18–19. Frank acknowledges the theory dismissively and focuses on other causes. FRANK, *supra* note 3, at 15.

<sup>26</sup> See MANN & ORNSTEIN, *supra* note 3, at 67–81; Anu Narayanswamy et al., *How Much Money is Behind Each Campaign*, WASH. POST (June 30, 2016), <https://www.washingtonpost.com/graphics/politics/2016-election/campaign-finance/>; Peter Overby, *Clinton’s Fundraising Outpaces Trump’s as the General Election Season Begins*, NPR (July 21, 2016), <http://www.npr.org/2016/07/21/486884485/clintons-fundraising-outpaces-trumps-as-the-general-election-season-begins>. See generally RALPH NADER, *BREAKING THROUGH POWER: IT’S EASIER THAN WE THINK* (2016) (advocating for a greater democracy in the United States where success is not dictated for the wealthy few).

problems, and that includes having a sophisticated understanding of the role of money in campaigns.

Third, we should focus on real problems. Money is often presumed to be corrupting the political system;<sup>27</sup> though my experience is that concerns about the corrupting influence of money in politics are overstated. Yet, even if you tried to corrupt the political system with money, it is almost impossible. That is because of the many safeguards and self-correcting mechanisms in our brilliantly engineered, cantilevered system of government, which over time effectively guard against abuse and rip-offs.<sup>28</sup> The policy process is ongoing, never-ending, and is also subject to public and press critique, not to mention the ballot box. Whatever is done can be undone. As one of my former law partners, former Democratic Senator John Breaux of Louisiana would say, “You can’t buy the government. Hell you can’t even rent it.”<sup>29</sup> That is not to say that money is not an evil or it cannot be abused, but I do not think we adequately understand the problematic nature of the ways that money is harmful. In conversations about reform, so frequently there is a presumption that money is bad, money adds up to undue influence, and that the whole system is rigged. *That* is the critical problem. And then the analysis follows from there in terms of remedies considered.

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<sup>27</sup> See Benjamin I. Page, *How Money Corrupts American Politics*, SCHOLARS STRATEGY NETWORK, <http://www.scholarsstrategynetwork.org/how-money-corrupts-american-politics> (last visited Nov. 16, 2016).

<sup>28</sup> We can stipulate that political corruption is bad. But its prevalence is often misunderstood and overstated, and the existing laws and rules pertaining to corruption are effective and enforced. See Nicholas W. Allard, *The Seven Deadly Virtues of Lobbyists: What Lawyer Lobbyists Really Do*, 13 ELECTION L. J. 210, 212–13 (2014). Moreover, the notion that money can simply buy results in the policy arena is simply wrong. *Id.*; see also Allard, *Lobbying is an Honorable Profession*, *supra* note 23, at 29–30 (“[T]here is a great deal of myth and misperception about what public policy advocacy entails and the important role it plays in the democratic process.”); Nicholas W. Allard, *Practical Perspectives in the Practice of Lobbying*, in LOBBYING MANUAL 101–03 (William V. Luneburg et al. eds., 4th ed. Supp. 2011) [hereinafter Allard, ABA LOBBYING MANUAL].

<sup>29</sup> “The Ten Commandments of Lobbying,” reflect a lot of the wit and wisdom of John Breaux. See Allard, ABA LOBBYING MANUAL, *supra* note 28, at 105–09. He also has said, “My vote can’t be bought, but it can be rented.” BURDETT A. LOOMIS & WENDY J. SCHILLER, *THE CONTEMPORARY CONGRESS* 112 (Traci Growell & Molly White eds., 6th. ed. 2016).

I believe we need a much more sophisticated and accurate understanding of the ways in which money has a harmful impact. Increasingly, studies such as Professor Frank Baumgartner's impressive longitudinal study, for example, focus on the impact of money on policy issues over several years.<sup>30</sup> Baumgartner's study shows, among other things, that money does have an impact in the sense that it favors holding on to the status quo. Baumgartner and others also show that often money is spent year in, year out, with no change, and then suddenly there can be a change.<sup>31</sup> Therefore, policy change is kind of like tectonic pressure.<sup>32</sup> It results from applying pressure, and then suddenly there is movement, a jerk rather than a creep. But, my point is that these studies explain that the impact of money is not exactly the direct quid pro quo linear type of result that people expect. Money, in fact, may be bigger, more insidious, and more difficult to rout out the problem than conventional wisdom might suggest.

So, if money is not necessarily the kind of problem it is assumed to be, what are the real problems? Well, I do believe that money is corrosive in a lot of ways. I think it has been mentioned frequently here today by our distinguished experts that asymmetry is a real problem. In a free speech context, if there is asymmetry in speech, I would always advocate for more speech. And that means trying to even up the sides in various ways—as, for example, we do in our criminal and civil justice system. If it pays to have a lawyer, then in certain situations where people cannot afford one, we try to establish mechanisms to provide them with a lawyer through public defenders, legal aid, class actions, and contingency fees, for example. The solutions to asymmetry in the justice system are imperfect, but they are better than the alternative—restricting the right to counsel. Similarly, I believe it is worth finding and addressing ways to mitigate the problem of asymmetry in campaign

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<sup>30</sup> Baumgartner et al., *Money, Priorities, and Stalemate*, *supra* note 24, at 280–89; see DRUTMAN, *supra* note 24, at 11, 22.

<sup>31</sup> See Baumgartner et al., *Money, Priorities, and Stalemate*, *supra* note 24, at 55.

<sup>32</sup> Tectonic pressure is a conceptualization of plate tectonics, a theory explaining the structure of the earth's crust. See *Understanding Plate Motions*, USGS, <http://pubs.usgs.gov/gip/dynamic/understanding.html> (last visited Nov. 16, 2016).

resources and money, and we should look to solving asymmetry by finding innovative ways to even up the score.

Partisan polarization is a real and growing problem because it leads to dysfunction, precludes consensus, and paralyzes government.<sup>33</sup> It has been studied and addressed elsewhere,<sup>34</sup> but many of the things that concern us and that we might attribute to money are a result of structural political problems. For example, and only one of many, Professor Gora and I heard Senator Chuck Schumer (D. NY) recently speaking about how, through changing primary systems and moving to more open primary systems, it might be possible to reduce partisan polarization and return to a less polarized, more consensus-driven government.<sup>35</sup> That is just one idea. My point, again, is that there needs to be more attention to solutions to what are our real problems, and that polarization is one of them.

Another real problem is that there is little or no governing between elections, certainly at the federal level. It is all campaigning, all fundraising, all the time. When I look at the problem of money and fundraising, it is not that it is corrupting; it is that it is keeping elected officials from doing their jobs because they have to spend all their time raising money. So, trying to find creative new ways to somehow curtail or end the perpetual, 24–7–365,

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<sup>33</sup> See e.g., MANN & ORNSTEIN, *supra* note 3, at xi–xii (discussing the evolution of partisan politics); *Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public>.

<sup>34</sup> See, e.g., MANN & ORNSTEIN, *supra* note 3, at 180 (explaining the need to change the current partisan political culture).

<sup>35</sup> Senator Schumer was speaking informally during the annual meeting of the Association of American Law Schools in New York on January 8, 2016. See *110th AALS Annual Meeting*, ASS'N AM. L. SCHS., <http://bit.ly/2cfbkF2> (last visited Nov. 16, 2016). There are many proposals for structural reform. One idea that I believe does not get the attention it deserves is whether campaigns can be shortened. As in the song from the movie *My Fair Lady*, “Wouldn’t it be Lovely” to have shorter campaigns as they do in England? Is it really impossible within our U.S. Constitution to curtail the length of U.S. campaigns? Maybe we can zone parts of the calendar for campaigns and more of it for governing, although, as I write these words I am aware of the complexity of even distinguishing the two, much less the challenge of curtailing the duration of campaigns consistent with the First Amendment.

campaigning within our constitutional parameters, whatever your election cycle is, and focusing on creative ways to address the problem are more likely to be solutions than curtailing speech.

A final issue that I believe is a very difficult subject that does not get enough attention is the appropriate scope and role of anonymity in politics. This topic relates directly to campaign finance disclosure requirements and the First Amendment, and has been front and center from *Buckley v. Valeo*,<sup>36</sup> to *McIntyre v. Ohio Elections Commission*,<sup>37</sup> to *Citizens United v. Federal Election Commission*,<sup>38</sup> and to the ongoing debate following *Citizens United* and its progeny<sup>39</sup> over the need versus the pitfalls of disclosure about the identity of contributors, about the identity of who is controlling donations and spending, and whether transparency is essential to or impinges upon First Amendment freedoms. Anonymity is a double-edged sword. We want to have accountability, but on the other hand, sometimes anonymity is useful to protect people—to prevent chilling their expression or exercise of their rights. But in terms of the political settings, I am personally more inclined to have greater disclosure and greater identification of donors and contributions. I believe that is an area that deserves much more attention and analysis.

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<sup>36</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>37</sup> *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995)

<sup>38</sup> *Citizens United v. Fed. Election Comm'n*, 588 U.S. 310 (2010).

<sup>39</sup> The FEC decision to allow organizations engaging in political speech—buying campaign ads to withhold the identity of donors—has recently been litigated and is sharply contested. See *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012); *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486 (D.C. Cir. 2016); MANN & ORNSTEIN, *supra* note 3, at 68–80. Compare ERIC WANG, *CTR. FOR COMPETITIVE POL., SEVEN MYTHS ABOUT DISCLOSURE MASQUERADING AS “REALITIES”*, <https://comm.ncsl.org/productfiles/83453509/Myths-About-Disclosure-Masquerading.pdf> (last visited Nov. 16, 2016) (arguing the average citizen does not want more public campaign finance disclosure, and they do not need more public finance disclosure), with TREVOR POTTER, *CAMPAIGN LEGAL CTR., SEVEN MYTHS (AND REALITIES) ABOUT DISCLOSURE*, <http://www.campaignlegalcenter.org/sites/default/files/Disclosure%20Myths%20and%20Realities.pdf> (last visited Nov 16, 2016) (arguing that given our highly advanced internet access, the public should have more access to campaign finance disclosure, and the public should have it quicker).

Anonymity has a long and rich history in our law and politics.<sup>40</sup> Take, for example, the most commonly cited and perhaps most important political writings used to justify anonymous speech—the Federalist Papers. The Federalist Papers were not signed anonymously; they were signed with a pseudonym: “Publius.”<sup>41</sup> I would submit that the rationales often expressed about the desirability of anonymity are not, upon examination, very satisfying as explanations for why Hamilton, Madison, and Jay declined to sign their own names to the famous essays, nor are they justifications for anonymity today. The fact that pseudonymous political writing was a stylistic convention of the time is hardly the basis for establishing a constitutional right to anonymity.<sup>42</sup> We no longer wear tri-corner hats and knee britches, nor as an accepted custom sleep in the same bed with strangers in taverns, despite our respect for the Founders.

Nor would the fear of ostracism and retaliation appear to be applicable to the debate over ratification of the Constitution after the Revolutionary War was won, when the risk of being charged with treason abated. Whatever personal risk might have attended the positions advocated by Hamilton, Madison, Jay, or their adversaries, that would seem mild compared with the risk of signing the Declaration of Independence and opposing England in the war, which each of them did when it was, in effect, akin to signing one’s own death warrant. Moreover, the writings were pseudonymous.<sup>43</sup> Authorship was known to some people, at least the publishers, and one would expect that they were known, suspected, or attributed

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<sup>40</sup> For a discussion of the history of anonymous speech in America as well as post-*McIntyre* disclosure cases, see Jennifer B. Weland, Note, *Death of Publius: Toward A World Without Anonymous Speech*, 17 J. L. & POL. 589 (2014); see also ROBERT ELLIS SMITH, BEN FRANKLIN’S WEB SITE: PRIVACY AND CURIOSITY FROM PLYMOUTH ROCK TO THE INTERNET (2000).

<sup>41</sup> See Weland, *supra* note 40, at 589.

<sup>42</sup> See Sharon K. Sandeen, *In for a Calf Is Not Always In For a Cow: An Analysis of the Constitutional Right of Anonymity as Applied to Anonymous E-Commerce*, 29 HASTINGS CONST. L.Q. 527, 579–82 (2002).

<sup>43</sup> *Id.* at 580.

rightly or wrongly to the authors at the time, and by many, if not most, readers.<sup>44</sup>

The interest of advancing the ideas behind the Constitution without the “baggage” of the individual author—who as a politician would have supporters and detractors—has some appeal, and the concept of branding “Publius” as a generic, nonpartisan supporter of the Constitution is a plausible explanation for the pseudonymous political author.<sup>45</sup> However, it is not an entirely compelling explanation and does not appear to be supported by historical evidence after all, as explained in Douglass Adair’s insightful work collected posthumously in a captivating book, *Fame and the Founding Fathers*.<sup>46</sup> In brief, Adair argues that fame was the driving force behind the founders’ rationales and aspirations.<sup>47</sup> If accepted, and one does not need to for the points that follow, it is even more remarkable that it might otherwise be that the eighty-five essays comprising the Federalist Papers which were first published in the fall of 1787 and the spring of 1788 did not identify the specific authors for each essay<sup>48</sup>—and more remarkable still, that after ratification the authorship was not attributed to those who would receive their deserved “fame” as authors. Indeed, the identity of the three authors, for a variety of reasons, was not an especially well-kept secret; but the authors were adamant that in subsequent publications there be no list published of the author of each essay.<sup>49</sup>

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<sup>44</sup> Thomas Jefferson wrote to James Madison “[w]ith respect to the Federalist, the three authors have been named to me.” *Id.* at 581, n. 222 (citing Letter from Thomas Jefferson to James Madison (Nov. 18, 1788), in ADRIENNE KOCH & WILLIAM PEDEN, *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 452 (1944)).

<sup>45</sup> *See id.* at 580 n.220 (regarding the convention of the time that gave increased credibility to unsigned, printed advocacy pieces).

<sup>46</sup> *FAME AND THE FOUNDING FATHERS: ESSAYS BY DOUGLASS ADAIR* (Trevor Colbourn ed., 1974).

<sup>47</sup> DOUGLASS ADAIR, *Fame and the Founding Fathers*, in *FAME AND THE FOUNDING FATHERS: ESSAYS BY DOUGLASS ADAIR*, *supra* note 46, at 8; *see* Douglass Adair, *The Authorship of the Disputed Federalist Papers*, 1 WM. & MARY Q. 97, 99–100 (1994) [hereinafter Adair, *The Authorship of the Disputed Federalist Papers*], <http://www.jstor.org/stable/1921883>.

<sup>48</sup> Adair, *The Authorship of the Disputed Federalist Papers*, *supra* note 47, at 98.

<sup>49</sup> *Id.* at 98–99.

Adair convincingly argues that both Hamilton and Madison desired pseudonymity because they desired deniability. They intended to be free to, and did, in fact, adopt positions when in power after ratification that were inconsistent with positions they advanced in order to convince the public to support the Constitution prior to ratification.<sup>50</sup> For example, vigorous opposition to the Constitution of 1787 on the grounds that the new national government would destroy state governments led Hamilton to promote a reassuring constitutional theory in Federalist No. 28 which he was later to deny when he did his best to consolidate the federal government at the expense of the states.<sup>51</sup> According to Adair, Madison was apparently no more anxious than was Hamilton to publish the essays citing the authors. He explained, for example, that Madison regretted arguments he advanced in Federalist No. 44 championing the “necessary and proper” clause, when Hamilton used that clause to create the National Bank and to strengthen the national government at the expense of the states, which Madison later disagreed with.<sup>52</sup>

For these reasons, Adair speculated that the authors did not desire their identities be revealed until all had died.<sup>53</sup> Fascinatingly, Hamilton’s impending duel with Aaron Burr, and Hamilton’s premonition of his own death, propelled him to set his affairs in order.<sup>54</sup> This included, as deliciously phrased by Adair, Hamilton, four days before his death, “ostentatiously conceal[ing]” in his attorney’s office a paper in his own handwriting listing, by number, the authors of the various Federalist essays.<sup>55</sup> The list, though published and in retrospect containing several likely inaccuracies, was not contradicted by Madison until many years later. Madison, when asked about Hamilton’s list, would say something like, “Well, I think he was under some emotional stress on his way to

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<sup>50</sup> Employing pseudonyms to achieve “deniability” was apparently not uncommon. See SMITH, *supra* note 40, at 41–42.

<sup>51</sup> Adair, *The Authorship of the Disputed Federalist Papers*, *supra* note 47, at 100.

<sup>52</sup> *Id.* at 101–02. Indeed, Madison rebutted Federalist 44 with his “strict construction” theory, which Jefferson used to argue that the Bank was unconstitutional. *Id.* at 102.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

Weehawken that morning, so . . . .”<sup>56</sup> The controversy over the authorship of several of the Federalist Papers remains unresolved to this day. If Adair is correct, and his scholarship is convincing, then we certainly have reason to pause before accepting the pseudonymous nature of the Federalist Papers as grounds to justify anonymous speech today. I am perhaps overdoing this historic episode to emphasize that we should be very skeptical about anonymity and think very carefully about instances where having disclosure can serve purpose; and, generally, transparency in campaign finance and politics is a good thing. We could use much more good scholarship and debate about the uses and abuses of anonymity as it applies to campaign finance reform.<sup>57</sup>

Given how much our other distinguished speakers have to offer and the many questions our audience no doubt have, I am going to end on that note. I enthusiastically compliment, not only this entire panel, but all of the symposium participants for contributing today to this important and timely program. We have been throwing out a lot of information, content, and thoughts your way, which I hope you find interesting and provocative. My job was to talk, yours was to listen. I sincerely hope we ended our work at the same time.

Thank you.

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<sup>56</sup> *Id.* at 103.

<sup>57</sup> Professors Bruce Ackerman’s and Ian Ayres’ ingenious argument for requiring that donations be anonymous in the sense that candidates should not know the identity of contributors is to say the least, intriguing. See Bruce Ackerman & Ian Ayres, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002); Bertram J. Levine & Michael Johnson, *Campaign Contributions Should Be Anonymous*, WASH. POST, (Sept. 4, 2014), [https://www.washingtonpost.com/opinions/making-campaign-contributions-anonymous/2014/09/04/65f2b8d8-2e39-11e4-9b98-848790384093\\_story.html?utm\\_term=.21c3ef96034c](https://www.washingtonpost.com/opinions/making-campaign-contributions-anonymous/2014/09/04/65f2b8d8-2e39-11e4-9b98-848790384093_story.html?utm_term=.21c3ef96034c).