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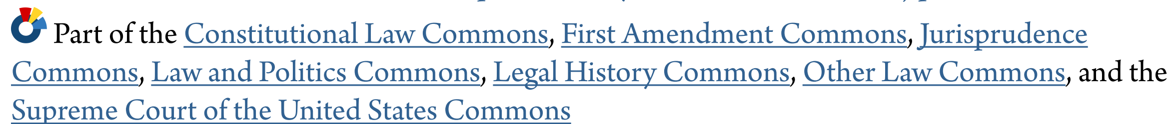
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THE ACADEMY, CAMPAIGN FINANCE, AND FREE SPEECH UNDER FIRE

Bradley A. Smith[*]

INTRODUCTION

One is hard pressed to find anyone who will argue that political speech is not at the core of the First Amendment.[1] Virtually all scholars and judges today recognize that campaign finance regulations infringe on core First Amendment rights.[2]

Despite this, over the past half-century, the great majority of academic scholarship in the field has been devoted to explaining why these particular infringements on the First Amendment are constitutional.[3] Academic defenders of the pro-speech view on the

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[*] Josiah H. Blackmore II/Shirley M. Nault Professor of Law, Capital University Law School. Thanks to Professor Joel Gora and the Journal of Law and Policy for inviting me to participate in this symposium, and to symposium participants for sharing thoughts and ideas. This is an expanded version of the remarks delivered at the symposium.

[1] *See, e.g.*, Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.").

[2] *See, e.g.*, Kyle Anne Gray, *Is Campaign Finance Reform Even a Thing Anymore?*, MONT. LAW., May 2016, at 11, 26 (noting that even "[t]he dissenters in *Citizens United* did not disagree with the basic premise of *Buckley* and the *Citizens United* majority that money facilitates speech, and its expenditure is protected from government regulation absent a compelling government interest"); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 334 (2010); Buckley v. Valeo, 424 U.S. 1, 48 (1976). Only one of the twenty-one justices to sit on the Supreme Court in the last forty years has not agreed that the issue should be analyzed under First Amendment doctrine, and that regulation infringes on First Amendment rights. *See* Bradley A. Smith, McCutcheon v. Federal Election Commission*: An Unlikely Blockbuster*, 9 N.Y.U. J. L. & LIB. 48, 49 n.5, 50 (2015).

[3] *See* Martin Shapiro, *Corruption, Freedom and Equality in Campaign Financing*, 18 HOFSTRA L. REV. 385, 393 (1989). Shapiro wrote of the "past

question of money and politics have become few and far between, and too many profess love for the First Amendment before urging its despoliation,[4] like the husband who ardently professes his fealty before heading off to meet his mistress.

The topic of this symposium is "Free Speech Under Fire," and I have been asked to offer a few words on the question of money and politics, and to place that debate within the broader context of public attitudes towards free speech. I suggest that proposals to regulate campaign finance threaten not only the political speech at the core of the First Amendment, but undermine support for free speech more broadly. Moreover, the academy, by attempting to justify this regulation of core speech on what is often the most wistful of reasoning, has contributed to a broad decline in support for free speech. The brevity of these remarks necessitates a very abbreviated analysis, but one that I hope may stir some serious reflection in the academy.

To understand the degree of the threat that campaign finance regulation poses to the First Amendment, we need only look at both academic proposals that have been made, and actual laws that have been enacted. Let us start with the latter.

I. CAMPAIGN FINANCE REGULATION IN PRACTICE

Modern campaign finance law began in 1974, when Congress passed amendments to the Federal Election Campaign Act ("FECA") that capped candidate spending at amounts far too low to educate the public about issues, and for candidates without substantial preexisting name recognition to sufficiently reach the

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twenty years." *Id.* at 393. I have seen nothing to think anything has changed in the twenty-five-plus years since. A survey of the Westlaw database for law review articles on campaign finance published in 2015 found that 75 percent (fifty-five of seventy-three) generally supported more regulation, versus 25 percent neutral or opposed to more regulation.

[4] *See, e.g.*, Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L. J. 789, 789–90, 793 (1998) (noting his long work at the ACLU and referring to himself as a "First Amendment warhorse," but going on to argue for greater regulation of free speech).

public to have a reasonable chance of defeating incumbents or celebrity candidates.[5]

The 1974 FECA amendments limited candidates in U.S. House races, for example, to spending just $70,000.[6] But in 1974, the average successful challenger to a House incumbent had spent over $100,000, 43 percent more than the $70,000 limit imposed by FECA for future races. The average winning incumbent, however, spent just $51,309, or 27 percent less than the limit imposed by FECA.[7] To update these numbers, $70,000 in 1974 is approximately $300,000 in 2016. Yet in 2012, challengers who defeated an incumbent spent, on average, over $2.4 million.[8]

Additionally, FECA limited citizens' spending to just $1,000 on all communications "relative to" a candidate, an amount the Supreme Court recognized was too low to effectively communicate with the public.[9] This limit applied to political-action committees

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[5] *See* JOHN SAMPLES, THE FALLACY OF CAMPAIGN FINANCE REFORM 177 (2006) ("[C]ampaign spending has striking benefits for both electoral competition and, more generally, for democratic values."). For benefits of spending on voter education and political competition, see John J. Coleman, *The Distribution of Campaign Spending Benefits Across Groups*, 63 J. POL. 916, 928 (2001); John J. Coleman & Paul F. Manna, *Congressional Spending and the Quality of Democracy*, 62 J. POL. 757, 771 (2000).

[6] *See Buckley*, 424 U.S. at 55.

[7] These averages are calculated from NORMAN J. ORNSTEIN ET AL., CAMPAIGN FIN. INST., VITAL STATISTICS ON CONGRESS, tbl.3-3, http://www.brookings.edu/~/media/Research/Files/Reports/2013/07/vital-statistics-congress-mann-ornstein/Vital-Statistics-Chapter-3--Campaign-Finance-in-Congressional-Elections.pdf?la=en (last updated Mar. 14, 2013). Studies by Gary Jacobson found that higher spending benefitted challengers in the 1972 and 1974 elections, but that the level of incumbent spending had little effect. Gary C. Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 AM. POL. SCI. REV. 469, 469 (1978). This strongly suggests that incumbents would have benefitted from caps on spending in the elections leading up to the passage of the 1974 FECA amendments.

[8] ORNSTEIN ET AL., *supra* note 7, at tbl.3-3. On average, these victorious challengers were still outspent by incumbents, suggesting the continued vitality of Jacobson's conclusion that absolute challenger spending, rather than the ratio of challenger to incumbent spending, is the more important factor in competitive elections. *See* Jacobson, *supra* note 7, at 469.

[9] *Buckley*, 424 U.S. at 22 ("[T]he Act's $1,000 limitation on independent expenditures 'relative to a clearly identified candidate' precludes most associations from effectively amplifying the voice of their adherents, the original

("PACs"), to individuals, and to advocacy groups and associations.[10] Unions and corporations, including incorporated nonprofit entities—which constitute the vast majority of citizen activists and educational organizations, from the Sierra Club to the NAACP, the NRA, and Right to Life, as well as most small, local groups—were prohibited entirely from spending money to voice opinions "in connection with" an election.[11] Another provision limited how much groups could spend or contribute "for the purpose of influencing" elections without first registering with, and reporting the names of their members to, the government.[12]

These provisions, among others, were challenged in *Buckley v. Valeo*.[13] The *Buckley* plaintiffs represented a thorough cross-section of American politics, including former Democratic Senator Eugene McCarthy, Republican Senator James Buckley, the New York Civil Liberties Union, the American Conservative Union, the Mississippi Republican Party, the Libertarian Party, and others. The ideologically diverse group of plaintiffs arguably demonstrated that the law was even-handed, not content-based; but it also demonstrated the broad swath it cut through political participation in American society. In a lengthy *per curiam* opinion, the Court struck down the spending provisions described above on First Amendment grounds.[14] Had these provisions not been struck down in *Buckley*, virtually all political information, including information on candidate voting records, legislative proposals, and more, today would have to be filtered through officeholders, politicians, and the institutional press, with voters and the groups they belong to acting as mere bystanders. Even politicians would have so little to spend as to be almost entirely at the mercy of the press.

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basis for the recognition of First Amendment protection of the freedom of association.").

[10] *See id.* at 39–40.

[11] 52 U.S.C. § 30118 (2014) ("It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office.").

[12] *Buckley*, 424 U.S. at 61–63.

[13] *Id.* at 39–58.

[14] *Id.*

Yet, far from being praised, *Buckley* has been under steady assault almost from the day it was published,[15] and this criticism continues today. Indeed, the 2016 Democratic Party national platform called for overruling *Buckley* as well as the more recent decision in *Citizens United v. Federal Election Commission.*[16] In 2014, fifty-four U.S. Senators—every then-sitting Democrat—voted for a Constitutional Amendment to specifically allow for regulation of political spending.[17] Had it passed, the Amendment would have undercut any basis for the Court to strike the spending provisions of the 1974 FECA Amendments. In 2003, a majority-Republican Congress enacted, and a Republican president signed into law, the Bipartisan Campaign Reform Act, an amendment to the Federal Election Campaign Act of 1971, often known simply as the "McCain-Feingold" Act after its lead Senate sponsors.[18] Going further than the 1974 FECA Amendments, it prohibited incorporated citizen advocacy groups from even mentioning the name of a candidate in a broadcast advertisement made within thirty days of a primary or caucus or sixty days of a general election.[19]

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[15] *See* Joel M. Gora, *The Legacy of* Buckley v. Valeo, 2 ELECTION L.J. 55, 58 (2003) ("[T]he Court's landmark *Buckley* ruling was condemned in the harshest terms by many academics and commentators; it was almost demonized as a derelict, a sport, a blemish on the law."). *Buckley* was decided on January 30, 1976. *See Buckley*, 424 U.S. 1. By July of 1976, in those pre-computerized days, the Yale Law Journal was out in print with an article excoriating the decision. *See* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005, 1010, 1020–21 (1976) (calling the *Buckley* opinion "dogma," a "blunderbuss," "blind[]," and "cynical").

[16] *The 2016 Democratic Platform*, DEMOCRATS, https://www.democrats.org/party-platform (last visited Dec. 31, 2016).

[17] *See* Ramsey Cox, *Senate GOP Blocks Constitutional Amendment on Campaign Spending*, HILL (Sept. 11, 2014, 2:19 PM), http://thehill.com/blogs/floor-action/senate/217449-senate-republicans-block-constitutional-amendment-on-campaign.

[18] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–55, 116 Stat. 81 (2002).

[19] *Id.* § 203. In fact, because many media markets overlap state borders, and states have primaries on different dates, in presidential races the law banned any broadcast reference to a presidential candidate, including an incumbent, for 200 days or more in many media markets. Bradley A. Smith & Jason Robert Owen, *Boundary-Based Restrictions in Boundless Broadcast Media Markets:*

After initially upholding the constitutionality of this provision of the McCain-Feingold bill in *McConnell v. Federal Election Commission*,[20] the Supreme Court fortunately reversed course and substantially narrowed the provision's reach in *Federal Election Commission v. Wisconsin Right to Life*,[21] before ultimately holding it unconstitutional in *Citizens United v. Federal Election Commission*.[22]

II. CAMPAIGN FINANCE IN THE ACADEMY

Academic proposals, however, have gone even further than these legal enactments and proposals. Seventeen years ago, my colleague at this symposium, Richard Hasen, proposed in the pages of the *Texas Law Review* that, in order to guarantee greater political equality, newspapers should be prohibited from using their capital and income to publish editorial endorsements of candidates.[23] He was not alone, as other professors, including Owen Fiss and Edward Foley, have also specifically called for limiting press freedoms as part of campaign finance reform.[24] In his recent book, *Plutocrats United*, Professor Hasen has backed off that part of his proposal, but not, so far as I can tell, for any reason of First Amendment principle. Rather, he has merely decided that the empirical assumptions on which he relied at the time—that such endorsements were influential

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McConnell v. FEC*'s Underinclusive Overbreadth Analysis*, 18 STAN. L. & POL'Y REV. 240, 241 (2007).

[20] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 105 (2003).

[21] Fed. Election Comm'n v. Wis. Right to Life, Inc. (*WRTL*), 551 U.S. 449, 457 (2007). In *WRTL*, the Court limited the reach of this provision to add: "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 470.

[22] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 314 (2010).

[23] Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627, 1630 (1999) [hereinafter Hasen, *Campaign Finance Laws*]. Professor Hasen would have allowed newspapers to form, and ask their owners, managers, and executives to contribute to a PAC, which would then be allowed to buy ad space in owners own newspaper. *Id.* at 1635.

[24] Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1411–13 (1986); Edward B. Foley, *Equal-Dollars-per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1252 (1994).

and skewed to the political right—were both incorrect,[25] and also that the political cost of such regulation is simply too high. The political backlash at this time is still too great to justify what he sees as the benefits of directly limiting the institutional press.[26] At the core of the First Amendment, however, should be the rejection of the idea that the government should decide who is too influential, or that government power should be used to limit the speech of those deemed to have too much influence, whether we are talking the institutional press or anybody else. That is simply not a power we entrust to government. Until recently, it seemed to be understood that that was what the First Amendment is about.[27]

The reason *Buckley* has survived forty years, despite forty years of determined scholarship criticizing it, is that the case for reform, on close examination, simply is not very good. The idea that the Constitution allows more regulation than we have now, which is more than we ever had before the 1970s, and in many particulars (such as federal limits on contributions to state and local parties)[28] more than ever, is not compatible with our historic understanding of the First Amendment, which is intended "to assure [the] unfettered

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[25] RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 129–30 & nn.12–15 (2016) [hereinafter HASEN, PLUTOCRATS UNITED].

[26] *Id.* at 126–27.

[27] *See* Buckley v. Valeo, 424 U.S. 1, 14 (1976) ("The First Amendment affords the broadest protection to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (quoting Roth v. United States, 354 U.S. 476, 484 (1957))); *see also* Fed. Election Comm'n v. Wis. Right to Life, Inc. (*WRTL*), 551 U.S. 449, 482 (2007) ("'Congress shall make no law . . . abridging the freedom of speech.' . . . Our jurisprudence over the past 216 years has rejected an absolutist interpretation of those words, but when it comes to drawing difficult lines in the area of pure political speech—between what is protected and what the Government may ban—it is worth recalling the language we are applying . . . [W]e give the benefit of the doubt to speech, not censorship. The First Amendment's command that 'Congress shall make no law . . . abridging the freedom of speech' demands at least that.").

[28] See 52 U.S.C. § 30116 (a)(1)(D) (2014), passed as part of the Bipartisan Campaign Reform Act of 2003.

interchange of ideas for the bringing about of political and social changes desired by the people."[29]

III. THE CORRUPTION OF "CORRUPTION"

Broadly put, the reasons offered as justifications for limiting campaign spending and contributions are to (a) prevent government corruption, and (b) promote political equality.[30] In *Buckley*, the Supreme Court held that the promotion of equality was an insufficiently compelling government interest to justify limitations on political speech.[31] But the Court also held that the prevention of "corruption," and its appearance, was a compelling enough reason to justify at least some restrictions on financing campaign speech.[32] The Court thus upheld some limited mandatory public disclosure and limitations on contributions,[33] but not limits on expenditures.[34]

As a result of the Court's ruling in *Buckley*, arguments supporting restrictions on political speech in the name of equality are non-starters in the courts.[35] Thus, scholars seeking to impact the debate have argued at length over the potentially corrupting effects of campaign contributions.[36] The difficulty for those who favor greater restrictions is that when it discusses "corruption," the Court

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[29] Roth v. United States, 354 U.S. 476, 484 (1957). *See generally* John O. McGinniss, *Neutral Principles and Some Campaign Finance Problems*, 57 WM. & MARY L. REV. 841 (2016)) ("In hundreds of cases from disparate walks of life . . . the Court has teased out the logic of the Amendment's underlying plan: protect a civic discourse created by individual choice.").

[30] *See* ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 47 (2014).

[31] *Buckley*, 424 U.S. at 48–49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.")

[32] *Id.* at 32.

[33] *Id.* at 26–27, 67.

[34] *Id.* at 58–59 (holding that the government's limitation on independent, personal and campaign expenditures violate the First Amendment).

[35] *See* Elizabeth Garrett, *New Voices in Politics: Justice Marshall's Jurisprudence on Law and Politics*, 52 HOW. L.J. 655, 671 (2009).

[36] *See* Eugene D. Mazo, *The Disappearance of Corruption and the New Path Forward in Campaign Finance*, 9 DUKE J. CONST. L. & PUB. POL'Y 259, 270–74 (2014).

has in mind a narrow definition of *quid pro quo* exchange: "dollars for political favors."[37] But there is not much evidence that campaign spending and contributions cause that type of corruption.[38] For many years, supporters of regulation argued for a broader definition of "corruption," and at times made headway, most notably in *Austin v. Michigan Chamber of Commerce*, in which Justice Marshall successfully smuggled in the equality rationale under the guise of "corruption."[39] But such outlier decisions had relatively little effect on the long-term course of the law,[40] and the Roberts Court wisely

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[37] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1441 (2014) (quoting Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985)); *see Buckley*, 424 U.S. at 26–27 ("To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined."); *see also* Allen Dickerson, McCutcheon v. FEC *and the Supreme Court's Return Back to* Buckley, 2014 CATO SUP. CT. REV. 95, 107–17 (discussing the *Buckley* Court's definition of "corruption" and its effect on other case law).

[38] *See, e.g.*, Adriana S. Cordis & Jeffrey Milyo, *Measuring Public Corruption in the United States: Evidence From Administrative Records of Federal Prosecutions*, 18 PUB. INTEGRITY 127, 137 (2016) (finding that most public corruption crimes involve "bribery, conspiracy, embezzlement, false statements, and theft," and are committed by low level employees). *See generally* Stephen Ansolabehere et al., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105 (2003) (summarizing results of more than 20 empirical studies on effects of money in politics). The evidence that lobbying skews legislative results is much more solid than the claim that campaign contributions do, albeit that many lobbyists also make campaign contributions. *See, e.g.*, FRANK R. BAUMGARTNER ET AL., LOBBYING AND POLICY CHANGE: WHO WINS, LOSES, AND WHY (2009) (examining the effects of lobbying on 98 issues before Congress). But lobbying is rarely the target of proposed limits or bans, perhaps because it is more hidden and thus generates less controversy with the public, or perhaps because reform advocates cannot figure out a way to limit lobbying that does not even more obviously violate the constitution, since the officeholders do not receive a direct benefit from lobbying and money does not change hands. *See id.*

[39] *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 692–95 (1990). For a detailed description of Marshall's successful recasting of an egalitarian rationale as the prevention of "corruption," see Garrett, *supra* note 35, at 670–78.

[40] Garrett, *supra* note 35, at 678–79.

slammed the door on them.[41] Of course, many Americans believe that campaign spending results in such corruption, in no small part because large sums have been spent to convince them of that fact.[42] Yet despite that, there is even less evidence that regulation improves public perception of government. So it turns out that regulation does not even address the "appearance of corruption."[43]

Recent years, however, have seen a new effort to redefine "corruption" in sweepingly broad terms. *Buckley* and its progeny have defined "corruption" as "*quid pro quo*."[44] This has sparked a rather odd academic preoccupation with the possible meanings of "corruption"—the label the Court gave to activity that justified limited restrictions—rather than with the actual activity that *Buckley* and its progeny considered a justification for limited restrictions on First Amendment rights.[45] Among the most distinguished scholars

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[41] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 336–65 (2010); *see also McCutcheon*, 134 S. Ct. at 1441 ("Any regulation must . . . target what we have called '*quid pro quo*' corruption or its appearance. That Latin phrase captures the notion of a direct exchange of an official act for money.").

[42] *See* Bradley A. Smith, *Politics, Money and Corruption: The Story of* McConnell v. Federal Election Commission, *in* ELECTION LAW STORIES 313, 329-331 (Joshua A. Douglas & Eugene D. Mazo eds., 2016) [hereinafter Smith, *Politics, Money and Corruption*].

[43] *See* Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 124–29 (2004); Jeff Milyo, Do State Campaign Finance Reforms Increase Trust and Confidence in State Government? (Mar. 30, 2016) (unpublished manuscript) (on file with University of Missouri), http://faculty.missouri.edu/~milyoj/files/CFR%20and%20trust%20in%20state%20government_v8.pdf.

[44] Buckley v. Valeo, 424 U.S. 1, 26–28 (1976); *McCutcheon*, 134 S. Ct. at 1441; *Citizens United*, 558 U.S. at 359; Fed. Election Comm'n v. Wis. Right to Life, Inc. (*WRTL*), 551 U.S. 449, 478 (2007); Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497–98 (1985); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 297 (1981); *c.f.* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 143 ("Thus, '[i]n speaking of "improper influence" and "opportunities for abuse" in addition to "*quid pro quo* arrangements," we [have] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.'" (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000))).

[45] *See* Lawrence Lessig, *What an Originalist Would Understand 'Corruption' to Mean*, 102 CAL. L. REV. 1, 6–7 (2014) [hereinafter Lessig,

to take on this effort in recent years are Larry Lessig,[46] Zephyr Teachout,[47] and Robert Post.[48] While a full review of each scholar's work, let alone the full body of literature, is beyond the scope of this article, a quick examination of these three is merited if only to get a flavor for recent approaches aimed at a functional upending of *Buckley* and more regulation of political speech.

Teachout, a professor at Fordham University School of Law and a candidate for Governor of New York in 2014, argues that the Constitution contains an "anti-corruption" principle that justifies most any act of government power needed to stop what Teachout, and similarly minded academics, might view as "corruption." She finds this sweeping principle—overriding the more obvious First Amendment commandment to "make no law" limiting speech—hidden in some unlikely corners of the Constitution, particularly the Ineligibility Clause, the Incompatibility Clause, and the Foreign Emoluments Clause.[49] The idea that there exists in these obscure clauses a sort of free-floating, hitherto undiscovered anti-corruption principle that provides constitutional justification for Professor Teachout's campaign finance policy preferences is interesting, but ultimately untenable.[50] Such obscure clauses in the Constitution

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Originalist Understanding]; Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009). For a discussion on why this effort to find an "originalist" principle of "corruption" is misplaced, see Seth Barrett Tillman, *Why Professor Lessig's "Dependence Corruption" Is Not a Founding-Era Concept*, 13 ELECTION L.J. 336 (2014) [hereinafter Tillman, *Lessig's Dependence Corruption*].

[46] *See* LAWRENCE LESSIG, REPUBLIC LOST: HOW MONEY CORRUPTS POLITICS - AND A PLAN TO STOP IT (2012) [hereinafter LESSIG, REPUBLIC LOST]; Lessig, *Originalist Understanding*, *supra* note 45.

[47] Teachout, *The Anti-Corruption Principle*, *supra* note 45; ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED (2014); *see* Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30 (2012).

[48] *See* POST, *supra* note 30.

[49] Teachout, *The Anti-Corruption Principle*, *supra* note 45, at 359 ("Ultimately, three of the biggest protections created by the Framers were the Ineligibility Clause, the Emoluments Clause, and the Foreign Gifts Clause."); *see* U.S. CONST. art. I, § 6, cl. 2; *id.* § 9, cl. 8.

[50] The one scholar who has taken the trouble to thoroughly rebut Teachout's theory in detail is Seth Barrett Tillman of Ireland's Maynooth University. *See* Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout's Anti-*

simply do not support such sweeping conclusions when measured against the much plainer, more straightforward language of the First Amendment.[51]

Robert Post, the Dean at Yale Law School, argues that the focus on "corruption" is "a constitutional blind alley."[52] His solution is to recast a broad definition of corruption as "electoral integrity."[53] But what is "electoral integrity?" It is not a "concept that can be applied to the particular decisions of particular representatives," but rather "a system of representation in which the public trusts that representatives will be attentive to public opinion."[54] In the end, "electoral integrity," however, turns out to be a vague concept that does not really seem much different than the traditional rationale that some believe that money in politics is too influential.[55] So "electoral integrity" winds up being about the effect of money on

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Corruption Principle, 107 NW. U. L. REV. COLLOQUY 1 (2012) [hereinafter Tillman, *Citizens United and Teachout's Principle*]; Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180 (2013). Professor Tillman's research leaves little doubt that these constitutional clauses cannot support the weight Professor Teachout places on them.

[51] *See* Tillman, *Citizens United and Teachout's Principle*, *supra* note 50; *see also* McDonnell v. United States, 136 S. Ct. 2355, 2372, 2375 (2016) (warning that despite public official's "distasteful" and "tawdry" behavior, the "breathtaking expansion of public-corruption law" was a substantial concern rendering a corruption prosecution unconstitutional (citation omitted)). For a response to the claims of Professors Teachout and Lessig that they have identified a unique "originalist" concern, see Tillman, *Lessig's Dependence Corruption*, *supra* note 45.

[52] POST, *supra* note 30, at 58.

[53] *Id.* at 60.

[54] *Id.* at 61 (emphasis omitted).

[55] *See id.* at 64 (arguing that in early twentieth-century Montana "electoral integrity" was violated by "massive expenditures by mining corporations"). Robert Natelson's detailed history suggests that Post's understanding of the era is incorrect. *See* ROBERT G. NATELSON, CTR. FOR COMPETITIVE POL., MONTANA'S SUPREME COURT RELIES ON ERRONEOUS HISTORY IN REJECTING *CITIZENS UNITED* 3–4 (2012), http://www.campaignfreedom.org/wp-content/uploads/2012/06/2012-06-Natelson-Montanas-Supreme-Court-Relies-on-Erroneous-History.pdf.

officeholders after all.[56] This sounds a lot like what Teachout and Lessig term "corruption." Whatever "electoral integrity" is, it is not *quid pro quo* corruption, but rather an amorphous concept that any speaker, legislator, or judge might apply to justify a speech restriction—exactly what the First Amendment prevents.[57]

Harvard Law School's Professor Lessig, for his part, offers up what he terms "dependence corruption."[58] This, he recognizes, is quite different from *quid pro quo* corruption, and indeed does not actually require individual officeholders to be corrupt in any way.[59] Rather, he sees policy outcomes being skewed by large expenditures, and that, he argues, makes the institutions themselves "corrupt." In other words, legislators respond to donors' wishes, or, as Lessig would frame it, they become "dependent" on their political supporters.[60] However, this sounds suspiciously like saying that legislators are grateful to those who help them win an election, and it is hard to see why that can, or should, be a justification that trumps the First Amendment right to free speech. *Of course* legislators consider and often respond to the policy preferences of those who help them get elected.[61] Why would citizens participate in the political process if they did not? *Of course* people who support a campaign, financially or otherwise, seek to sway electoral outcomes.[62] It would be shocking if it were otherwise. To suggest that voters should not be swayed, or to determine that voters are routinely, and predictably, fooled in such a way that government can manage the debate so that they are not fooled (or perhaps fooled only

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[56] *See* Pamela S. Karlan, *Citizens Deflected: Electoral Integrity and Political Reform*, *in* CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION, *supra* note 30, at 141, 141–152.

[57] Bradley A. Smith, *Why Should 'Electoral Integrity' Exclude Freedom of Speech?*, LIBR. L. & LIBERTY (Mar. 3, 2015), http://www.libertylawsite.org/2015/03/03/why-should-electoral-integrity-exclude-freedom-of-speech/#sthash.BjYdVrPs.dpuf.

[58] LESSIG, REPUBLIC LOST, *supra* note 46, at 17.

[59] Lessig, *Originalist Understanding*, *supra* note 45, at 6–7.

[60] *Id.* at 4 ("[T]he money election produces a subtle, perhaps camouflaged bending to keep the funders in the money elections happy.").

[61] *See* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1441 (2014).

[62] *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 790–91 (1978) ("[A]dvertising may influence the outcome of the vote; this would be its purpose.").

to some appropriate degree) is to give up on the democratic project itself. To the extent we find it disturbing that there is rent-seeking in government, the Founders looked to limits on government, not limits on the people, to prevent it. These limits on government, ironically, have been substantially eroded by other progressive thinkers and politicians.[63]

Professor Lessig's "corruption" is a strange type of "corruption," one in which no one is actually "corrupt," but political activity makes some political and policy outcomes more likely. Politics and campaigning, however, are all about making certain political and policy outcomes more likely. Professor Hasen's critique, that at root, Professor Lessig's "dependence corruption" is really an equality argument, is persuasive.[64] After all, money "distorts" legislative outcomes because some people have more of it than others.

In any case, these efforts to redefine "corruption" as something broader than the *quid pro quo* meaning utilized by the Supreme Court all fail to provide a consistent or principled basis for a judge to decide actual cases,[65] and thus none provides a consistent or serious check on state abuse of power to squelch dissenting views. If these are all judges have to go on, why bother with a First Amendment at all, other than to empower judges to periodically insert themselves into the political process? In short, none of them

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[63] Bradley A. Smith, *Hamilton at Wits End: The Lost Discipline of the Spending Clause vs. the False Discipline of Campaign Finance Reform*, 4 CHAP. L. REV. 117, 128–29 (2001); Richard A. Epstein, *Property, Speech, and the Politics of Distrust,* 59 U. CHI. L. REV. 41, 56 (1992).

[64] Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550, 572 (2012); *see* Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990); Elizabeth Garrett, *supra* note 35, 670–78 (disclosing, as Justice Thurgood Marshall's clerk during the *Austin* Term, that his opinion was based on an egalitarian rationale but, in order to gain a court majority, termed that rationale a "different type of corruption"). *Austin* was overruled in *Citizens United*. Professor Lessig has vigorously contested Hasen's characterization of his argument, leading to a lively (for law reviews) debate. *See* 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 Laws? A Reply to Professor Lessig*, 12 ELECTION L. J. 305 (2013); Lessig, *Originalist Understanding*, *supra* note 45, at 12–15. I score it a win for Professor Hasen—not a K.O., but a lopsided margin on points.

[65] Mazo, *supra* note 36, at 261–62.

address the reason that the Court has adopted *quid pro quo* as the Constitutional line that must be drawn to protect free speech from an overweening legislature—it is the only rationale that can be cabined off to prevent the regulation from overrunning the speech at the core of the First Amendment.

IV. REINVIGORATING THE EQUALITY RATIONALE

Professor Hasen, rather than engage in contortions of coming up with a new definition of "corruption" that the Supreme Court will correctly reject in any case,[66] attempts to revitalize a forthright case for the equality rationale in his book *Plutocrats United*.[67] Although arguments for regulating speech to enhance equality are not new,[68] Professor Hasen's straightforward effort to reinvigorate the equality argument merits a brief review, even if this short essay is not the place to explore its contours in depth. Hasen's work in *Plutocrats United* is more sensitive to First Amendment concerns than some of his earlier writings,[69] offering much greater recognition of the First Amendment rights involved.[70] But whatever exceptions there might be to the plain language of the First Amendment prohibition on

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[66] *See id.* Professor Mazo notes that these efforts to redefine corruption are necessary because of the Court's *Buckley* doctrine, but ultimately have come to constitute an ever more elaborate "distraction" that no longer moves the discussion forward. *Id.* at 260–61.

[67] HASEN, PLUTOCRATS UNITED, *supra* note 25. For another relatively recent effort, see Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599.

[68] *See, e.g.*, Fiss, *supra* note 24 (arguing that the First Amendment's purpose is in the preservation of democracy through public discourse, allowing people to "vote intelligently and freely"); Foley, *supra* note 24 (advocating an end to the media exception for corporations and promoting equal financial resources to all eligible voters).

[69] *See* Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/ Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996) [hereinafter Hasen, *Clipping Coupons for Democracy*] (proposing a voucher program for federal election to promote an egalitarian political market); Hasen, *Campaign Finance Laws*, *supra* note 23 (proposing to abolish the "press exemption" for media).

[70] HASEN, PLUTOCRATS UNITED, *supra* note 25, at 21–22.

restrictions on speech,[71] such a flowing, nebulous concept as "equality" does not seem to have been contemplated by the Constitution. Professor Hasen still fails to come to grips with the fundamental problem of regulating political speech: why is the First Amendment worded as a restriction on government regulation, rather than a command to enhance equality, assure enlightened or balanced debate, or guarantee that adequate points of view are heard?

The First Amendment prohibits congressional action to regulate speech not because the drafters and the ratifying states were unconcerned about bribery, power, and ethics (on this much, at least, Professor Teachout is correct), or unconcerned about having a government reliant on the people (as Professor Lessig points out), or political equality (score one for Professor Hasen). These concerns should be obvious enough that it is bizarre that law review articles are written about them. Rather, restricting Congress's ability to limit speech was determined to be the best means to address those concerns, at least as balanced against other values and fears.[72] The First Amendment adopts that approach because the drafters and ratifiers were realistic about government power and its abuse.[73] The

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[71] "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Schenck v. United States, 249 U.S. 47, 52 (1919).

[72] *See, e.g.*, Epstein, *supra* note 63, at 56 (suggesting that the "right solution" is to reduce the power of government to transfer wealth and dispense favors rather than limit speech); Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045, 1068–74 (1985) [hereinafter BeVier, *Money and Politics*] (arguing that the courts should not defer to Congress's judgment on the need for campaign finance legislation).

[73] *See* JAMES MADISON, THE PAPERS OF JAMES MADISON 196–209 (Charles Hobson & Robert Rutland eds., 1979); Steven Helle, *Prior Restraint by the Back Door: Conditional Rights*, 39 VILL. L. REV. 824, 825–26 (1994); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 194–249 (1989); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 534 (1983); C. Edwin Baker, *Press Rights and Government Power to Structure the Press*, 34 U. MIAMI L. REV. 819, 840 (1980); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (discussing that free expression intended to check abuses of government power, and arguing that courts should interpret First Amendment with this factor in mind); Potter Stewart, *"Or of the Press"*, 26 HASTING L. J. 631, 634 (1975) (discussing that the primary purpose of the First Amendment's Press Clause was to create a check on government power).

problem with an equality rationale, or sweeping redefinitions of "corruption," is that they are bottomless pits that can justify almost any decision on censorship a politician wants to make. What judgment limiting campaign speech could an officeholder, or a court granting the legislature substantial deference, not justify as somehow promoting political equality?[74] Equality is indeed an American value, and so presumably was considered when the First Amendment, with its absolutist language against regulation of speech, was written. The First Amendment contains no affirmative power for government to promote the value of equality of speech and influence. Quite the contrary, it suggests that equality is either best met through a regime that allows "all channels of communication be open to [the people] during every election, that [leaves] no point of view be restrained or barred,"[75] or that it was determined that other values, mainly fear of government censorship and tyranny, make it best to keep government out of the business of policing speech.

Separately from Professor Hasen, and in apparent rebuttal to this rather plain constitutional language, Justice Stephen Breyer, a former law professor, has taken to arguing that the Court should not presume laws limiting political speech are unconstitutional because there are "First Amendment interests . . . on both sides."[76] So what? Or perhaps better put, *of course* there are interests on both sides. There are constitutional interests and values on both sides of almost every provision in the Constitution, from requiring Congress to keep

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[74] *See* Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1267–68 (1994); *see also* Bradley A. Smith, *The John Roberts Salvage Company: After* McConnell*, A New Court Looks to Repair the Constitution*, 68 OHIO ST. L. J. 891, 904–10 (2007). Although in this piece I speak more of a broad corruption analysis, the points are equally if not more applicable to an egalitarian analysis.

[75] United States v. Int'l Union, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting).

[76] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1466 (2014) (Breyer, J., dissenting); *see* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 48 (2005); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring).

a journal of its proceedings[77] to repealing prohibition.[78] Having a minimum age for President,[79] for example, balances mature judgment in office-holders, versus permitting a full range of options to voters. The point is not *whether* there are interests or values lurking around any particular constitutional issue, but rather *how* the Constitution chooses to deal with the issue. For presidential age, the Constitution mandates a minimum of thirty-five;[80] for speech, it takes the position that Congress shall pass no law, not that it shall "pass only laws reasonably calculated to promote democratic accountability," or some such standard. Perhaps "no law" does not really mean "no exceptions ever,"[81] but surely it must at least mean there is a presumption that laws regulating speech are unconstitutional. Otherwise, the word "no" is left meaningless.

As part of his egalitarian reform proposals, Professor Hasen has long advocated for a nationwide voucher program,[82] and raises this idea again in *Plutocrats United*.[83] I will not address here the practical difficulties of his program—having been on the enforcement side of things, I can say that they are, in my view, thoroughly insurmountable, which may be why they remain academic rather than legislative proposals—but instead focus on the limits he proposes to accompany this program. He would limit expenditures to $25,000 in any race and $500,000 total, though he is amenable to some other number,[84] which makes sense since there

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[77] U.S. CONST. art. I, § 5, would seem to pit the value of open government against the benefits of private deliberation.

[78] U.S. CONST. amend. XXI, pits the harms of prohibition against the harms of drinking.

[79] U.S. CONST. art. II, § 1, cl. 5.

[80] *Id.*

[81] I'm perfectly willing to have Justice Holmes's opinion in in *Schenck v. United States* (upholding conviction under the Espionage Act for printing and distributing anti-war pamphlets) thrown at me, as Professor Hasen does, see discussion in HASEN, PLUTOCRATS UNITED, *supra* note 25. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Schenck v. United States, 249 U.S. 47, 52 (1919). I do think that *Schenck* was wrongly decided, and is one of many embarrassing opinions written by Justice Holmes.

[82] *See* Hasen, *Clipping Coupons for Democracy*, *supra* note 69.

[83] HASEN, PLUTOCRATS UNITED, *supra* note 25, at 102.

[84] *Id.*

appears to be no particular reason for using these limits, other than that they are round numbers. Professor Hasen says that such limits will not matter because most Americans cannot afford to spend a lot of money anyway.[85] Leave aside, for the moment, that large spenders often represent large numbers of people—think of the anti-war millionaires who funded Gene McCarthy's 1968 anti-war campaign for president,[86] or Ross Perot spending his money to make deficit spending an issue in the 1992 and 1996 campaigns,[87] or ice cream mogul Ben Cohen of Ben & Jerry's flacking for Bernie Sanders' socialism[88]—and leave aside that many potential listeners may want to hear those views, delivered by those speakers. We still do not generally give government the authority to limit rights based on the number of Americans who will directly use them. The vast majority of Americans will never need a criminal defense attorney; they will never be subjected to a warrantless home search; they will never have difficulty getting an ID enabling them to vote.[89] But we do not think that this allows us to strip these rights from those who do need or desire to use them.

So Professor Hasen's effort, however well-intentioned, appears to be exactly the issue that the First Amendment decided. Government may not limit speech to promote equality, even if one

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[85] *Id.*

[86] Richard Cohen, *How Political Donations Changed History*, WASH. POST (Jan. 16, 2012), https://www.washingtonpost.com/opinions/how-political-donations-changed-history/2012/01/16/gIQA6oH63P_story.html.

[87] *See* Steven A. Holmes, *Perot Plan to Attack Deficit Thrust Issue at Opponents*, N.Y. TIMES (Sept. 28, 1992), http://www.nytimes.com/1992/09/28/us/1992-campaign-ross-perot-perot-plan-attack-deficit-thrusts-issue-opponents.html?pagewanted=all.

[88] Samantha Bonar, *Q&A: Ben & Jerry's Cofounder Ben Cohen Talks About His New Bernie Sanders Ice Cream*, L.A. TIMES (Jan. 27, 2016), http://www.latimes.com/food/dailydish/la-dd-ben-jerrys-bernie-sanders-ice-cream-20160127-story.html; *7 Reasons Why Ben & Jerry's Supports Campaign Finance Reform*, BEN & JERRY'S, INC. (Jan. 22, 2016), http://www.benjerry.com/whats-new/campaign-finance-reform.

[89] In *Crawford v. Marion County Election Board*, it was determined that approximately one percent of the state's voters lacked a current, acceptable ID. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 218–19 (2008) (Souter, J., dissenting). Some estimates put the number as high as six to ten percent. *Id.* at 219. But of course many of those persons could get ID with relatively little difficulty.

thinks it will only harm a few wealthy people. The cure—limiting or silencing some voices through government action—is worse than the disease. Indeed, that cure may be the disease the First Amendment was intended to guard against.

Professor Hasen seems stung by the charge that his proposals amount to "censorship," devoting a full chapter of *Plutocrats United* to rebutting that charge.[90] But Professor Hasen thinks he has found the answer to the charge in *Bluman v. Federal Election Commission*.[91] In *Bluman*, a three-judge panel of the U.S. District Court for the District of Columbia upheld the federal ban on political contributions to candidates, and express advocacy expenditures,[92] by non-U.S. citizens or lawful permanent residents, and the Supreme Court summarily affirmed. Professor Hasen seems to believe that *Bluman* solves his censorship problem. He argues that even opponents of campaign finance restrictions support the ruling in *Bluman*,[93] citing as examples Floyd Abrams,[94] James Bopp,[95] and (incorrectly) me.[96] If First Amendment advocates do not support

[90] HASEN, PLUTOCRATS UNITED, *supra* note 25, at 107–23.

[91] Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012).

[92] *Id.* at 282–85. *Buckley* cabined off certain campaign finance rules to be applicable only to "express advocacy," which it defined as "communications containing express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject." Buckley v. Valeo, 424 U.S. 1, 45, n.52. The importance of "express advocacy" is discussed in Bradley A. Smith, *Politics, Money and Corruption*, *supra* note 42, at 319–21.

[93] HASEN, PLUTOCRATS UNITED, *supra* note 25, at 114–17.

[94] Floyd Abrams has a powerful claim to being the most distinguished First Amendment litigators of the last fifty years. *See* David Segal, *A Matter of Opinion?*, N.Y. TIMES (July 18, 2009), http://www.nytimes.com/2009/07/19/business/19floyd.html?_r=0 ("The most famous First Amendment lawyer in the country.").

[95] James Bopp has made a national reputation as one of the best, if not the best litigator in the country for campaign finance deregulation. *See* Terry Carter, *The Big Bopper*, ABA J. (Nov. 24, 2006), http://www.abajournal.com/magazine/article/the_big_bopper.

[96] *See* HASEN, PLUTOCRATS UNITED, *supra* note 25, at 114–15. Professor Hasen, I must note, is incorrect in saying that I was "not at all bothered by the total and absolute ban" on Bluman's political spending, and that I "support[] the government's ability to strip . . . Benjamin Bluman of the right to spend a penny

Ben Bluman's right to spend in American elections, or, he adds for good measure, laws against bribery,[97] then all bets are off. For if Bopp, Abrams, or I do not think there is a constitutional right for aliens to contribute, or, it appears, for citizens to bribe, then there is no real difference in principle between regulatory advocates such as himself, and free speech advocates such as Bopp, Abrams, and me—it is just a question of "where to draw the line."[98]

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to support a political candidate." *Id.* at 115. Professor Hasen cites as evidence of my alleged support for the decision in *Bluman* a blog post of mine published the morning after the Supreme Court's summary affirmance of the decision. *See* Bradley A. Smith, Bluman v. FEC *and the Infield Fly Rule* (Jan. 9, 2012), http://www.campaignfreedom.org/2012/01/09/bluman-v-fec-and-the-infield-fly-rule/. Re-reading the post, I can see why one might conclude that I supported the decision. If one reads the post, however, I do not say that. Indeed, the post does not argue Bluman either way. Rather, it notes only that Professor Hasen's claim that the decision created "doctrinal incoherence" is wrong. The opinion in the case by the district court, affirmed by the Supreme Court, is not, as Professor Hasen alleges, inconsistent, let alone doctrinally incoherent, with *Citizens United*. Frankly, I am more or less agnostic on the result in *Bluman*, and because I do not consider it, as a practical matter, a very important case, I have not worried too much about sorting out my concerns. As the blog post Professor Hasen quotes states quite clearly, as an empirical matter I am not terribly worried about foreign money damaging our democracy today. Indeed, I have been criticized for failing to show more concern about the possibility that some foreigner, somewhere, is, undetected, spending money in connection with U.S. elections. *See* Jon Schwarz, *Foreign Money is Flowing into U.S. Elections, Alito's Lying Lips Notwithstanding*, INTERCEPT (Mar. 31, 2016), https://theintercept.com/2016/03/31/foreign-money-is-flowing-into-u-s-elections-alitos-lying-lips-notwithstanding/. I think voters would sort that type of foreign involvement out and vote accordingly against a candidate they felt was subject to undue foreign influence. But I understand that others are much more bothered by the thought of foreign voices in U.S. elections. *See, e.g.*, Ellen Weintraub, *Taking on Citizens United*, N.Y. TIMES (Mar. 30, 2016), http://www.nytimes.com/2016/03/30/opinion/taking-n-citizens-united.html?_r=0 (arguing that corporations with even one non-U.S. citizen or permanent resident shareholder should be prohibited from making political expenditures). However, and this is important, it really does not matter to the argument which way I come down on *Bluman*, because the analogy is wholly inapt, as I explain in the text.

[97] HASEN, PLUTOCRATS UNITED, *supra* note 25, at 118. Given Professor Hasen's suggestion that laws prohibiting bribery are akin to "censorship," I would also like to make clear that I support laws against bribery, and do not believe that support for such laws undercuts arguments against campaign finance regulations, either.

[98] *Id.* at 117–18.

Well, of course there are lines to be drawn. What Professor Hasen misses is that it matters *where* the lines are drawn and *why*. It is simply insufficient to suggest that the only difference between a parent who lies about the existence of Santa Clause and a con man who intentionally defrauds consumers is "where to draw the line" on lying, and then conclude that both are "liars" and that either standard is equally valid.

When lines are being drawn, it seems hardly necessary to mention that the Constitution often treats citizens differently from noncitizens.[99] The argument for excluding noncitizens has nothing to do with equality, or even preventing corruption, but rather with time-honored, and indeed constitutionalized, conceptions about make-up of the political community.[100] The ban on non-U.S. citizen participation, whether right or wrong, is conceptually distinct from efforts, such as Professor Hasen's, to ban or limit participation by U.S. citizens, including citizens who organize themselves in the corporate form.[101]

Further, there are simply practical considerations that distinguish the two. Limiting the participation of foreign citizens is a clear line that, once enacted, is not readily subject to political manipulation. Professor Hasen's equality justification, however, or Professors Lessig, Teachout, and Post's broad anti-corruption theories, are infinitely malleable. There is no general definition of those concepts that would tell us what Congress could or could not prohibit. Again, this malleability allows the government to manipulate the law to squelch disfavored opinions and political opposition. Once one recognizes that the First Amendment was

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[99] *See* Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 287–88 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012) (cataloguing several such distinctions).

[100] *See id.* at 288. ("It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government."). Note that 52 U.S.C. § 30121 allows for lawful permanent resident aliens to make financial contributions and expenditures.

[101] *See* Hasen, *Clipping Coupons for Democracy*, *supra* note 69, at 23; Hasen, *Campaign Finance Laws*, *supra* note 23, at 1628. Professor Hasen apparently believes that U.S. citizens should lose their speech rights if they organize themselves as a corporation. Hasen, *Campaign Finance Laws*, *supra* note 23, at 1628.

intended to prevent government manipulation of debate, one sees that Professor Hasen's broad equality rationale, and the regulation it could spawn, is exactly the type of danger that the First Amendment aims to prevent. Constitutional language and purpose merge, as they should. Regardless of whether one favor's Bluman's antiforeigner rationale, it seems less open to manipulation and less problematic under the First Amendment.

Efforts to limit citizen speech in the name of equality also betray the Court's landmark decision in *United States v. Carolene Products Corporation*.[102] In that decision's famous footnote four, the Court made clear that while it would abandon meaningful judicial scrutiny of economic regulation, "legislation which restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation" would presumably face a tougher hurdle.[103] Now, campaign finance reformers wish to call off this "great compromise," fearful that certain actors have become too likely to succeed in bringing about such repeal.[104] And, to again compare with *Bluman*, there is little reason to think that *Carolene Products* was about permitting alien citizens to participate in that debate.

Nor should history be discounted. Unlimited participation by individual citizens—including minors—was, until the 1970s, taken for granted.[105] U.S. corporations have also traditionally been

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[102] *See* United States v. Carolene Products Co., 304 U.S. 144 (1938).

[103] *Id.* at 152 n.4 ("[L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.").

[104] John Samples, *The End of the Great Compromise*, LIBR. L. & LIBERTY (June 21, 2016), http://www.libertylawsite.org/liberty-forum/the-end-of-the-great-compromise/.

[105] FECA was the first federal law to limit general individual contributions. Even the Hatch Act of 1939, 5 U.S.C. §§ 1501–1508, 7321–7326 (1939), which placed strict limits on political activities of government employees, did not limit their ability to contribute voluntarily to political campaigns. The act was intended to prevent coercion of government employees, and also the ability of government to use tax money to entrench itself in power. *See* Scott S. Bloch, *The Judgment of History: Faction, Political Machines, and the Hatch Act*, 7 U. PA. J. LAB. & EMP. L. 225, 231–34 (2005). Similarly, the Pendleton Civil Service Act of 1883 had prevented coercion of government employees to make political contributions, but

valuable participants in political debate,[106] with the 1907 ban on corporate contributions often honored more in the breach than in the observance.[107] Noncitizen participation in politics, however, has long been disfavored.[108] In other words, no one is undermining traditional understandings of the First Amendment in *Bluman*. But the arguments that the academy is promulgating in support of regulation are, quite intentionally, aimed at undermining traditional understandings of the First Amendment when they offer justifications for broad restraints on political activity by U.S. citizens.[109] If we are talking about threats to the First Amendment, as this symposium presumes, we presumably mean things that change the status quo, which *Bluman* did not. The forty-year scholarly effort to undermine protection for citizen speech, including overruling *Buckley v. Valeo* and, hence, all of its legitimate progeny, is a threat to our established First Amendment norms of free speech, free association, and democratic dialogue.

In the end, there is nothing new about Professor Hasen's egalitarian rationale—it was argued to the Court in *Buckley* and rejected, and has been rejected many times since.[110] The reason is fairly obvious: it is because, again, no matter how we try, giving the

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had not prohibited employees from making them voluntarily. Pendleton Civil Service Act of 1883, ch. 27, 22 Stat. 403, §2 (1883). *See* Bloch, *supra* note 105, at 230.

[106] *See, e.g.*, GEORGE THAYER, WHO SHAKES THE MONEY TREE?: AMERICAN CAMPAIGN FINANCING PRACTICES FROM 1789 TO THE PRESENT (1974) (showing the important role of corporations in financing political activity from the early 19th century on).

[107] *See* BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 24–25, 27, 180–81 (2001) [hereinafter SMITH, UNFREE SPEECH].

[108] *See, e.g.*, Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 Tulsa J. COMP. & INT'L L. 63, 67–68 (2002) (noting how efforts of French to influence the election of 1796 helped spur passage of the Alien and Sedition Acts).

[109] *See* Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 281–90 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012); McGinnis, *supra* note 29, at 846–48; BeVier, *Money and Politics*, *supra* note 72, at 1068–74.

[110] Buckley v. Valeo, 424 U.S. 1, 48–49 (1976); *see* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1441 (2014); Arizona Free Enter. Club's Freedom PAC v. Bennett, 564 U.S. 721, 748–51 (2011); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 790–92 (1978).

government the power to limit the speech of some in order to enhance the voices of others really is "wholly foreign to the First Amendment," which was intended to deny government that power.[111] The First Amendment was intended to deny government that power because we cannot trust the government not to abuse that power; or to use it as cover for other goals; or simply to adopt, in error, bad policies that erode our democracy. These include proposals that such advocates may later regret, such as passing the 1974 FECA amendments, or limiting newspaper endorsements. And here we should note that at some point, the claims of virtually every egalitarian theorist—from distinguished judges such as J. Skelly Wright,[112] to distinguished academics such as Professor Lessig,[113] to political candidates like Bernie Sanders—eventually devolve to arguing that regulation and limits are necessary because free speech is dissuading the voters from supporting the policy goals favored by the advocates of restricting speech.[114] That is what the First Amendment prevents.

CONCLUSION

Unfortunately, the forty-year academic assault on free speech has consequences that pose a threat to speech beyond even campaign finance. Although it is true that the Court does not always appear to have a unified First Amendment theory—it sometimes cabins off

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[111] *Buckley*, 424 U.S. at 49; *see* BeVier, *Money and Politics*, *supra* note 72, at 1068.

[112] *See* J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 618–19 & n. 63 (1982) (arguing that restraints on campaign contributions and spending are necessary to impose various policies, such as "a windfall profits tax on oil companies, hospital cost containment, . . . a superfund for the victims of toxic chemicals, or any other legislation that affects powerful interests").

[113] *See One Mission*, LESSIG2016.US, https://lessig2016.us/one-mission/ (last visited Dec. 31, 2016) (demonstrating Professor Lessig's official website for his aborted 2016 presidential campaign). Here Lessig argues that greater campaign finance regulation is necessary if we are to properly address "every issue, from climate change to gun safety, from Wall Street reform to defense spending." *Id.*

[114] *See* SMITH, UNFREE SPEECH, *supra* note 107, at 120–21, 145–46.

different areas of speech under somewhat different doctrines[115]—there is little doubt that doctrine in one area influences doctrine in another, and, more important for our purposes, that attacks on free speech in one area likely undermine public support for free speech in other areas. A recent Pew Research Center survey found that Millenials are generally less supportive of free speech than the Greatest Generation, Baby Boomers, or Generation Xers.[116] Similarly, Gallup found that while current college students support free speech in the abstract, in its concrete applications their support is thin: 49 percent think it is legitimate to prevent reporters from covering campus protests if the organizers think the reporters will be biased; 69 percent favor restrictions on slurs that are intentionally offensive to minority groups.[117] Yet another national survey found that over half of those polled favored campus speech codes, and over one-third believed that the First Amendment did not protect "hate speech."[118] Half favored banning political cartoons offensive to some religions.[119] These findings should be troubling—at least to the substantial majorities of seniors, Boomers, and Generation Xers who have free speech high in their pantheon on values.

It is fair to say that a half-century of clever argumentation as to why we should support silencing some views has carried over to a more general atmosphere that views we do not like should be

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[115] *But see* McGinnis, *supra* note 29, at 847, 859–60, 895, 898 (arguing that the Roberts Court campaign finance jurisprudence follows precedent, doctrine, and "traditional First Amendment theory," and that courts should pursue a campaign finance jurisprudence based on "neutral principles," often drawn from other areas of First Amendment law).

[116] Jacob Poushter, *40% of Millennials OK with Limiting Speech Offensive to Minorities*, PEW CHARITABLE TRUST (Nov. 20, 2015), http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/.

[117] GALLUP, INC., FREE EXPRESSION ON CAMPUS: A SURVEY OF U.S. COLLEGE STUDENTS AND U.S. ADULTS 13, 15 (Mar. 2016), http://www.knightfoundation.org/media/uploads/publication_pdfs/FreeSpeech_campus.pdf.

[118] JIM MCLAUGHLIN & ROB SCHMIDT, MCLAUGHLIN & ASSOCIATES, NATIONAL UNDERGRADUATE STUDY 8, 12 (Oct. 26, 2015), https://www.dropbox.com/s/sfmpoeytvqc3cl2/NATL%20College%2010-25-15%20Presentation.pdf?dl=0.

[119] *Id.* at 17.

silenced, if not by law then by mob action, either physically or in the virtual world of social media.[120]

We all, pretty much, recognize that political speech is at the core of the First Amendment, and that efforts to limit spending on politics in fact cuts hard against these core First Amendment rights. Yet these rights have been subject to relentless rhetorical assault in the academy for decades.[121] These attacks on the value of political speech, whether framed as an anti-corruption interest or an egalitarian interest, have a corrosive effect on society's support for free speech, its willingness to tolerate dissenting or opposing views, and its openness to new knowledge and new ideas.

Experience should teach us to be most on our guard to protect liberty when the government's real or alleged purposes are beneficent. For if political speech about candidates and government does not deserve maximum protection, what does? As Justice Brandeis noted in *Olmstead v. United States*, "the greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[122]

This is the big threat of campaign finance regulation, and through it the academy has, and deserves, much blame for the current threats to free speech.

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[120] *See, e.g.*, Doe v. Reed, 561 U.S. 186, 228, 242-45 (2010) (Thomas, J.,dissenting) (noting that compulsory disclosure enables improper public behavior, including threats and harassment.). *See generally* KIMBERLEY STRASSEL, THE INTIMIDATION GAME: HOW THE LEFT IS SILENCING FREE SPEECH (2016) (arguing how the "modern intimidation game" involves innovative silencing of viewpoints that are not liked via the left's use of campaign finance laws and other, less obvious methods).

[121] *See* Buckley v. Valeo, 424 U.S. 1, 39–59 (1976); Shapiro, *supra* note 3, at 393 & n.14; Smith, *Politics, Money and Corruption*, *supra* note 42, at 333–34.

[122] Olmsted v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).