Policy Analysis

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Move to Defend
The Case against the Constitutional Amendments Seeking to Overturn Citizens United

by John Samples

Executive Summary

Three years ago the U.S. Supreme Court decided the case of *Citizens United v. Federal Election Commission*. It found that Congress lacked the power to prohibit independent spending on electoral speech by corporations. A later lower-court decision, *SpeechNow v. Federal Election Commission*, applied *Citizens United* to such spending and related fundraising by individuals. Concerns about the putative political and electoral consequences of the *Citizens United* decision have fostered several proposals to amend the Constitution. Most simply propose giving Congress unchecked new power over spending on political speech, power that will be certainly abused. The old and new public purposes cited for restricting political spending and speech (preventing corruption, restoring equality, and others) are not persuasive in general and do not justify the breadth of power granted under these amendments.

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Introduction

In January 2010, the United States Supreme Court handed down its decision in *Citizens United v. Federal Election Commission*.[1] The Court found that prohibiting independent electoral spending by corporations violated the First Amendment. A later lower-court decision, *SpeechNow v. Federal Election Commission*, liberalized fundraising and spending by individuals.[2] *Citizens United* fostered controversy and considerable criticism. Some critics called for a constitutional amendment to overturn the decision. In 2012, President Obama joined that call.[3]

By the end of February 2013, members of the 113th Congress had introduced eight proposed amendments responding to *Citizens United*.[4] Five of these eight bills give Congress and the states full power to regulate and restrict both contributions and electoral spending.[5] The other three implicitly grant such powers. Four of the bills focus their attention on contributions and spending by corporations and other organizations.[6] The other four grant a general power to regulate and restrict contributions and spending. Three of the proposed amendments in the 113th Congress explicitly exempt "freedom of the press" from the powers granted in the bill.[7]

This essay will focus on the amendments offered early in the 113th Congress. However, a look back to amendments introduced in the 112th Congress makes sense; similar bills may appear later in the current Congress. In the 112th Congress, members introduced 16 constitutional amendments related to *Citizens United*, 3 in Senate and 13 in the House.[8] Eleven of the amendments would have granted Congress the power to regulate or limit spending on elections; 10 of those would have given the states the same power. Nine of the amendments in the 112th Congress would have given Congress or the states the power to regulate or limit contributions in federal elections. Four of the amendments would have explicitly outlawed donations or spending by corporations. Two amendments would have prohibited all private spending on federal elections in favor of full public funding. Eight of the amendments would have explicitly protected the freedom of the press from their strictures. Another four stated that only natural persons and not corporations would have had rights under the U.S. Constitution.[9]

Many of the proposed amendments in the 113th Congress would not change existing law. Under the national Constitution, Congress and the states have had the power to regulate campaign contributions for several decades.[10] They also possess the power to prohibit contributions by corporations.[11] While these parts of the proposals do not change the status quo, they would preclude possible future court decisions voiding contribution limits or prohibitions related to corporations.

Other amendments propose significant changes in the current law. As noted earlier, three of amendments explicitly include authority to regulate or prohibit corporate independent expenditures, thereby overturning *Citizens United*. But four of the amendments go much further, as will be later explained, overturning *Buckley's* invalidation of expenditure limits more generally. The fact that two of the proposed amendments found it necessary to explicitly exempt the press from the new congressional powers over electoral spending indicates the radical character of the proposed changes.

Why should Congress gain such power over spending? Perhaps the spending and speech at stake should not be protected by the Constitution. If they are protected, perhaps Congress should have the power to pursue other values, even at a cost to the freedom of speech. I examine each possibility in turn.

Unprotected Speech?

We might begin by recalling a few reasons why free speech matters. First, free speech is needed for republican government. It informs voters about the conduct of elected officials, thereby helping voters to hold officials responsible at election time. Scholars

have found that more spending on speech leads to better-informed voters; less informed voters benefit more from more spending and speech than relatively better-informed voters. Informing voters fosters electoral competition through criticizing incumbents and creating name recognition for challengers.[12] These arguments suggest why legal protections for free speech are needed. Officials in power have every reason to fear speech. It fosters change, not least in elections. Elected officials have strong reasons to find acceptable ways to suppress free speech.

Many doubt that limiting spending on elections implicates the First Amendment. Some argue that money is not speech.[13] Congress has long assumed broad powers to regulate the use of property in the economy. These amendments would extend this broad power from economic activities to the funding of political speech, thereby extending the government activism of the New Deal to political activities.[14] Yet the actual New Deal Court indicated that speech had more constitutional protection than the use of property.[15] The Supreme Court distinguished protections for speech from power over property in *Buckley v. Valeo*, its most important campaign finance decision:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.[16]

In other words, speaking out requires spending money, and restricting or prohibiting such spending will restrain or prohibit the related speech. Similarly, printing presses may not be actual speech, but banning printing presses would place a severe burden on the ability of people to disseminate their speech. No Supreme Court justice has denied a connection between money and speech.[17] Even Justice John Paul Stevens, the author of the dissent in *Citizens United*, has acknowledged that spending money implicates the First Amendment.[18]

But does freedom of speech apply to corporations? We are accustomed to thinking about *individual* rights. Perhaps freedom of speech should apply only to natural persons. Two amendments propose to change that by limiting the freedom of speech to natural persons. [19]

The shareholders and owners of a business are natural persons (not to mention the members of an interest group taking a corporate form or a labor union). The leaders of a corporation are also natural persons who fund speech on behalf of shareholders or members who are also natural persons. The corporate form they take, however, is a legal construct, not a natural person. Corporations share this artificiality with other politically engaged organizations: political action committees, political parties, mass mobilization organizations, independent expenditure committees (so-called Super-PACS), and so on. Under these proposals, individuals, wealthy or not, would have full First Amendment protections. Individuals organized into groups would not. These amendments would expose what most people take to be normal political activity to government control.

Courts have recognized corporations have some aspect of legal personhood since at least 1886.[20] Over 30 years ago, the Supreme Court decided that corporate speech merited First Amendment protection. The Court focused on the speech at issue, not the corporate identity of the speaker.[21] The text of the Constitution supports this concern for speech rather than the speaker. The First Amendment states "Congress shall make no law...abridging the freedom of speech." It does not mention people, natural or otherwise. The amendments would both contravene the text of one part of the Constitution and longstanding Supreme Court decisions.

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Perhaps we should distinguish political entities promoting one version or another of the public interest from economic entities that seek private profits or interests. Some advocates say freedom of speech should apply only to the former.[22] The text of the First Amendment makes no such distinction. The pursuit of profits may well serve the public interest. Managers of business corporations have an obligation to maximize shareholder value. Fulfilling that obligation has long been deemed in the public interest. They might have good reason to support some candidates for office to meet their obligation. In any case, businesses need not engage politics only in a self-interested way. Managers might believe that candidates and policies that favor their business also promote national prosperity. Perhaps they are wrong, but the decision that they are wrong belongs to voters, not Congress.

Not all speech is protected by the First Amendment. Slander, obscenity, direct incitements to violence, and other kinds of speech may be prohibited by Congress to protect the public.[23] But ads critical of the Obama administration's economic record or Mitt Romney's work at Bain Capital have little in common with child pornography or incitements to riot.[24] The spending at issue in these amendments supports political speech similar to speech long protected by the courts. The federal government does have the power to prevent violence through criminalizing incitement. It does not, and should not, have the power to prevent people from adopting "incorrect" political views.

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Compelling Government Interests

Americans appear to value freedom of speech. Perhaps they value it too much. A proponent of these amendments might argue that republics pursue many different ends reflecting many values. Freedom of speech is one value, sanctioned by the Constitution. These amendments would allow Congress to pursue other purposes and values at a cost to freedom of speech.[25] Freedom of speech would matter less, and other values would matter more.

The congressional resolutions themselves are largely silent as to their purposes.[26] We do have a source for identifying the purposes of campaign finance regulation. The Supreme Court has long applied strict scrutiny analysis to campaign finance laws. Such analysis identifies a compelling government interest that justifies abridging a fundamental right like freedom of speech. Such interests suggest purposes and values that might justify the remarkable grants of power over speech in these proposed amendments. Some values or purposes have been rejected by the Court as legitimate reasons for regulating speech. These rejected values—the idea of equality above all—may underpin a constitutional amendment but not an ordinary law. After all, "We, the People," the authors of the Constitution, stand above the Supreme Court, the interpreters of that text. We shall consider both the traditional purposes for regulation and those rejected by the Court.

Corruption

The Supreme Court has said the only government interests compelling enough to allow limits on political spending are preventing corruption (or the appearance of corruption) of politics. What is corruption? The courts and commentators have offered more than one answer to this question.

Appearance of Corruption

The courts have said that preventing an *appearance* of corruption caused by donations may justify restricting campaign contributions. Such appearances are said to cause citizens to lose confidence in government; the government has a legitimate interest apparently in fostering confidence in itself.[27] The proposed amendments might be defended as a way to counter appearances of corruption and thus to bolster confidence in Congress.

Scholarly research has shown that "trends in public perception of corruption may have little to do with the campaign finance system."[28] The number of Americans who thought that the government was corrupt went down even when large contributions to the political parties increased during the late 1990s.[29] Thus, if Congress could limit the purported cause of distrust (spending), we have no reason to think the presumed effect of higher confidence would follow.

The appearance of corruption standard has deeper problems. Imagine a set containing all spending on electoral speech. Further imagine that some spending corrupts government while much of it does not. Imagine also, plausibly, that the public believes much more spending corrupts than is actually the case; the public's beliefs are overly inclusive. This set of mistaken public beliefs about corruption will be both a rationale for limiting free speech and an exercise of free speech.

This subset of mistaken beliefs is important. Congress has the power to act against actual corruption; the public's accurate beliefs may be acted on by Congress under the "preventing corruption" rationale. Given that, the subset of spending believed to be corrupt but not actually corrupt constitutes the actual "appearance of corruption" rationale for regulating campaign finance. Should Congress have the power to restrict First Amendment rights based on false public beliefs about the exercise of those rights?

Some might say that preserving public confidence in government justifies restricting rights even if those limits are founded on false public beliefs. Here we might distinguish between a government that *has* public confidence and one that *deserves* it. A government deserves public confidence if it pursues public purposes through effective policies. A policy is effective if it is based on a true belief that the means chosen will attain a legitimate public purpose. A government does not deserve public confidence if it pursues public purposes through policies based on false beliefs about their effects. Such a government might retain public confidence, however, if the public falsely believed the policies would attain the relevant ends. A government that restricts speech based on the appearance of corruption may thereby have public confidence, but it cannot deserve it.

Quid Pro Quo Corruption

In *Buckley*, the Court said that corruption arises when "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."[30] Campaign contributions show support for a candidate and his positions; the donor hopes to help a candidate win an election and carry out his promises. But they can also degenerate into a kind of bribery: a candidate can promise a favor in return for a contribution. The contribution determines the promised actions of the candidate rather than the promised positions and actions attracting the contributions. By limiting contributions, the Court concluded, Congress could make such quid pro quos less likely.[31] Preventing this type of corruption also justifies a congressional ban on contributions by corporations. To this day, even after *Citizens United*, corporations cannot directly contribute to candidates.

Quid pro quo corruption depends on a person giving money to a candidate and receiving something in return. What if a person or group doesn't give money directly to the candidate and just spends money on speech supporting or opposing a candidate? Such independent spending leads to speech, not a corrupt exchange of a donation for a favor.[32] Many of these proposed amendments would give Congress power to regulate or prohibit independent spending on speech. Some argue that independent spending allows for a type of bribery. Candidates know about independent spending, the argument goes, and they can reward those who fund such speech.[33] Independent spending is not really independent; it is just another kind of contribution that obscures the quid pro quo transaction. To prevent such quid pro quos, Congress should have the power to limit or

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ban such spending just as it has always had the power to regulate contributions.

How do we know public officials are providing favors in exchange for independent spending? Candidates for office complain sometimes about their lack of control over independent groups. [34] Absent such control, independent groups cannot deliver benefits to donors reliably. By law a leader of such a group cannot be a representative of a candidate. Moreover, it is not enough to say that a person gave money to an independent group and later benefited from an act of Congress. Candidates take positions, and donors seek to support the candidate and his positions. In other words, the money may follow (not determine) the positions of the candidate.[35] In that case, independent spending seems like normal democratic politics. If *Citizens United* were overturned by an amendment, who would decide whether independent spending fosters quid pro quos and should restricted or prohibited? Congress would make that judgment.[36] The courts would be deferential toward such determinations of corruption.[37]

Here's the problem with such deference: Congress cannot fairly judge this matter. Being elected officials, they have a stake in the game. Members care most of all about winning re-election. They also care about their party attaining and holding a majority. Independent groups can threaten those vital interests. Freed of contribution limits, independent groups can raise funds quickly to criticize incumbents and perhaps bring about their defeat, even in a primary.[38] Congress will always have a working, bipartisan majority in favor of protecting the members' jobs, and that majority will equate uncontrolled, independent spending with a higher probability of losing a bid for re-election.

Members thus face a conflict of interest: they can ban independent spending and increase the likelihood of re-electing incumbents or they can decide such spending does not corrupt and face stiffer competition for holding on to their seats. It is too much to expect that members of Congress (or anyone similarly placed) would consistently vote against their primary self-interest and declare independent spending innocent of all charges. In short, the people have an interest in robust, unencumbered political speech; members of Congress do not. For this reason, among others, the Constitution says, "Congress shall make no law . . . abridging the freedom of speech."

Access

Many people believe representatives reward contributions with access defined as "the ability to see and to speak with government decisionmakers."[39] Lobbyists believe contributions lead to access or "the chance to have your opinion heard."[40] Of course the chance to be heard is not the same as support for a policy. Legislators still may vote based on their ideology or partisanship. Hence, lobbyists tell scholars that "money can buy access . . . but the real work of lobbying is done elsewhere."[41] The legislator's judgment is the intermediary between access and policy.

Citizens United found that offering such "access" to a member did not constitute quid pro quo corruption.[42] The Court deemed such theories of favoritism "unbounded and susceptible to no limiting principle."[43] Representatives are more inclined to meet with their supporters, including donors, than constituents who are neutral or hostile.[44] They are also more likely to meet with sympathetic groups or leaders who influence voters. For the Court, this inequality between friends and opponents would seem to be part of politics.[45] For the Court, such normal politics hardly justified prohibiting speech.

The access argument does not offer a relevant foundation for the proposed amendments. Lobbyists seek access in part through contributions given through the traditional legal framework of political action committees. The amendments give Congress power over spending not covered by existing regulations. Such power thus could not address the access issue, even if we accept that supporters meeting with members is a problem to be solved.

Distortion Theories

Prior to *Citizens United*, the Supreme Court had recognized a different type of corruption that created a state interest compelling enough to support a ban on independent expenditures by corporations. The Court described this corruption as "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." Such spending would not "reflect actual public support for the political ideas espoused by corporations" and thus would "unfairly influence elections."[46] This distortion theory of corruption comprises two ideas: public support and political equality.[47] I treat the former now and return to the question of equality later.

What is wrong, according to the Court, with corporate spending and speech? It lacks public support and thus distorts elections. This argument makes sense for voting. In a democracy, voters elect public officials who then make laws. Elected officials should have public support as indicated by voting.

Is spending on speech like voting? It is not enough to say that spending influences elections. Voting determines the outcomes of elections. If spending on speech determined the outcome of elections, it would make sense to demand that such spending have broad public support. However, money does not determine those outcomes. Congressional incumbents do usually raise and spend more than challengers, and they also win re-election almost all the time. Having more money would thus appear to determine the outcomes of elections. But appearances are misleading. Challengers are often poor candidates who do not attract enough money to mount an effective challenge because they are expected to lose. A candidate might, for example, have little experience and thus, weak name recognition in a district. The quality of the candidate, not the money itself, fosters an incumbent victory, and incumbents are more often experienced candidates. Challengers do not need to spend as much or more than incumbents to win elections, and quality candidates are able to raise sufficient sums.[48] Even if incumbents have a war chest built up from past elections, a challenger can raise money and defeat a vulnerable incumbent.[49] The political environment matters also. In 2010, 52 Republican challengers defeated Democratic incumbents in the House of Representatives even though 43 of those incumbents had outspent their victorious challengers.[50] Those 43 Republican challengers could not have taken office if campaign spending were like votes.

Assume Congress again bans independent spending by corporations or by individuals. Some ideas would not be heard, and among those would be ideas that genuinely inform voters. Voters would be deprived of information they might have wanted to hear. Congress would have decided that ideas funded by a few people lack public support and should not be heard. Voters would not get the chance to decide whether those ideas deserved public support. The U.S. Constitution reserves that decision to the voters, not to Congress.

Finally, consider the question of ends and means. The powers conferred by these amendments cover all electoral spending, not just the corporate outlays. Congress will have the power to restrict speech about ideas with both broad and narrow support. Can we be sure ex ante that Congress will only regulate spending that does not reflect broad public support? If members are concerned primarily with re-election, ideas that enjoy (or potentially enjoy) broad public support are relevant to that goal. If a majority in Congress finds such popular ideas threatening, they might use their new powers to restrict the propagation of such ideas. Ideas with narrow support, in contrast, are unlikely to be regulated or restricted. They pose a lesser threat to the re-election of those who make campaign finance policy. Paradoxically the proposed amendments are likely to make Congress *less* responsive to the popular will.

Recent commentators have explicated two revised versions of the distortion rationale for giving Congress control over spending on speech. I now consider each in turn.

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The Anti-Corruption Principle. Zephyr Teachout believes the American Framers saw preventing corruption as "a central part of the United States Constitution."[51] She argues that the Constitution contains "within it an anti-corruption principle, much like the separation-of-powers principle, or Federalism."[52] According to Teachout, this principle defines corruption as "the self serving use of public power for private ends."[53] Like other structural principles, this anti-corruption principle should be given "independent weight" in judicial or other deliberations about applying the Constitution.[54] Teachout's principle might justify the amendments under consideration. Congress could be given the power to restrict spending and speech to vindicate the anti-corruption principle.

"We, the People" might wish to amend the Constitution to vindicate founding principles and renew republicanism. But two questions need affirmative answers before the proposed amendments can build on Teachout's foundation: Is the anti-corruption principle part of the Constitution? Are the amendments consistent with the anti-corruption principle?

Teachout practices a curious sort of originalism.[55] She does not set out the original public meaning of discrete clauses of the Constitution.[56] She seeks instead to establish the Framers' concern about corruption, a concern said to underlie various parts of the Constitution. Above all, she focuses on the Ineligibility Clause,[57] the Emoluments Clause,[58] and the Foreign Gifts Clause,[59] from which, she says, her anti-corruption principle emanates. Justice William O. Douglas followed a similar method of derivation in that bane of originalism, *Griswold v. Connecticut*.[60]

Teachout herself, despite her copious citations to the Framers, invokes the anti-corruption principle through a historical relativism that recalls the Living Constitution idea. She writes: "the anti-corruption principle embodies a broad principle that can mean different things and apply to different acts over time."[61] This statement calls into question her reliance on the authority of the Framers. If the meaning of principles can change, why should contemporary pluralists not agree with Progressives that the old Jeffersonian Constitution (and its putative anti-corruption principle) are out of date and should give way to the more modest and functional quid pro quo standard enunciated in *Buckley*? After all, the latter might be more in accord with contemporary pluralism.

Teachout claims the Framers were obsessed with corruption. She cites the Foreign Gifts Clause, which states "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."[62] However, the Foreign Gifts Clause in the Constitution is a weaker version of the one in the Articles, a strange move for men said to be obsessed with corruption.[63] In particular, the weaker current version does not reach state officials and state elections.[64] The language of the Clause also omits many important federal offices, omissions that again raise doubts about the obsession claim.[65]

Could the anti-corruption principle justify the powers over speech that would be granted by these proposed amendments? The Foreign Gifts Clause cited above speaks of "accepting" gifts from foreigners. Even if we assume, as Teachout proposes, that corporations are foreigners or foreign governments for constitutional purposes,[66] the anti-corruption principle could not reach independent spending on elections, the kind of spending vindicated in *Citizens United*.[67] In such activities, officials accept nothing from foreigners at home or abroad; indeed, they "accept" nothing from Americans in a legal sense. Moreover, the Foreign Gifts Clause refers to "any Office of Profit or Trust under [the United States]." The weight of the evidence indicates this phrase does not include federal elected positions.[68] Even if Teachout were correct about the founding era, her principle could not provide an intellectual foundation for these amendments.

Teachout's principle should prove irrelevant to the amendments in another way. She seeks to give weight to an anti-corruption principle that could then be balanced against other principles like the freedom of speech. Most of the proposed amendments do no balancing. They simply give power to Congress to regulate or prohibit spending on speech. The balancing, if any, will be done by Congress. The speech that prohibited spending would have supported will not be heard. The First Amendment would not be a constraint on that power, especially since the proposed amendments are meant to overrule *Buckley* and *Citizens United*. The point of the proposed amendments is to exclude some political activities (spending on speech) from First Amendment protections. The amendments confer power on Congress, not an interest to be weighed by the judiciary. The amendments provide answers to constitutional questions, not a means for courts to reconsider those questions.

In fact, the amendments might well foster violations of Teachout's anti-corruption principle. Giving a majority of members of Congress the power to control electoral spending would tempt Congress to constrain and censor their critics. Such actions would be in service to private ends: the reelection of members of Congress. Of course, electoral success might be in the public interest if elections were fair and competitive; such elections would reveal the desires of voters relative to candidates. But the proposed amendments would make it possible for members of Congress to control spending by their opponents. A rigged election does not lead to outcomes that serve the public. In this case, the members of Congress would be acting against the interests and desires of their constituents.

The threat of incumbent self-dealing may be found elsewhere in Teachout's argument. She posits that a devotion to the common good is required to enter the political fray. Those who seek private ends in politics are to be excluded as potential corrupters of the polity. Defining the common good prior to politics thus defines who may speak in politics. If that is the rule, those who seek private ends will speak the language of the common good. Indeed, they may believe sincerely and with good reason that the pursuit of self-interest serves the common good: ambition may counteract ambition beyond elected officials. Someone will have to decide who is truly motivated by the common good and who is just faking it.[69] Majorities in Congress, along with the president, will be that "someone." The temptation to harass one's opponents would be powerful. The anti-corruption principle is likely to become the incumbent protection principle.[70]

Let us say, however, that a majority wishes to regulate campaign finance to to defund (and thereby silence) a minority. Let us assume, plausibly, that the voters who compose such a majority are acting on self-interest. Perhaps they wish to take the property of the defunded minority or they simply take pleasure in doing harm in some way to the defunded minority. By using the new power granted by the amendments in this way a majority would be seeking to use public power for private ends. If a majority of Congress acted on that majoritarian impulse, Congress itself would be corrupt by Teachout's standard. In this way, the proposed amendments would provide Congress with new public powers to pursue private ends. The amendments would, at the margin, enable corruption.

It is possible that these new powers over spending would be used predominantly for public ends. But it seems unlikely. Incumbents would have to forgo using a powerful weapon against challengers. Majorities would have to tolerate resistance from propertied minorities. To think the powers granted by the proposed amendments would be used predominantly for the public good assumes too much about human nature and politics. To say more reasonably that the powers over spending would empower private interests half the time and that we should tolerate corruption to fight corruption would hardly recommend these amendments to the American people.

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Teachout ultimately misunderstands American government. It embraces individual rights and limited government; the Constitution establishes procedures for political struggle. American government is not defined by a devotion to a common good.[71] Teachout makes the common good central to her argument about corruption and good government. She writes thus from outside, not within, the modern American political tradition. She asks not that we reform government to revive founding principles but rather that public officials impose a different conception of government on the nation.

Dependence. Law professor Lawrence Lessig has articulated a distortion theory he calls "dependence corruption." What would an undistorted government look like? Lessig does not rely on a theory of the common good to set the baseline for measuring corruption and recognizing integrity. He writes, "What is the 'public good'? . . . The answer (for us at least) is that there's no good answer, at least not anymore."[72] Instead he emphasizes the political process. Lessig postulates that the Founders intended the United States government to be dependent on "the People alone."[73] He writes, "Dependent—meaning answerable to, relying upon, controlled by. Alone—meaning dependent upon nothing or no one else."[74]

Instead, as Lessig argues in some detail, both what Congress considers and what it enacts depend in part on "the funders," people who provide campaign funds to members of Congress and receive, in turn, policies that favor special interests.[75] This is not, however, quid pro quo corruption. Washington is a gift economy: funders help out members who become obligated in fact, if not legally, to return the favor.[76] Lawmaking is distorted because members and their actions are dependent on the funders (and their clients) rather than "the People alone."[77]

How do we discern what "the People alone" want? Lessig notes that polls tell us "what 'the People' believe about an issue" and "what the people want [Congress] to work on."[78] He argues that to the extent that Congress does not follow the issue concerns or agenda of the polled public, government is corrupt. For Lessig, the "people alone" speak to Gallup within a range and with a 95 percent certainty.

This idea has one advantage over many views of corruption. A skeptic might doubt that the common good of the people and Zephyr Teachout's idea of the common good of the people would ever differ much. But "the people alone" might differ with Lawrence Lessig's political hopes. The foundations of his theory of corruption need not be just a rhetorical restatement of his own substantive commitments.

Invoking the authority of the Founders, however, seems strange. Contrary to Lessig, Madison did not define a faction as a "special interest."[79] Madison wrote:

> By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.[80]

A faction is not just a special interest (or minority); it might also be a majority acting against the rights of others or the larger interests of the whole. Madison assumed that in a republic a majority would quickly suppress mischief by a minority by simply outvoting them. Mischief by a majority, however, had no obvious remedy in a republic, a form of government marked by majority rule. Federalist 10 focuses on precluding misrule by a majority. Madison did believe that the United States should be a republic and that in such a government the people ruled. But he also believed that passions and interests would sometimes lead the people to greatly harm or even destroy their republic. He did not simply identify "the people" with a majority. He also thought representation in a republic would be one remedy for the dangers posed by wayward majorities. Lessig affirms majorities; they are neither a fac-

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tion nor a threat to the republic. The threat comes from departing from the will of "the people alone" understood as a majority.

One example clarifies how far Lessig is from Madison. Imagine polls show that a majority of Americans wished to redistribute all wealth from its current owners to the bottom 50 percent of the income distribution. If Congress did not put that issue on its agenda and pass relevant laws, Lessig would be bound to judge that Congress corrupt. In contrast, Madison found such laws "wicked and improper."[81] Lessig is much more of a democrat than Madison. His reliance on the authority of that Founder is misplaced.

Lessig's concept of corruption also appears overly broad. Madison thought representatives would refine the views of the people, thereby making laws "more consonant to the public good than if pronounced by the people themselves, convened for the purpose."[82] For Lessig, such departures from the public's initial views must be judged evidence of dependence on someone other than the people and hence, corrupt. Lessig might want to say, with Madison, that if representatives ignore the people's voice now in pursuit of their long-term interests, the deviation would not be corrupt. But to say that requires a theory of the public good that Lessig doubts we can have now.

Lessig recommends public financing of campaigns to end dependence on donors. Two of the proposed amendments in the 112th Congress also included public financing. However, Lessig's proposal is voluntary for candidates, if not for taxpayers, that is, "the funders."[83] The two proposed public-financing amendments also prohibit private spending on elections, thereby prohibiting some speech. Lessig's plan "doesn't forbid anyone from running their own ads. . . . It doesn't stop the likes of Citizens United, Inc., from selling videos attacking anyone."[84]

What about the power to regulate spending in general? Lessig believes Congress should be empowered to regulate independent spending by corporations. As noted earlier, the powers granted in these amendments are broader than a reclaimed power over corporate spending. The powers in the amendments thus seem broader than Lessig's proposal. In general, Lessig says his plan "is not a solution that says speak less. It is a solution that would, if adopted, allow people to speak more."[85] The power to control all spending on electoral speech would lead to less speech through prohibitions or limits.

Lessig's work does suggest a way of thinking about these proposed powers. He abhors dependence of the government on the "the funders." Government should depend on "the people alone." However, these amendments make people who wish to speak dependent on the goodwill of Congress. If Congress cuts off the spending needed to fund the speech, the speech is not heard. The First Amendment precludes such dependence by recognizing a legal right to be free of congressional coercion.

Such dependence would distort collective decisions. By excluding some speech and thereby favoring other speech, government officials could shape what desires and choices are transmitted in an election. Making the public sphere dependent on congressional decisions would thus cause public opinion to deviate away from what the people might want in the absence of the restrictions allowed by these proposed amendments. In other words, by changing what is heard and thereby electoral outcomes, the amendments corrupt American politics as properly measured by a First Amendment baseline.

Clientelism. Samuel Issacharoff, a professor of law at New York University, argues that private financing of campaigns can foster a kind of corruption he calls clientelism. Issacharoff asks "whether the electoral system leads the political class to offer private gain from public action to distinct, tightly organized constituenticies." In return, these groups "may be mobilized to keep compliant public officials in office."[86] Clientelism is a distortion of politics away from its proper goal of providing public goods, that is, "matters from which private initiative cannot realize gains and that in turn require public coordination."[87]

By changing what is heard and thereby electoral outcomes, the amendments corrupt American politics as properly measured by a First Amendment baseline.

Issacharoff's argument differs from reformist conceptions. Reformers generally equate corruption with efforts by the rich and powerful to enrich themselves by simple plunder or by constraining government regulations or by precluding redistribution to the weak and powerless. After reform, they assume government would regulate and redistribute more on behalf of the weak and powerless. Issacharoff sees clientelism as expanding government on behalf of private interests "often beyond the limits of what the national economy can tolerate."[88] A reformed government that provides only public goods might be smaller than the one we have under clientelism.

The amendments in question would give Congress the power to discriminate among speakers and thereby against rent seekers. Congress is unlikely to use its new powers in that way.

Issacharoff's reliance on a theory of public goods to define propriety in politics appears promising. But as Issascharoff recognizes, the theory of public goods can only take us so far.[89] Consider the health care legislation passed in 2010. Was its mandate to obtain insurance an effort to deal with a negative externality and hence, a public good? Or was the mandate a bold move by concentrated interests—the health insurance companies—to gain new members and revenues through capturing government? It might be both. Should Congress then permit the speech of the externality crowd while prohibiting the arguments of the insurance companies? Of course, concentrated interests might make the case against negative externalities hoping to help the law pass and thereby gain new revenue. Would their speech then be permitted? Who would decide? It seems odd to think the First Amendment only permits speech that takes a form approved by Congress.

The amendments in question would give Congress the power to discriminate among speakers and thereby against rent seekers. Congress is unlikely to use its new powers in that way. To the extent clientelism is true, members receive help toward re-election from concentrated interests. They are unlikely to suppress that assistance. In contrast, groups or movements (most recently, the Tea Party) threaten incumbents, threats sometimes realized in a "wave" election as in 2010. These outside groups are likely to find that their speech potentially corrupts government and thus should be banned or regulated.[90] Preventing clientelism is a poor justification for these proposed amendments.

Summary

Preventing corruption remains a major rationale for prohibiting or regulating spending on political speech. Critics of liberalized campaign finance have continued to elaborate the idea of corruption in the aftermath of *Citizens United*. This section has examined older and newer ideas of corruption in pursuit of empirical and logical flaws. None of these ideas justify the broad and risky powers granted Congress in the constitutional amendments currently before Congress.

Equality

The justices who created the distortion concept also decried the effects of "immense aggregations of wealth" on elections. The Court believed such wealth in corporate treasuries and its use in elections justified prohibitions of corporate spending and speech. Why? The answer must be that spending on speech should be equal in some respect. [91] The franchise seems to be the model here. Votes are required to be of equal weight ("one person, one vote"). Unequal spending, however, gives some people more influence than others, which is said to be "anathema" to democracy.[92] Two amendments in the 113th Congress have evoked equality as a rationale for giving Congress more power over speech.[93]

If private spending on elections leads to inequality, government might simply prohibit private spending, thereby ending the source of the inequality. However, elections still require spending to mobilize and persuade voters. In the 113th Congress, no amendment has yet sought to ban private financing of campaigns. Two amendments in the 112th Congress did propose such a prohibition, followed by publicly funding elections through taxation. These amendments would certainly suppress

speech that might have been funded by private sources. No doubt these amendments would also lead to criminal sanctions for those who nonetheless engaged in privately funded (and thus illegal) speech. If these amendments were adopted, the funding of electoral politics would come *exclusively* from the government. Of course, government officials might fund different points of view so as to foster a rich public debate. Under the First Amendment, private individuals and associations currently have the right to decide what and how much speech to utter and to fund. Transferring those rights to government officials would profoundly change American politics.

But would these amendments achieve equality? These two proposals from the 112th Congress favoring public financing would have replaced the older private inequalities with a new kind of difference: all candidates and causes would be financed by the government, no candidates or causes would be financed by non-governmental entities. Electoral spending by government would not be equal with electoral spending by private individuals and associations.

Put aside the extreme public financing amendments. Most amendments, as noted earlier, call for a broad power to restrict electoral spending. Congress could (and probably would) impose a ceiling on speech by prohibiting independent spending by corporations and perhaps also by individuals (assuming an amendment were broad enough). Compared to the average contributor, spending on speech would not become equal, but it would perhaps become less unequal. Spending limits, however, have other effects.

Who would actually benefit from limits on spending? Scholars have consistently found that limits on spending favor incumbents.[94] Limits on spending have different effects on challengers and incumbents; the former need to spend enough money to make it a race, and spending limits make it harder to meet that threshold. In addition, individuals and groups that can raise and spend money quickly can threaten incumbent re-election efforts. *Citizens United* freed up such spending. These amendments would likely distort elections to favor those already in office. Those already in power would become more, not less powerful.

Moreover, a consistent pursuit of equality in political speech leads to disturbing results. The media influence elections. They spend money to frame the news, endorse candidates and causes, and generally determine what everyone is talking and thinking about as the election draws near. They also strongly influence what people think *about* candidates and issues. Recent research has established a strong left-wing bias in the national media, a bias that sharply pushes public opinion toward the left.[95]

The media are also corporations. Even if they were not corporations, they would have unequal influence on American elections. Should their efforts to influence elections be prohibited or restricted? Should Congress regulate media spending to make sure liberals and conservatives are treated more equally?

One might argue that the media is exercising the freedom of the press and not the freedom of speech. Imagine identical political expressions, "Vote for Smith," one coming from a corporation that owns a television station and the other from a corporation that does not own a media outlet. Should the media's "Vote for Smith" be protected from congressional attack while the non-media's "Vote for Smith" be subject to prohibition? If equality is the goal, should not spending on speech by the newspaper and the non-newspaper both be subject to congressional control?

Many people might be squeamish about censoring newspapers or television to attain equality of speech. But why? Newspapers such as the *New York Times* are among the most powerful participants in national debates. If we are to have equality of speech, such powerful speakers should also be constrained. The same would apply to prominent bloggers or users of new media. Bans on corporate speech, if we are to be consistent, cannot be limited to non-media businesses. The same would be true if policymakers sought only to mitigate rather than end inequality of speech.

Many people might be squeamish about censoring newspapers or television to attain equality of speech. But why? Newspapers such as the *New York Times* are among the most powerful participants in national debates.

Wealthy people are more conservative than the average American. Rich liberals, however, put their money where their ideas are. In the end, both sides are heard. No one is "drowned out."

The authors of several of these amendments recognize this implication; they respond by carving out an exception for "freedom of the press" to the general congressional powers to control spending and speech.[96] Some corporations and speakers are indeed more equal than others. Some are free of government control over their speech; others are subject to whatever restrictions and prohibitions Congress might wish to impose. However, making one kind of speaker "more equal" creates a new inequality between unregulated speakers and the regulated class. It also affirms the unequal influence over elections that media corporations would enjoy after rival speakers are silenced. Finally, this carve-out for the press suggests that the distinction between those who are permitted to speak and those who are not permitted to speak corresponds with a distinction between liberal/conservative or perhaps, in a polarized age, between Democrat/Republican. The amendments thus appear to write partisan or ideological advantages into the Constitution. Some may decry writing such private interests into a document meant to benefit all citizens. In any case, the authors of the amendments should be more explicit about their partisan intentions so citizens can assess the proposed changes in the basic law.

Finally, did *Citizens United* mean that some voices were "drowned out"? This complaint is often heard and rarely specified. Recent history raises doubts whether the rich and conservative dominate the funding of elections, thereby "drowning out" other voices and other interests. "Big Money" existed prior to *Citizens United*, and much of it went to the self-styled party of "the little guy." For example, the financier George Soros and two friends gave $75 million to the John Kerry campaign in 2004. Large contributions to 527 organizations—the Super PACs of that era—went four-to-one in favor of Kerry in 2004. In 2000, contributions in excess of $100,000 went predominately to the Democrats.[97] More recently, a majority of individuals making over $200,000 annually voted for President Obama in 2008. The left-leaning Obama also took half of the votes of those making over $100,000 annually.[98] In 2012, Obama did worse than in 2008 among those making over $100,000; he nonetheless received 46 percent of their votes.[99] His supporters have ample funds to make their views known to voters. Moreover, in 2012, some evidence indicates that the Obama campaign used fundraising to actively involve voters in the campaign as well as raise money; the Romney campaign did not engage voters through fundraising.[100] In the end, what matters is who votes rather than who gives money, and in that regard Obama in 2012 seems to have done much better than his opponent. In general, wealthy people are more conservative than the average American. Rich liberals, however, put their money where their ideas are. In the end, both sides are heard. No one is "drowned out."[101]

Conclusion

Fears about the putative political and electoral consequences of the Citizens United decision have fostered several proposals to amend the Constitution. Most simply propose giving Congress unchecked power over political speech, power that will be certainly abused. The old and new public purposes cited for restricting political spending and speech are not persuasive in general and do not justify the breadth of power granted under these amendments. Americans should defend—not amend away—the freedom of speech recognized by the First Amendment.

Notes

I would like to thank Professor Seth Barrett Tillman of the National University of Ireland, Maynooth for many helpful comments.

1. *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010).

2. *SpeechNow.org v. Federal Election Commission*, United States Court of Appeals, DC Circuit, March 26, 2010.

3. Neil Munro, "Obama Floats Constitutional

Amendment Overturning *Citizens United*," *Daily Caller*, August 29, 2012.

4. Expressing the sense of Congress that the Supreme Court misinterpreted the First Amendment to the Constitution in the case of *Buckley v. Valeo* (H. Con. Res. 6, 113th Congress, 1st Sess., January 4, 2013); proposing an amendment to the Constitution of the United States relating to limitations on the amounts of contributions and expenditures that may be made in connection with campaigns for election to public office (H.J. Res. 12, 113th Congress, 1st sess., January 4, 2013); proposing an amendment to the Constitution of the United States waiving the application of the first article of amendment to the political speech of corporations and other business organizations with respect to the disbursement of funds in connection with public elections (H.J. Res. 13, 113th Congress, 1st sess., January 4, 2013); proposing an amendment to the Constitution of the United States relating to contributions and expenditures with respect to elections (H.J. Res. 20, 113th Congress, 1st sess., January 22, 2013); proposing an amendment to the Constitution of the United States to clarify the authority of Congress and the States to regulate corporations, limited liability companies or other corporate entities established by the laws of any State, the United States, or any foreign state. (H.J. Res. 21, 113th Congress, 1st Sess., January 22, 2013); proposing an amendment to the Constitution of the United States relative to authorizing regulation of contributions to candidates for State public office and Federal office by corporations, entities organized and operated for profit, and labor organizations, and expenditures by such entities and labor organizations, in support of or opposition to such candidates (S.J. Res 5, 113th Congress, 1st sess., January 28, 2013); proposing an amendment to the Constitution of the United States to clarify the authority of Congress and the States to regulate the expenditure of funds for political activity by corporations (H.J. Res. 21, 113th Congress, 1st sess., February 6, 2013); proposing an amendment to the Constitution of the United States providing that the rights extended by the Constitution are the rights of natural persons only (H.J. Res. 29, 113th Congress, 1st sess., February 14, 2013).

5. S.J. Res. 5; H.J. Res. 25; H.J. Res. 20; H.J. Res. 12.

6. S.J. Res. 5, H.J. Res. 21; H.J. Res. 13.

7. S.J. Res. 5; H.J. Res. 21; H.J. Res. 29.

8. The proposed amendments: A joint resolution proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections, U.S. Congress, S.J. Res. 29, 112th Cong., 1st sess., (November 1, 2011); a joint resolution proposing an amendment to the Constitution of the United States to expressly exclude for-profit corporations from the rights given to natural persons by the Constitution of the United States, S. J. Res. 33, 112th Cong., 1st sess. (December 8, 2011); a joint resolution proposing an amendment to the Constitution of the United States relative to authorizing regulation of contributions to candidates for State public office and Federal office by corporations, entities organized and operated for profit, and labor organizations, and expenditures by such entities and labor organizations in support of, or opposition to such candidates, S. J. Res. 33, 112th Cong., 2nd sess. (January 24, 2012); a joint resolution proposing an amendment to the Constitution of the United States waiving the application of the first article of amendment to the political speech of corporations and other business organizations, U.S. Congress, H.J. Res. 6, 112th Cong., 1st sess. (January 5, 2011); a joint resolution proposing an amendment to the Constitution of the United States waiving the application of the first article of amendment to the political speech of corporations and other business, U.S. Congress, H.J. 7, 112th Cong., 1st sess. (January 5, 2011); a joint resolution proposing an amendment to the Constitution of the United States relating to limitations on the amounts of contributions and expenditures that may be made in connection with campaigns, U.S. Congress, H.J. 8, 112th Cong., 1st sess. (January 5, 2011); a joint resolution proposing an amendment to the Constitution of the United States to prohibit candidates for election to Congress from accepting contributions from individuals who do not reside in the State or Congressional district the candidate seeks to represent, H.J. 65, 112th Cong., 1st sess. (May 24, 2011); a joint resolution proposing an amendment to the Constitution of the United States giving Congress power to regulate campaign contributions for Federal elections, H.J. 72 112th Cong., 1st sess. (July 13, 2011); a joint resolution proposing an amendment to the Constitution of the United States giving Congress power to regulate campaign contributions for Federal elections, H.J. 75, 112th Cong., 1st sess. (July 13, 2011); a joint resolution proposing an amendment to the Constitution of the United States to clarify the authority of Congress and the States to regulate the expenditure of funds for political activity by corporations, H.J. 78, 112th Cong., 1st sess. (September 12, 2011); a joint resolution proposing an amendment to the Constitution of the United States relating to contributions and expenditures with respect to elections, H.J. 86, 112th Cong., 1st sess. (November 14, 2011); a joint resolution proposing an amendment to the Constitution of the United States to clarify the authority of Congress and the States to regulate corporations, limited liability companies or other corporate entities established by the laws of any state, the United States, or any foreign state, H.J. 88, 112th Cong., 1st sess.

(November 15, 2011); a joint resolution proposing an amendment to the Constitution of the United States to expressly exclude for-profit corporations from the rights given to natural persons by the Constitution of the United States, prohibit corporate spending in all elections, and affirm the authority of Congress and the States to regulate corporations and to regulate and set limits on all election contributions and expenditures, H.J. 90, 112th Cong., 1st sess. (November 18, 2011); a joint resolution proposing an amendment to the Constitution of the United States relating to the authority of Congress and the States to regulate the disbursement of funds for political activity by for-profit corporations and other for-profit business organizations, H.J. 92, 112th Cong., 1st sess. (December 6, 2011); a joint resolution proposing an amendment to the Constitution of the United States relating to contributions and expenditures with respect to Federal elections, H.J. 97, 112th Cong., 1st sess. (December 20, 2011); a joint resolution proposing an amendment to the Constitution of the United States regarding the use of public funds to pay for campaigns for election to Federal office, H.J. 100, 112th Cong., 2nd. sess. (January 18, 2012).

9. These omissions include a ban on electoral spending by non-citizens, H.J. 72; exempting corporate spending from First Amendment protections, H.J. 6 and H.J. 7; permitting contributions only by residents of state or congressional district, HJ65; requiring equal and uniform application of a regulations on spending, H.J. 72 and HJ88; and allowing "content neutral" regulation of spending on political activity, H.J. 78.

10. *Buckley v. Valeo*, 424 U.S. 1, 23–38 (1976).

11. See *U.S. v. Danielczyk*, United States Court of Appeals for the Fourth Circuit, June 28, 2012. Some argue that *Citizens United* does threaten contribution limits. See Richard L. Hasen, "*Citizens United* and the Illlusion of Coherence," *Michigan Law Review* 109, no. 581 (2011): 616–17.

12. See John J. Coleman, "The Benefits of Campaign Spending," Cato Institute Briefing Paper no. 84, September 4, 2003. See also the academic articles that are the basis for this briefing paper: John Coleman, "The Distribution of Campaign Spending Benefits across Groups," *Journal of Politics* 63, no. 3 (2001): 916–34; and John Coleman and Paul F. Manna, "Congressional Campaign Spending and the Quality of Democracy," *Journal of Politics* 62, no. 3 (2000): 757–89.

13. Move to Amend, "We the People Amendment," Section 2, http://movetoamend.org/amendment.

14. Cass Sunstein, *Democracy and the Problem of Free Speech*, chap. 2 (New York: Free Press, 1995).

15. *United States v. Carolene Products Co*., 304 U.S. 144, 152 (1938), footnote 4 remarks "It is unnecessary to consider now whether legislation 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." The Court notes such restrictions voided by earlier courts have included "restraints upon the dissemination of information . . ."

16. *Buckley v. Valeo*, 20.

17. Geoffrey R. Stone, "Is Money Speech?" *Huffington Post*, February 5, 2012: "Not a single justice of the United States Supreme Court who has voted in any of the more than a dozen cases involving the constitutionality of campaign finance regulations, regardless of which way he or she came out in the case, has *ever* embraced the position that money is not speech."

18. See *Nixon v. Shrink Missouri Government*, 528 U.S. 377 (2000).

19. H.J. Res. 21; H.J. Res. 29.

20. *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886).

21. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776-783 (1978). Hence, H.J. Res. 21 begs the constitutional question. The amendment limits constitutional rights to natural persons and then states that "corporate entities are subject to such regulation as the people, through their elected State and Federal representatives, deem reasonable and are otherwise consistent with the powers of Congress and the States under this Constitution." Given that *Citizens United* did not depend on corporate personhood, the decision would still stand even if H.J. Res. 21 became part of the Constitution.

22. S.J. Res. 5 explicitly identifies for-profit corporations as subject to the new powers granted the Congress.

23. A concise guide to the kinds of speech not included in "the freedom of speech" may be found in Eugene Volokh, "Freedom of Speech and of the Press," in *The Heritage Guide to the Constitution*, eds. David Forte and Matthew Spalding (Washington: Regnery Publishing, 2005): 311–15.

24. This describes two 2012 ads funded by SuperPACs supporting the major party candidates. See Michael D. Shear, "'Super PACs' Release Dueling Ads," May 30, 2012, http://thecaucus.blogs.nytimes.com/2012/05/22/super-pacs-release-dueling-ads/.

25. H.J. Con. Res. 6 identifies governmental interests that should compete with freedom of speech. See (2) of the bill.

26. In the 113th Congress, H.J. Res. 20 and H.J. Con. Res. 6 identify equality as a value; the latter proposal also identifies corruption as a reason to regulate money in politics. In the 212th Congress, H.J. 92 mentioned preventing corruption or the appearance of corruption as it goal: "We, the People" need not identify a purpose for a grant of power. Presumably giving Congress power to regulate or prohibit spending on electoral speech serves the purposes of the preamble. The power to limit electoral spending, and thus, speech, would appear to contravene securing "the Blessings of Liberty to ourselves and our Posterity."

27. Commentators also define corruption by its effects on citizens: "When democracy seems a charade, we lose faith in its process. That doesn't matter to some of us— we will vote and participate regardless. But to more rational souls, the charade is a signal: spend your time elsewhere, because this game is not for real. Participation thus declines, especially among the sensible middle. Policy gets driven by the extremists at both ends." Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It* (New York: Hachette Book Group, 2011), p. 9.

28. Nathaniel Persily and Kelli Lammie, "Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law," *Scholarship at Penn Law*, Paper 30 (2004), http://lsr.nellco.org/upenn_wps/30.

29. Ibid.

30. *Buckley*, 26–27.

31. *Buckley*, 20–21. The Court found that contributions implicate freedom of speech less than direct spending on speech. Contributions were only a symbolic expression of support for a candidate, not an argument for their election.

32. "[t]he absence of prearrangement and coordination . . . alleviates the danger that [independent] expenditures will be given as a quid pro quo for improper commitments from the candidate," *Buckley*, 424 U.S. at 47. Quoted in *Citizens United* at 60. Following *Buckley*, Justice Kennedy in *Citizens United* ruled "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." Ibid., 80.

33. In its supplemental brief for the rehearing of *Citizens United* before the Supreme Court, the government put forth this argument. See p. 8 of the brief at http://www.scotusblog.com/wp-content/uploads/2009/07/08-205_us_supp.pdf.

34. See, for example, Shailagh Murray, "A Contentious Campaign in a Battleground State," *Washington Post*, October 25, 2006.

35. The observation was first made many years ago. See Frank J. Sorauf, *Money in American Elections* (Glenview, IL: Scott, Foresman, 1988), pp. 310 and following.

36. Congress might de facto delegate details to the Federal Election Commission. I assume for present purposes that in such matter the FEC would be a trusted agent for Congress in part because controlling independent spending would be a salient matter for many members.

37. Such deference was counted a virtue by a majority of the Supreme Court in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

38. For example, see Jennifer Steinhauer and Jonathan Weisman, "'Super PAC' Increasing Congress's Sense of Insecurity," *New York Times*, March 8, 2012.

39. Anthony J. Nownes, *Total Lobbying: What Lobbyists Want (and How They Try to Get It)* (New York: Cambridge University Press, 2006), p. 80.

40. Nownes, p. 81; Lessig, p. 145.

41. Nownes, p. 81.

42. *Citizens United*, 44–45.

43. Ibid.

44. At the same time, "most government officials—especially elected officials—also tend to favor constituents when they decide whom to meet with." Nownes, p. 215.

45. This analysis will treat equality later.

46. *Austin v. Chamber of Commerce*, 494 U.S. 660 (1990).

47. Commentators dispute whether the Court embraced an equality rationale in *Austin*. See Hasen, p. 587. Justice Stevens denied Austin's egalitarianism in his *Citizens United* dissent, p. 971, n. 69. In the dissent to *National Bank of Boston*, Justice Byron White wrote of a compelling government interest in preventing "unfair advantage in the political process" and "corporate domination of the electoral process," pp. 809–10.

48. The political scientist Gary Jacobson is associated with this analysis. See the summary of this scholarship in Jason M. Roberts and Jamie L. Carson, "House and Senate Elections," in *The Oxford Handbook of the American Congress,* ed. Eric Schickler and Frances E. Lee (New York: Oxford University

Press, 2011), pp. 152–55.

49. J. Goodliffe, "Campaign War Chests and Challenger Quality in Senate Elections," *Legislative Studies Quarterly* 32 (2007): 135–56, doi: 10.3162/036298007X202010.

50. A list of defeated incumbents in 2010 may be found at http://www.opensecrets.org/politicians/casualties.php?cycle=2010. Spending by incumbents and challengers may be found at http://www.opensecrets.org/bigpicture/stats.php.

51. Zephyr Teachout, "The Anti-Corruption Principle," *Cornell Law Review* 94, no. 341 (2009): 347, n. 1. A concise summary of Teachout's argument and apt criticisms may be found in Seth Barrett Tillman, Opening Statement, "Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*," 107 *Northwestern Law Review Colloquy* 1 (2012): 399. See also Seth Barrett Tillman, Closing Statement, "*The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout,*" 107 *Northwestern Law Review Colloquy* 1 (2013): 180, http://ssrn.com/abstract=2012803.

52. Teachout, 342.

53. Ibid., 373–74.

54. Ibid.

55. Lawrence Solum remarks that "originalism means different things to different people." He offers four elements of a definition. See Lawrence B. Solum, "We are All Originalists Now," in *Constitutional Originalism, A Debate* (Ithaca: Cornell University Press, 2011): 2–4.

56. Ibid., p. 2, fn. 3, and the citation to Gary Lawson therein.

57. Art. I, Sec. 6, Cl. 2: ". . . no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

58. Art. I, Sec. 6, Cl. 2: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time. . ."

59. Art. I, Sec. 9, Cl. 8: "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." Lessig also cites the clause. *Republic Lost*, 18.

60. 381 U.S. 479 (1965).

61. Teachout, 382.

62. United States Constitution, Article I, section 9, clause 8.

63. Tillman, 5.

64. Ibid.

65. Ibid.

66. Teachout, 393, n. 245.

67. Tillman, 6.

68. Ibid., 12–18.

69. Teachout argues that the intention to use public means for private ends defines corruption, 382.

70. The anti-corruption principle might pose the greatest threat to the integrity of the incumbents. As Madison notes, "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." James Madison, "Federalist No. 10," in *The Federalist: The Gideon Edition*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), p. 44. Teachout, 380, speaks of limiting temptation of officials as a part of an anti-corruption strategy.

71. People who differ about much agree on this point. See Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy*, chaps. 1 and 2 (Cambridge: Harvard University Press, 1996): and Aladair MacIntyre, *After Virtue*, 2nd ed., (Notre Dame: University of Notre Dame Press, 1984). Both authors rue the lack of a commitment to a common good. They both also affirm its absence.

72. Lessig, 128.

73. Ibid.

74. Ibid.

75. "There are two ways we might measure distortion. One maps the gap between what "the People" believe about an issue and what Congress does about that issue. Call this substantive distortion. The other way maps the gap between what Congress actually works on and what is important or, alternatively, what the people want them to work on. Call this agenda distortion." Lessig, 151.

76. Lessig, 109. Lessig arguably misunderstands the nature of a gift. He assumes the gift of a donation requires strict reciprocity from the recipient: a contribution requires a policy favor. The philoso-

pher David Schmidtz notes, however, a different meaning accorded gifts. For Schmidtz, if a gift is given, "any attempt literally to repay runs a risk of dishonoring [the gift]. So, realizing this, we may instead pass it on, explicitly or implicitly in the original benefactor's name. In passing the favor on, we restore symmetry around ourselves, between what we have given and were given." See David Schmidtz, *Elements of Justice* (New York: Cambridge University Press, 2006), p. 83. Lessig seems to be concerned, as most reformers are, with an exchange of money for money, services, or goods. But such exchanges are not commonly thought of as gifts but rather economic transactions.

77. Lessig, 160.

78. Ibid., 151.

79. Ibid., 127.

80. Madison, Federalist No. 10, 43.

81. Ibid., 48.

82. Ibid., 46.

83. In Lessig's plan, taxpayers would have part of their taxes earmarked for candidates. The taxpayer would select which candidate receives his taxes. Those who do not select a candidate would see their earmark go to their political party. Voters who did not wish to support a candidate or a party would be deprived of that choice. Lessig, chap. 16.

84. Lessig, 271.

85. Ibid., 271.

86. Samuel Issacharoff, "Comment: On Political Corruption," *Harvard Law Review* 124, no. 118 (2010): 126.

87. Ibid., 127.

88. Ibid., 129.

89. Ibid.: "it is often difficult to distinguish between rewards to constituents and matters of policy and principle."

90. The judiciary might be empowered to evaluate Congress' view of corruption in a clientelist framework. The courts would find themselves in a situation similar to applying the "general welfare" clause to ordinary legislation, a task judges have refused to take up since 1937.

91. E. Joshua Rosenkranz and Richard L. Hasen, "Introduction: Money, Politics, and Equality," *Texas Law Review* 77, no. 1603 (1999): 1605. "The Court's concern there about 'the corrosive and distorting effects of immense aggregations of wealth' at least smacks of equality, though the Court contorted to couch it as a 'different type of corruption.'" Courts currently do not recognize an equality rationale for regulating campaign finance. See *Buckley v. Valeo,* 48–49. Political equality is also unlikely to justify regulating lobbying. Richard L. Hasen, "Lobbying, Rent-Seeking, and the Constitution," *Stanford Law Review* 64, no. 191 (2012): 216.

92. See Daniel P. Tokaji, "Reviving Equality in Campaign Finance: What the U.S. Can Learn from Canada," Election Law@Moritz, January 28, 2011 at http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=8103. See also *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 648–49 (1996) (Stevens, J., dissenting).

93. H.J. Res. 20 and H.J. Res. 6.

94. Adam Meirowitz, "Electoral Contests, Incumbency Advantages, and Campaign Finance," *Journal of Politics* 70 (July 2008): 681–99.

95. Tim Groseclose, *Left Turn: How Liberal Media Bias Distorts the American Mind* (New York: St. Martin's, 2011), pp. 201–218.

96. See, for example, S.J. Res. 5, 113th Congress, First Session, January 28, 2013, section 3.

97. See John Samples, *The Fallacy of Campaign Finance Reform* (Chicago: University of Chicago Press, 2006), pp. 143–44, and sources cited therein.

98. CNNPolitics.com, "Election Center 2008," http://www.cnn.com/2008/POLITICS/11/04/exit.polls/.

99. See "President Exit Polls," *New York Times*, http://elections.nytimes.com/2012/results/president/exit-polls.

100. See Campaign Finance Institute, "Money vs. Money-Plus: Post-Election Reports Reveal Two Different Campaign Strategies," January 11, 2013, at http://www.cfinst.org/Press/Releases_tags/13-01-11/Money_vs_Money-Plus_Post-Election_Reports_Reveal_Two_Different_Campaign_Strategies.aspx.

101. The Democracy Alliance, for example, connected donors to producers of speech, seeking to "bring back the progressive majority in this country." See Thomas B. Edsall, "Rich Liberals Vow to Fund Think Tanks," *Washington Post,* August 7, 2005. Later the Democracy Alliance focused much more closely on electoral success. See Ryan Grim, "Peter Lewis Leaves Democracy Alliance, The Liberal Donor Network," *Huffington Post*, March 21, 2012.

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