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# Campaign Finance Reform Without Law?

**Robert Yablon**

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## CAMPAIGN FINANCE REFORM WITHOUT LAW

Robert Yablon\*

### ABSTRACT

*Conventionally understood, campaign finance reform is a matter of public regulation. Reformers believe that, without adequate government intervention, wealthy individuals and entities are destined to exert outsized influence over elections and governance. Propelled by that belief, they have spent decades advocating regulatory fixes, with relatively little to show for it. Many existing regulations are watered down and easy to circumvent. Efforts to bolster them have repeatedly hit doctrinal and political roadblocks—obstacles that are more formidable today than ever before.*

*This Article seeks to shift campaign finance discourse toward private ordering. Because scholars and reformers have long focused on public regulation, they have largely overlooked possible private correctives. The Article maps that uncharted terrain, revealing an array of extra-legal mechanisms that at least somewhat constrain money's electoral clout. This survey suggests that numerous private actors have incentives and capacities to implement additional extra-legal reform. The Article then sketches several potential private interventions, and it assesses the interplay between public regulation and private reform. Private reform is no silver bullet, but to ignore private ordering even as public regulation flounders makes little sense. Especially given the significant constraints on public intervention, it is vital for campaign finance scholars and reformers to look beyond the law.*

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## INTRODUCTION

Discourse about campaign finance reform is almost invariably discourse about government regulation. Those concerned about the role of money in elections have long sought to change the system by changing the law. This has never been an easy project, and today the task seems almost Sisyphean. Recent campaign finance jurisprudence has narrowed the universe of constitutionally permissible regulation, and that trend is likely to continue in the years ahead. At the same time, political prospects for legal reform at the federal level and in many states are bleak. In the realm of campaign finance, we appear to have entered an anti-regulatory era.<sup>1</sup>

While some celebrate the recent deregulatory trend and urge a further rollback of campaign finance laws,<sup>2</sup> many others are disillusioned. Commentators often portray a campaign finance system unconstrained by law as one in which big money inevitably calls the tune. According to such accounts, the absence of regulation paves the way for plutocracy by enabling those with economic clout to propel their favored candidates to

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<sup>1</sup> See, e.g., Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 6 (2012).

<sup>2</sup> See, e.g., Joel Gora, *In Defense of “Super PACs” and of the First Amendment*, 43 SETON HALL L. REV. 1185 (2013); Bradley Smith, *Separation of Campaign and State*, 81 GEO. WASH. L. REV. 2038 (2013).

victory, shape the agendas of officeholders, and more.<sup>3</sup> At the same time, it reduces the relative influence of everyone else and potentially discourages average citizens from participating in democratic governance at all.<sup>4</sup>

Proponents of campaign finance reform certainly have cause to be disheartened, but the gloomy story they tell about the perils of a deregulated system is incomplete and perhaps too pessimistic. Its implicit premise is that the only constraints on money in the electoral process come from law. That premise is mistaken. In reality, a patchwork of extra-legal factors and forces affect who gives, how much they give, and what impact their money has on democratic governance. These extra-legal mechanisms can mitigate at least some of the ills that reformers attribute to big money.

Consider three initial illustrations of how extra-legal forces shape money's role in elections. First, following the Supreme Court's decision in *Citizens United v. FEC*,<sup>5</sup> which lifted restrictions on corporate political spending, some predicted a deluge of corporate money into the system.<sup>6</sup> That has not happened. Although there are exceptions, most major business corporations have declined to open their wallets.<sup>7</sup> Many have even adopted formal policies that limit their electoral spending.<sup>8</sup> A host of non-legal considerations—shareholder pressure, concern about customer backlash, skepticism about money's effectiveness, and more—have kept these corporations on the sidelines.<sup>9</sup>

Second, candidates for office routinely turn money into a campaign issue. They decry the huge sums that big spenders inject into the system, condemn political opponents who rely on the largesse of the wealthy, and boast about their own small-dollar grassroots campaigns.<sup>10</sup> Such appeals are by no means a surefire formula for political success, but these tactics can alter the calculus of potential spenders and their intended beneficiaries. Politicians have to consider the extent to which being cast as the big-money candidate might offset the benefits that the money will provide. Potential financiers need to make a similar calculation about whether popular disapproval of big spenders will dilute the value of their money, and perhaps whether the risk of being personally denounced is worth the cost. Again,

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<sup>3</sup> See RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* 6 (2016); see also *infra* notes 43-57 and accompanying text.

<sup>4</sup> See, e.g., *McConnell v. FEC*, 540 U.S. 93, 144 (2003), *overruled in part by Citizens United v. FEC*, 558 U.S. 310 (2010) (“Take away Congress’ authority to regulate the appearance of undue influence and ‘the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.’”) (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390 (2000)).

<sup>5</sup> 558 U.S. 310.

<sup>6</sup> See *infra* note 150 and accompanying text.

<sup>7</sup> See *infra* notes 152-157 and accompanying text.

<sup>8</sup> See *infra* notes 158-169 and accompanying text.

<sup>9</sup> See *infra* notes 153, 171-173 and accompanying text.

<sup>10</sup> See *infra* notes 198-202, 208-212 and accompanying text.

these considerations beyond the law are vital to understanding our campaign finance system in operation.

Third, technology affects money's role in elections in myriad ways. Compared to a generation ago, it is significantly easier and cheaper today for candidates and organizations to solicit and collect money from small donors.<sup>11</sup> Technology also provides new outlets for spending. Election advertising on websites, search engines, and social media networks has become the norm, and these platforms make it increasingly possible to tailor messages to discrete slivers of the electorate.<sup>12</sup> At the same time, technology provides new opportunities to reach the public without significant expense—a candidate with millions of social media followers becomes less dependent on paid forms of communication.<sup>13</sup>

Campaign finance scholarship has given short shrift to the system's extra-legal aspects. Instead, the literature focuses principally on legal doctrine and regulatory policy. In recent years, commentators have thoroughly critiqued the Roberts Court's campaign finance jurisprudence and advanced alternative constitutional theories for regulation.<sup>14</sup> As a practical matter, however, their arguments are unlikely to persuade the current Supreme Court to change course. Commentators have also proposed a litany of public-law reforms, with special focus on interventions that might avoid running afoul of a skeptical Supreme Court.<sup>15</sup> But again, practically speaking, even the most promising proposals often face strong political headwinds, and some may be more vulnerable to constitutional challenge than their authors acknowledge.<sup>16</sup>

Especially given the current legal and political climate, it is time for campaign finance scholars and advocates to look beyond the law. A handful of commentators have taken tentative steps in this direction, analyzing specific existing extra-legal interventions and recommending others.<sup>17</sup> This

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<sup>11</sup> See *infra* notes 213-217 and accompanying text.

<sup>12</sup> See *infra* notes 143, 246-247 and accompanying text.

<sup>13</sup> See *infra* notes 219-221 and accompanying text.

<sup>14</sup> See, e.g., HASEN, *supra* note 3; ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (2014); Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425 (2015).

<sup>15</sup> See, e.g., LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011); Kang, *supra* note 1, at 6; Spencer Overton, *Matching Political Contributions*, 96 MINN. L. REV. 1694 (2012).

<sup>16</sup> See, e.g., Ganesh Sitaraman, *Contracting Around Citizens United*, 114 COLUM. L. REV. 755, 765 (2014) (“In short, relying on a public law solution to third party spending seems unlikely to succeed as a reform strategy in the short run.”).

<sup>17</sup> Sarah Haan and Ganesh Sitaraman have made two particularly notable recent contributions. See Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262 (2016); Sitaraman, *supra* note 16. Haan focuses on the phenomenon of shareholders pushing corporations to adopt voluntary campaign finance disclosure policies. Sitaraman assesses the use of self-enforcing contracts between rival political candidates to deter outside expenditures in their races. Two pieces have since built on Sitaraman's work by offering variations on the self-

insightful work underscores the need for a more thoroughgoing descriptive and prescriptive account of private ordering in campaign finance.

This Article shifts the campaign finance spotlight from the public to the private. In doing so, it draws upon two venerable strands of legal theory. First, a vast literature on private ordering teaches that social relations are not governed by law alone. This Article’s title is a nod to one of the seminal works in this area: Robert Ellickson’s *Order Without Law: How Neighbors Settle Disputes*.<sup>18</sup> Ellickson pushes back against the widespread tendency to view government as “the chief source[] of rules and enforcement efforts”—a position he and others call “legal centralism.”<sup>19</sup> He observes that “much social order can emerge without law.”<sup>20</sup> People continually self-regulate in accordance with social norms, and private intermediaries often exert strong influence on conduct as well. Ellickson urges legal scholars, policymakers, and activists “to deepen their understanding of the nonlegal components of the system of social control.”<sup>21</sup> Scholars in a variety of other areas have heeded Ellickson’s advice,<sup>22</sup> which makes the relative inattention to private ordering in campaign finance—and in election law more generally—all the more glaring.<sup>23</sup>

Second, this Article looks to proponents of comparative institutional analysis, who teach that policy goals should be pursued through the

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enforcing contract idea. See Scott Bloomberg, *Contracting Around Citizens United: A Systemic Solution*, 66 SYRACUSE L. REV. 301 (2016); Nick Warshaw, Comment, *Forget Congress: Reforming Campaign Finance Through Mutually Assured Destruction*, 63 UCLA L. REV. 208 (2016). Two earlier works address the related phenomenon of candidates voluntarily agreeing to limit their expenditures. See John Copeland Nagle, *Voluntary Campaign Finance Reform*, 85 MINN. L. REV. 1809, 1831-38 (2001); Todd Overman, Note, *Shame on You: Campaign Finance Reform Through Social Norms*, 55 VAND. L. REV. 1243 (2002). In addition, Nathaniel Persily has been producing thoughtful work on how technological advances are giving internet platforms and other private actors a greater role in shaping campaign communications and money’s electoral influence. See Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63 (2017); Nathaniel Persily, *The Campaign Revolution Will Not Be Televised*, THE AMERICAN INTEREST, Oct. 10, 2015.

<sup>18</sup> ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

<sup>19</sup> *Id.* at 138; see also Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 1 (1981).

<sup>20</sup> ELICKSON, *supra* note 18, at 281-82.

<sup>21</sup> *Id.*

<sup>22</sup> See, e.g., Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129 (2013) (environmental protection); Yafit Lev-Aretz, *Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering*, 27 HARV. J.L. & TECH. 203 (2013) (copyright); Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81 (2010) (copyright).

<sup>23</sup> One of the few exceptions similarly adopts an Ellicksonian title. See Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135 (1996) (discussing the existence and maintenance of a social norms in favor of voting).

institutions best positioned, relatively speaking, to take on the task.<sup>24</sup> In the realm of campaign finance, scholars and activists have tended to assume that, to the extent big money in elections produces pathologies, the answer lies in public regulation.<sup>25</sup> Indeed, a desire for greater governmental intervention is usually seen as a defining characteristic of a campaign finance reformer. This preoccupation with public action has left private alternatives chronically neglected. It is vital, however, to compare the relative virtues and limits of law-oriented and extra-legal reform strategies, especially as the constitutional and political barriers to regulation mount. Private ordering may not be a panacea, but neither is public regulation. The choice among institutions “is always a choice among highly imperfect alternatives.”<sup>26</sup> If private ordering might achieve something that public regulation, with all its institutional baggage, cannot, then it deserves a closer look.<sup>27</sup>

Comparatively speaking, an important virtue of private ordering is that it frees campaign finance reformers from the shackles that jurisprudence and politics place on public regulation. Consider, for instance, the mismatch the Supreme Court’s campaign finance doctrine has created between what reformers want and what governmental intervention can offer. The Court has held that the First Amendment precludes the government from regulating the flow of election-related money except as necessary to prevent quid pro quo corruption—*i.e.*, the exchange of campaign money for political favors.<sup>28</sup> Most scholars and advocates, however, have a broader conception of the problem of money in elections and loftier aspirations for reform.<sup>29</sup> They do not just want to root out quid pro quo corruption; they want to promote political equality and improve democratic governance.<sup>30</sup> Because the First Amendment applies principally to governmental action,<sup>31</sup> turning to extra-legal reform mechanisms enables reformers to steer clear of the constitutional roadblocks that so often thwart their regulatory agenda.

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<sup>24</sup> See, e.g., NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5 (1994) (“Embedded in every law and public policy analysis that ostensibly depends solely on goal choice is the judgment, often unarticulated, that the goal in question is best carried out by a particular institution.”).

<sup>25</sup> See, e.g., *supra* note 15.

<sup>26</sup> KOMESAR, *supra* note 24, at 5.

<sup>27</sup> *Id.* at 6 (“[T]asks that strain the abilities of an institution may wisely be assigned to it anyway if the alternatives are even worse.”).

<sup>28</sup> See, e.g., *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014).

<sup>29</sup> See, e.g., Kang, *supra* note 1, at 47 (“[T]here are many important democratic values implicated by campaign finance law that are left unconsidered in the Court’s nearly exclusive focus on the prevention of corruption in the constitutional analysis.”)

<sup>30</sup> See *infra* Part I.

<sup>31</sup> U.S. CONST. amend I (“Congress shall make no law . . . abridging the freedom of speech[.]”); see also *McCutcheon*, 134 S. Ct. at 1448 (“The First Amendment ‘is designed and intended to remove governmental restraints from the arena of public discussion . . . .’”) (quoting *Cohen v. California*, 403, U.S. 15, 24 (1971)).

Of course, private campaign finance reform is a viable alternative to public regulation only to the extent that private parties have the incentives and capacities to act. This Article's core descriptive contribution is to chart the terrain of private ordering in campaign finance. It turns out that a variety of extra-legal interventions are already occurring, including the ones previously offered as illustrations.<sup>32</sup> This private activity indicates that many actors in the system—from corporations to candidates to political party activists—have an interest in reducing the electoral clout of big spenders, and they have tools at their disposal to help make that happen.<sup>33</sup> Private reform may therefore be a viable option for curbing the influence of big money in a world of limited public regulation. By getting a better handle on the private order as it exists, it becomes possible to think more systematically about achieving campaign finance reform without law.

The potential pathways for private reform are many. If the ultimate goal is to make it harder for spenders to translate large aggregations of wealth into votes or policy,<sup>34</sup> then at least three overlapping sets of tactics are available. First, reformers can seek to drive big money out by making it more expensive, difficult, or unattractive to spend or receive it. Second, reformers can attempt to dilute the influence of the big money that enters the system, including by endeavoring to increase the relative clout of those who lack the resources to spend big. And third, reformers can endeavor to shield the electorate from some of the most egregious big-money abuses.

In an effort to kindle further discussion of what might be done, this Article briefly sketches out two specific private reform strategies. First, it suggests taking steps to strengthen or shift social norms associated with election-related spending. Reformers could mount two parallel campaigns: a get-the-dollars-out effort that encourages mega-donors to remain on the sidelines, and a get-out-the-dollars effort that encourages greater participation by small-dollar donors. The former effort could include a campaign finance version of the Gates-Buffet Giving Pledge. Instead of using the power of peer pressure to spur the well off to give their fortunes to charity, the wealthy would commit to keep their fortunes out of elections. The latter effort could model itself on nonpartisan get-out-the-vote campaigns, as well as campaigns by nonprofits to spur charitable giving.<sup>35</sup>

Second, reformers could seek to fight big money with big money by persuading affluent non-spenders and reluctant spenders to use their economic leverage to advance reform. Wealthy individuals and entities, for instance, could pool their resources and create a large fund that they announce will be available to counter—and outdo—any infusion of big

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<sup>32</sup> See *supra* notes 5-13 and accompanying text.

<sup>33</sup> See *infra* Part III.B.

<sup>34</sup> Cf. Samuel Issacharoff & Pamela Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1720 (1999) (“political spending is useful to a politician to the extent, and only to the extent, that it enables him to attain or retain office”).

<sup>35</sup> See *infra* Section IV.A.



money into an election race. Along similar lines, some of the many businesses that have decided to keep their money out of elections could go a step further and use their clout as advertisers to discourage media outlets from accepting advertisements paid for by mega-donors.<sup>36</sup>

Reforms such as these are not perfect, and they might be questioned on various grounds. Some might perceive them as difficult to implement, or might expect them to suffer from gaps, weak enforcement, or free riding. The strength of such critiques will likely vary depending on the particular private reform. A detailed reform-by-reform assessment is beyond this Article's scope. Instead, this Article offers a broader, comparative response: whatever the difficulties or weaknesses of private reform, public regulation may have even greater drawbacks. That suffices to justify a shift in emphasis among scholars and reformers.

While this Article seeks to reorient campaign finance discourse from the public to the private, it does not argue that law is unimportant. To the contrary, the legal and extra-legal orders inevitably interact with and influence one another. Existing law helps to define the field on which private actors operate, and it can make private action more or less difficult.<sup>37</sup> For example, the existence of laws that require the disclosure of election-related spending can help to facilitate certain private actions (such as consumer boycotts). Strengthening disclosure laws would aid the cause of private reform; weakening such laws would hinder it. Moreover, just as law can facilitate private reform, private reform might, in turn, smooth the way for additional public intervention. Thus, by thinking beyond the law, reformers can seek to achieve what law cannot, while also helping law achieve what it can.

This Article proceeds in five parts. Parts I and II set the stage by describing how reform proponents conceptualize the problem of money in elections and by cataloging the doctrinal, political, and practical constraints on public campaign finance regulation. With that backdrop in mind, Part III maps the private ordering landscape, offering a taxonomy of the various ways in which private actors can and do influence the role of money in elections through extra-legal means. Part IV suggests additional private interventions that may advance reformers' goals. Finally, Part V situates private reform in its broader context, examining the relationship between public and private campaign finance interventions and also between campaign finance reform and other political reform activities.

## I. THE PROBLEM OF MONEY AND THE PROJECT OF REFORM

Calls for campaign finance reform spring from concerns about money's role in our electoral system. In particular, reform proponents decry the system's reliance on so-called "big money"—a phrase that is ubiquitous

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<sup>36</sup> See *infra* Section IV.B.

<sup>37</sup> See *infra* Section V.A.

but rarely defined, perhaps because its utility rests in part on its imprecision.<sup>38</sup> Reformers may have difficulty pinning down exactly when someone is injecting too much money into the electoral system, but they share a basic sensibility that the line is routinely being crossed, and that the deep-pocketed actors who disproportionately bankroll U.S. election campaigns are doing more harm than good. Consistent with prevailing usage, this Article uses “big money” as shorthand for the sort of outsized sums that campaign finance reformers view as warranting a corrective response.

The big-money statistics reformers cite are indeed striking. According to one tally, a mere 10 mega-donors were responsible for nearly 20 percent of the \$1.1 billion given to Super PACs during the 2016 election cycle.<sup>39</sup> According to another, 158 families supplied nearly half of the early funds poured into the 2016 presidential race.<sup>40</sup> In 2012, the top 32 contributors to Super PACs matched the total amount of campaign contributions that President Obama and Governor Romney received from their 3.7 million small donors.<sup>41</sup> The overall proportion of election-related funds that come from major donors is substantial and has been on an upward trajectory.<sup>42</sup>

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<sup>38</sup> See, e.g., KENNETH P. VOGEL, *BIG MONEY* (2014); Bert Bandenburg, *Big Money and Impartial Justice: Can They Live Together?*, 52 ARIZ. L. REV. 207 (2010); Nathaniel Persily, *Bringing Big Money Out of the Shadows*, N.Y. TIMES, Apr. 2, 2014; Sean McElwee et al., *Whose Voice, Whose Choice? The Distorting Influence of the Political Donor Class in Our Big-Money Elections*, Demos (2016), [http://www.demos.org/sites/default/files/publications/Whose%20Voice%20Whose%20Choice\\_2.pdf](http://www.demos.org/sites/default/files/publications/Whose%20Voice%20Whose%20Choice_2.pdf); Common Cause, *Fighting Big Money*, <http://www.commoncause.org/issues/money-in-politics/fighting-big-money/> (last visited June 12, 2017).

<sup>39</sup> Matea Gold & Anu Narayanswamy, *How 10 Mega-Donors Already Helped Pour a Record \$1.1 Billion into Super PACs*, WASH. POST (Oct. 5, 2016), [https://www.washingtonpost.com/politics/how-10-mega-donors-already-helped-pour-a-record-11-billion-into-super-pacs/2016/10/05/d2d51d44-8a60-11e6-875e-2c1bfe943b66\\_story.html?utm\\_term=.53ccaa51c798](https://www.washingtonpost.com/politics/how-10-mega-donors-already-helped-pour-a-record-11-billion-into-super-pacs/2016/10/05/d2d51d44-8a60-11e6-875e-2c1bfe943b66_story.html?utm_term=.53ccaa51c798); see also Anu Narayanswamy et al., *Meet the Wealthy Donors Who Are Pouring Millions into the 2016 Elections*, WASH. POST (Nov. 2, 2016), <https://www.washingtonpost.com/graphics/politics/superpac-donors-2016/> (calculating that 50 multimillion-dollar donors were responsible for 37 percent of all super PAC funding during the 2016 cycle).

<sup>40</sup> Nicholas Confessore et al., *The Families Funding the 2016 Presidential Election*, N.Y. TIMES, Oct. 10, 2015, <http://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html>

<sup>41</sup> Blair Bowie & Adam Lioz, *Billion Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections*, at 9 (Jan. 2013), <http://www.demos.org/sites/default/files/publications/billion.pdf>. The 32 Super PAC donors gave nearly \$10 million each; the 3.7 million small donors were persons who contributed \$200 or less.

<sup>42</sup> See, e.g., Adam Bonica et al., *Why Hasn't Democracy Slowed Rising Inequality?*, 27 J. ECON. PERSP. 103, 111-12 (2013) (observing that, during the 2012 cycle, the wealthiest 0.01% made more than 40% of all campaign contributions, up from 10-15% in the 1980s).

Scholars and advocates formulate their objections to big money in a variety of ways. Some paint with a broad brush, contending that an electoral system reliant on big spenders undermines political equality,<sup>43</sup> distorts democracy,<sup>44</sup> diminishes electoral integrity,<sup>45</sup> breeds corruption,<sup>46</sup> discourages broad public participation,<sup>47</sup> coarsens political discourse,<sup>48</sup> and more.<sup>49</sup> Others offer more targeted critiques, emphasizing, for instance, particular ills associated with corporate political spending,<sup>50</sup> or outside spending,<sup>51</sup> or undisclosed spending,<sup>52</sup> or with the infusion of big money into judicial elections.<sup>53</sup> Some emphasize how money influences the

<sup>43</sup> See, e.g., HASEN, *supra* note 3, at 5; Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL'Y REV. 105, 112-13 (2008) (“A concern about political equality, or at least about constraining the impact of inequalities of wealth on the electoral process, is one of the driving forces behind campaign finance law.”).

<sup>44</sup> See, e.g., McElwee et al., *supra* note 38.

<sup>45</sup> See, e.g., POST, *supra* note 14, at 87; Daniel I. Weiner & Benjamin T. Brickner, *Electoral Integrity in Campaign Finance Law*, 20 N.Y.U. J. LEGISL. & PUB. POL'Y 101 (2017).

<sup>46</sup> See, e.g., LESSIG, *supra* note 15, at 151; Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 121 (2010); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009).

<sup>47</sup> See, e.g., Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 253 (2002); Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259 (2012); Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004).

<sup>48</sup> See, e.g., Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 CARDOZO L. REV. 2365, 2375 (2010) (discussing “evidence that campaign money pays for the strategic use of psychological tactics”); Barry P. McDonald, *Campaign Finance Regulation and the Marketplace of Emotions*, 36 PEPP. L. REV. 395, 408 (2009); Erika Franklin Fowler & Travis N. Ridout, *Negative, Angry, and Ubiquitous: Political Advertising in 2012*, THE FORUM, Dec. 2012, at 51.

<sup>49</sup> When reform proponents in Congress unsuccessfully pursued a constitutional amendment in 2014 to permit greater regulation of campaign finance, their proposed text declared that the measure aimed “[t]o advance democratic self-government and political equality, and to protect the integrity of government and the electoral process.” S.J. Res. 19, 113th Cong. (2014).

<sup>50</sup> See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 465-75 (2010) (Stevens, J., concurring in part and dissenting in part); Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 31 & n.167 (2012) (noting the “swift and overwhelmingly negative” public reaction to *Citizens United*’s suggestion that “corporations are people”); Adam Winkler, *“Other People’s Money”*: Corporations, Agency Costs, and Campaign Finance Law, 92 GEO. L.J. 871 (2004).

<sup>51</sup> See, e.g., Bruce Ledewitz, *The Threat of Independent Political Spending to Democratic Life—and a Plan to Stop It*, 64 CLEV. ST. L. REV. 133 (2016); Kang, *supra* note 1, at 5-6.

<sup>52</sup> See, e.g., Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the “Dark Money” Election*, 27 NOTRE DAME J.L. & PUB. POL'Y 383 (2013).

<sup>53</sup> See, e.g., Brennan Center for Justice, *TV Ad Spending Reaches Nearly \$14 Million in 2014 State Supreme Court Races*, Nov. 5, 2014, <https://www.brennancenter.org/press-release/tv-ad-spending-reaches-nearly-14-million-2014-state-supreme-court-races>; Morgan L. W. Hazelton, et al., *Does Public Financing Affect Judicial Behavior? Evidence from the North Carolina Supreme Court*, 44 AM. POLITICS RESEARCH 587 (2016); cf.

electorate and electoral outcomes;<sup>54</sup> others focus on how it impacts policy and governance.<sup>55</sup> And they draw upon assorted combinations of political theory,<sup>56</sup> empirical data,<sup>57</sup> and observations about the practical realities of politics.

To a large extent, the diverse criticisms of money's electoral role are interconnected and complementary, and commentators frequently synthesize them.<sup>58</sup> For instance, they may lament that, because wealth is highly concentrated,<sup>59</sup> citizens have profoundly unequal opportunities to influence the political process through electoral spending.<sup>60</sup> That concern about inequality may intersect with a related concern that, because the policy preferences and priorities of wealthy spenders often diverge from those of the broader public,<sup>61</sup> big money distorts public policy.<sup>62</sup> And such

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*Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015) (observing that judges are differently situated from other elected officials).

<sup>54</sup> See, e.g., Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1230 (1994) (“[T]he rich cannot be allowed to claim title to their income and wealth for the specific purpose of attempting to influence the outcome of the electoral process.”); cf. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1383 (1994) (“A campaign contribution or expenditure, like a vote, is in part an effort to influence the outcome of an election.”).

<sup>55</sup> See, e.g., Stephanopoulos, *supra* note 14, at 1427 (noting that politicians’ policy positions more closely reflect donor preferences than the preferences of the broader public).

<sup>56</sup> See, e.g., Daryl J. Levinson, *Foreword: Looking For Power in Public Law*, 130 HARV. L. REV. 31, 120 (2016) (“[M]any democratic theorists and ordinary citizens would sign on to the intuitive ideal ‘that democratic institutions should provide citizens with equal procedural opportunities to influence political decisions (or, more briefly, with equal power over outcomes).’” (quoting CHARLES R. BEITZ, *POLITICAL EQUALITY* 4 (1989))).

<sup>57</sup> See generally Daniel R. Ortiz, *The Empirics of Campaign Finance*, 78 S. CAL. L. REV. 939 (2005); Christopher Robertson et al., *The Appearance and the Reality of Quid Pro Quo Corruption: An Empirical Investigation*, 8 J. LEGAL ANALYSIS 375 (2016).

<sup>58</sup> When reform proponents in Congress unsuccessfully pursued a constitutional amendment in 2014 to permit greater regulation of campaign finance, their proposed text declared that the measure aimed “[t]o advance democratic self-government and political equality, and to protect the integrity of government and the electoral process.” S.J. Res. 19, 113th Cong. (2014).

<sup>59</sup> See, e.g., Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913*, NBER Working Paper Series 22 (Oct. 2014), <http://www.nber.org/papers/w20625> (estimating that the wealthiest 0.1% of Americans hold as much wealth as the bottom 90%).

<sup>60</sup> See, e.g., HASEN, *supra* note 3, at 5 (lamenting “a system in which economic inequalities ... are transformed into political inequalities”); Levinson, *supra* note 56, at 125 (“Campaign spending is arguably the most flagrant source of inequality in the American political system, inasmuch as it permits business interests and wealthy individuals to exert exorbitantly disproportionate political influence.”).

<sup>61</sup> See, e.g., Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 453 (2015); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 576 (2014); Stephanopoulos, *supra* note 14, at 1426.

<sup>62</sup> See, e.g., HASEN, *supra* note 3, at 6 (“[M]oney systematically skews U.S. public policy even if it does not buy elections.”); Walter J. Stone & Elizabeth N. Simas, *Candidate*

worries about inequality and distortion may reinforce concerns that big money's outsized role can alienate average citizens from the political process.<sup>63</sup> This is not to suggest that reform proponents are monolithic in their views. Their varied framings of the problem and their divergent points of emphasis can reflect distinctive ultimate objectives and priorities for reform—priorities that will also be shaped by judgments about politics, workability, and the countervailing interests at stake.<sup>64</sup>

As they translate their specific concerns and aims into a reform agenda, scholars and advocates can pursue an array of possible campaign finance interventions. This Article divides these options into three overarching categories. First, reformers can seek to reduce the amount of big money that enters the system. Such efforts might focus on the supply side (by restraining the sources of big money) or on the demand side (by restraining the recipients of big money).<sup>65</sup> Second, reformers can seek to dilute big money's influence. That could involve bringing other public or private funds into the system, taking steps to reduce the purchasing power of big money, or perhaps establishing alternative non-monetary channels for exerting electoral influence.<sup>66</sup> Third, reformers can seek what are essentially consumer protection measures for the electorate. That might

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*Valence and Ideological Positions in the U.S. House Elections*, 54 AM. J. POLI. SCI. 371, 381-82 (2010) (suggesting that a desire for large contributions can push candidates toward ideological extremes).

<sup>63</sup> See, e.g., *McCutcheon v. FEC*, 134 S. Ct. 1434, 1468 (2014) (Breyer, J., dissenting) (“[A] cynical public can lose interest in political participation altogether.”); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390 (2000); Brennan Center for Justice, *National Survey: Super PACs, Corruption, and Democracy*, April 24, 2012, <https://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy> (discussing survey results indicating that that three-quarters of respondents believe that elected officials don’t care what they think; two-thirds say that the outside influence of wealthy donors reduces their trust in government; and one in four report they are less likely to vote as a result).

<sup>64</sup> For example, those who are especially troubled as a matter of principle by people’s unequal opportunities to spend may stress egalitarian correctives, including strict limits on spending. See, e.g., Foley, *supra* note 54. Others may prefer to facilitate greater financial participation by average citizens without directly constraining the wealthy. See, e.g., Overton, *supra* note 15.

<sup>65</sup> Cf. Justin A. Nelson, Note, *The Supply and Demand of Campaign Finance Reform*, 100 COLUM. L. REV. 524 (2000).

<sup>66</sup> These first two categories roughly correspond with the distinction others have drawn between reform strategies that seek to level down (remove money from the system) and those that seek to level up (add money to the system), or, relatedly, strategies that impose ceilings and those that set floors. See, e.g., HASEN, *supra* note 3, at 84-103 (distinguishing between levelling up and levelling down); Robert Post, *Regulating Election Speech Under the First Amendment*, 77 TEX. L. REV. 1837, 1837 (1999) (suggesting campaign finance be approached “by focusing on floors rather than ceilings”); Joel L. Fleishman & Pope McCorkle, *Level-Up Rather Than Level-Down: Towards a New Theory of Campaign Finance Reform*, 1 J.L. & POL. 211 (1984). But the second category in particular is somewhat broader, recognizing that there might be ways to reduce big money’s influence beyond giving more people the ability to spend.

include pursuing public disclosure of the sources of big money or attempting to root out deceptive campaign practices. The lines between these three categories are not bright. Providing for public disclosure of big money, for instance, might indirectly keep some money from entering the system or indirectly reduce big money's influence. Nevertheless, the categories do offer a rough organizational framework that may be helpful in assessing and comparing reform possibilities.

Traditionally, academic and advocacy work on campaign finance has approached all three types of intervention through a regulatory lens, seemingly taking for granted that the problem of money must be addressed through public institutions. For most commentators, the goal of reducing big money is synonymous with legal limits on election-related contributions and expenditures; the goal of diluting big money's influence is synonymous with public financing; and the goal of minimizing big-money abuses is synonymous with disclosure laws. Discrete regulatory topics, such as disclosure requirements, generate more discussion in the legal literature in a single year than the subject of private reform has ever generated.<sup>67</sup> With a few notable exceptions, campaign finance advocacy groups similarly focus on litigation and public policy, and they cast their organizational missions principally in those terms.<sup>68</sup>

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<sup>67</sup> Compare the literature on private ordering collected above, *supra* note 17, with the plethora of pieces analyzing disclosure regulation published in 2016 alone. *See, e.g.*, Jennifer A. Heerwig, *Diagnosing Disclosure: A Social Scientific Perspective on Campaign Finance Disclosure*, 34 YALE L. & POL'Y REV. INTER ALIA 8 (2016); Nicole L. Jones, Comment, *Citizens United Round II: Campaign Finance Disclosure, the First Amendment, and Expanding Exemptions and Loopholes for Corporate Influence on Elections*, 93 DEN. L. REV. 749 (2016); Jessica Levinson, *Full Disclosure: The Next Frontier in Campaign Finance Law*, 93 DENV. L. REV. 431 (2016); William Alan Nelson II, *Informing Shareholders: Providing a Roadmap for the SEC to Act to Require Public Corporations to Disclose Political Spending*, 9 ALB. GOV'T L. REV. 241 (2016); Sushma Raju, Note, *The FCC's Abandonment of Sponsorship Identification Regulation and Anonymous Special Interest Group Political Advertising*, 93 WASH. U. L. REV. 1103 (2016); Tyler S. Roberts, *Enhanced Disclosure as a Response to Increasing Out-of-State Spending in State and Local Elections*, 50 COLUM. J.L. & SOC. PROBS. 137 (2016); Shannon Rohn, Note, *Protecting Political Speech and Broadcasters from Unnecessary Disclosure: Why the FCC Should Not Expand Sponsorship Identification Requirements for Political Issue Ads*, 68 FED. COMM. L. J. 181 (2016); Katherine Shaw, *Taking Disclosure Seriously*, 34 YALE L. & POL'Y REV. INTER ALIA 18 (2016); Linda Sugin, *Politics, Disclosure, and State Law Solutions for 501(c)(4) Organizations*, 91 CHI.-KENT L. REV. 895 (2016).

<sup>68</sup> *See, e.g.*, Brennan Center for Justice, *Money in Politics*, <http://www.brennancenter.org/issues/money-politics> (last visited June 15, 2017) ("We work with policy makers and activists to help draft and enact legislation, defend campaign finance laws in court, and promote innovative policy solutions nationwide."); The Campaign Legal Center, *Campaign Finance*, <http://www.campaignlegalcenter.org/issues/281> (last visited June 15, 2017) ("We work to protect the integrity of our democracy by litigating a wide range of campaign finance cases at the federal and state level, and by participating in rulemaking proceedings and filing complaints at federal and state enforcement agencies."); Common Cause, *Money in Politics*, <http://www.commoncause.org/issues/money-in-politics/> (last visited June 15,

The remainder of this Article challenges the prevailing legal centralism in campaign finance. The presumption that reform requires government action overlooks potential private correctives. Whether the aim is to reduce big money, dilute big money's influence, or counter abuses associated with big money, this Article suggests that private ordering has an important role to play.

## II. THE LIMITS OF PUBLIC REGULATION

The case for private ordering in campaign finance is ultimately comparative. If reformers are achieving their goals through public regulation, or have good prospects for success, then their existing focus on government action makes sense. If, instead, public regulatory efforts have fallen short and will likely continue to disappoint, then private alternatives warrant a closer look.

Accordingly, this Part briefly assesses the history of and outlook for public campaign finance regulation. It contends that, despite decades of sustained effort, campaign finance reformers have made limited progress in addressing the problem of money through regulatory means. The hurdles reformers have faced are threefold, and these barriers will likely be as formidable in the foreseeable future as they have been in the past. First,

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2017) (noting the group's efforts to amend the Constitution to overturn objectionable Supreme Court precedents and to push for public financing and stronger disclosure laws); Democracy 21, *Our Mission*, <http://www.democracy21.org/our-mission/> (last visited June 15, 2017) (describing the group's support for "a new public financing system for presidential and congressional races," "new campaign finance disclosure laws," and "a new system to effectively enforce the campaign finance laws," as well as its work "[b]ringing lawsuits" and "[p]articipating in administrative proceedings"); Demos, *Impact Report 2000-2016*, at 5-8, available at [http://www.demos.org/sites/default/files/publications/Demos\\_Impact\\_Report\\_2016.pdf](http://www.demos.org/sites/default/files/publications/Demos_Impact_Report_2016.pdf) ("Demos seeks to . . . advanc[e] a new interpretation of the Constitution that would enshrine the political equality of citizens in our election system. . . . Our legal strategists and campaigners are also moving pro-democracy reforms such as public financing for elections and matching funds for small donor donations."); Free Speech for People, *Our Mission*, <https://freespeechforpeople.org/our-mission/> (last visited June 15, 2017) (noting that the group "help[s] lead the movement to amend the U.S. Constitution to overturn" objectionable Supreme Court precedents, "engage[s] in legal advocacy to advance a new jurisprudence of money in politics," and "develop[s] and advocate[s] for model laws and other tools to challenge big money in politics"); Issue One, *Our Work*, <https://www.issueone.org/our-work-2/> (last visited June 15, 2017) ("At the federal level, . . . we're working with current and former members of Congress to educate lawmakers about solutions and disrupt Washington's do-nothing status quo. We're also investing in the most promising state and local efforts to fix money in politics, and advancing pro-democracy jurisprudence reform."); Public Citizen, *2015: Fighting Corporate Power Together*, Jan./Feb. 2016, at 6, available at [https://www.citizen.org/sites/default/files/pc\\_news\\_2015\\_annual\\_report.pdf](https://www.citizen.org/sites/default/files/pc_news_2015_annual_report.pdf) (noting the group's advocacy of a constitutional amendment to overturn *Citizens United* and of stronger disclosure laws). Every Voice, *Our Plan*, <http://www.everyvoice.org/solutions> (last visited June 15, 2017) ("[W]e design, support, and win small-donor elections programs at all levels of government across the country.").

judicial doctrine has narrowed the universe of constitutionally permissible campaign finance regulations. Second, persuading government officials to take significant action to address money in politics is a major political challenge. Third, even when governmental intervention occurs, spenders and recipients often shift their behavior in ways that diminish the practical value of the intervention, or even render it counterproductive. Each constraint is addressed below. Together, these impediments to effective government regulation suggest that the private reform path may be at least as promising as the public one.

### A. Doctrinal Limitations

Long before *Citizens United* became the scourge of campaign finance reformers, the Supreme Court had already substantially narrowed reformers' potential regulatory paths. In *Buckley v. Valeo*,<sup>69</sup> the Court established a jurisprudential framework for campaign finance that continues to hold sway today. Relevant here, *Buckley* made two key doctrinal moves.

First, *Buckley* confirmed that campaign finance regulations implicate the First Amendment's guarantees of free speech and association and are thus subject to heightened scrutiny.<sup>70</sup> Just how heightened depends on the type of regulation and its perceived First Amendment burden.

Second, *Buckley* established that the primary regulatory objective the government may pursue in the campaign finance context is "the prevention of corruption and the appearance of corruption."<sup>71</sup> The Court rejected the notion that the government has a valid interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections."<sup>72</sup> Since *Citizens United*, the Court has conceived of corruption narrowly, holding that the government may seek to combat only quid pro quo corruption ("dollars for political favors") or the appearance thereof.<sup>73</sup> The government may not take aim at broader systemic distortions,<sup>74</sup> or even seek to address concerns that spenders may gain "influence over or access to elected officials."<sup>75</sup> As a practical matter, this means that reformers may seek to enhance equality and improve democratic representation through campaign finance regulation only to the extent that those goals can be advanced as the incidental byproduct of laws suitably tailored to combat quid pro quo corruption. This is a significant constraint.<sup>76</sup>

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<sup>69</sup> 424 U.S. 1 (1976).

<sup>70</sup> *Id.* at 14-23.

<sup>71</sup> *Id.* at 25.

<sup>72</sup> *Id.* at 48-49.

<sup>73</sup> 558 U.S. 310, 359 (2010) (quoting *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 497 (1985)).

<sup>74</sup> *See* 558 U.S. at 351, 355.

<sup>75</sup> *Id.* at 359.

<sup>76</sup> *See* Kang, *supra* note 1, at 52 ("[*Citizens United*'s] narrow interpretation of the government interest in the prevention of corruption leaves virtually no constitutional space for new campaign finance regulation.").



What follows is a brief synopsis of how major regulatory options have fared and may fare under the Supreme Court’s campaign finance jurisprudence. The discussion tracks the three reform categories set forth in Part I, beginning with the two key methods of restricting the money that enters the system—expenditure limits and contribution limits. It then addresses public financing (the chief mechanism for diluting big money’s influence) and disclosure requirements (the most prominent device for discouraging big-money abuses). The bottom line is that constitutional doctrine bars reformers from pursuing many of the regulatory measures they might favor.

### *1. Expenditure Limits*

The Court has long distinguished between regulations that restrict how much money candidates and their backers can spend on elections (expenditure limits) and those that restrict how much money supporters can give directly to candidates and parties (contribution limits). Jurisprudentially, expenditure limits are basically nonstarters. Since *Buckley*, the Court has subjected them to strict scrutiny,<sup>77</sup> which means they cannot survive unless they are “the least restrictive means” to further a “compelling” governmental interest.<sup>78</sup> Applying this test, *Buckley* invalidated federal statutory limits on how much individuals could independently spend to support or oppose candidates. As the Court saw it, independent expenditures had little corrupting potential, so the government lacked a sufficient basis to restrict them.<sup>79</sup> *Buckley* did not disturb separate federal laws restricting corporate independent expenditures, and, for a time, the Court approved of such limits.<sup>80</sup> In *Citizens United*, however, the Supreme Court decisively disavowed its prior endorsements of corporate independent expenditure limits, and adopted a nearly categorical rule that the First Amendment bars restrictions on independent expenditures no matter the source.<sup>81</sup> The Court is unlikely to back away from this rule anytime soon.

### *2. Contribution Limits*

The Supreme Court has historically given the government somewhat more leeway to limit contributions that donors make directly to candidates’ campaigns. Since *Buckley*, it has characterized contribution caps as less threatening to speech and associational rights than expenditure limits.<sup>82</sup>

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<sup>77</sup> 424 U.S. at 23.

<sup>78</sup> *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014) (plurality opinion); *see also Buckley*, 424 U.S. at 23.

<sup>79</sup> *Buckley*, 424 U.S. at 68.

<sup>80</sup> *See McConnell v. FEC*, 540 U.S. 93 (2003); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

<sup>81</sup> 558 U.S. at 357.

<sup>82</sup> 424 U.S. at 21.

Contribution limits can thus survive a First Amendment challenge if the government shows that they advance “a sufficiently important interest” and are “closely drawn to avoid unnecessary abridgement of associational freedoms”—still a “rigorous standard of review,” but not full-fledged strict scrutiny.<sup>83</sup> Moreover, the Court has viewed direct contributions as posing a greater threat of corruption than independent expenditures. As a result, limits on how much individual donors can contribute to candidates have often been upheld,<sup>84</sup> and the Court has also upheld bans on direct contributions from corporations.<sup>85</sup>

That said, contribution limits face meaningful and growing judicial pushback. The Court, for instance, has invalidated limits that it concluded were so low as to “work more harm to protected First Amendment interests than their anticorruption objectives could justify.”<sup>86</sup> The Court also recently invalidated a cap on the total amount that an individual may contribute to all federal candidates and party committees during an election cycle.<sup>87</sup> Because that case, *McCutcheon v. FEC*, involved aggregate limits, the Court did not directly controvert prior decisions upholding limits on contributions to individual candidates.<sup>88</sup> The Court’s reasoning, however, suggests skepticism of such limits. First, the Court nudged the governing standard in the direction of strict scrutiny.<sup>89</sup> Second, in contrast to *Buckley*, which downplayed the First Amendment burdens of contribution limits, *McCutcheon* found “significant First Amendment costs.”<sup>90</sup> And third, the Court confirmed that the government’s regulatory interest in the contribution limit context is confined to the same narrow conception of corruption articulated in *Citizens United*.<sup>91</sup>

In short, longstanding limits on contributions to individual candidates are more vulnerable today than they have been since *Buckley*.<sup>92</sup> Limits on so-called “soft money”—funds contributed to political parties for activities other than direct electoral advocacy on behalf of candidates—may be even more vulnerable. In 2003, the Supreme Court upheld federal soft-money restrictions imposed by the Bipartisan Campaign Reform Act of 2002.<sup>93</sup> But that ruling, *McConnell v. FEC*, rested in large part on a broader

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<sup>83</sup> *Id.* at 25, 29; *see also McCutcheon*, 134 S. Ct. at 1444.

<sup>84</sup> *See, e.g., Buckley*, 424 U.S. at 26, 28; *FEC v. Colorado Repub. Fed. Campaign Comm.*, 533 U.S. 431 (2001); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000).

<sup>85</sup> *See, e.g., FEC v. Beaumont*, 539 U.S. 146 (2003).

<sup>86</sup> *Randall v. Sorrell*, 548 U.S. 230, 247-48 (2006) (plurality opinion).

<sup>87</sup> *McCutcheon*, 134 S. Ct. 1434.

<sup>88</sup> 134 S. Ct. at 1451 (“[W]e leave the base limits undisturbed.”).

<sup>89</sup> *Id.* at 1445-46; *see also* Richard Briffault, *The Uncertain Future of the Corporate Contribution Ban*, 49 VAL. U. L. REV. 397, 398 (2015); Robert Yablon, *Voting, Spending, and the Right to Participate*, 111 NW. U. L. REV. 655, 665 & n.40 (2017).

<sup>90</sup> *McCutcheon*, 134 S.Ct. at 1448, 1450.

<sup>91</sup> *See id.* at 1450-51.

<sup>92</sup> *See, e.g., Briffault, supra* note 89, at 449.

<sup>93</sup> Pub. L. No. 107-155, 116 Stat. 81.

definition of corruption than the one the Court now embraces.<sup>94</sup> Indeed, the *McCutcheon* dissenters accused the majority of overruling *McConnell* sub silentio.<sup>95</sup> The Court denied that charge,<sup>96</sup> but it may be only a matter of time before regulatory limits on soft money are invalidated.<sup>97</sup>

### 3. Public Financing

As with contribution limits, the constitutional status of programs that allocate public funds to candidates (or parties) are in flux, but the trend is similarly deregulatory. *Buckley* upheld a voluntary federal public financing system for presidential elections, which gave matching funds during the primaries and a lump sum for the general election to candidates who agreed to limit their overall spending.<sup>98</sup> The Court declared that, by “us[ing] public money to facilitate and enlarge public discussion and participation in the electoral process,” the scheme “furthers, not abridges, pertinent First Amendment values”<sup>99</sup>

Although *Buckley*’s specific holding remains intact, the Court recently took a far more skeptical view of another public financing system in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*.<sup>100</sup> That system allowed candidates for state office in Arizona to choose to receive public financing for their campaigns in exchange for limiting their private spending.<sup>101</sup> To encourage candidates to opt in, the program offered participants supplemental public grants help keep pace with privately funded opponents who spent big.<sup>102</sup> While Arizona’s scheme did not “actually prevent anyone from speaking in the first place or cap campaign expenditures,”<sup>103</sup> the Court nevertheless viewed it as a substantial burden on the First Amendment rights of privately financed candidates—substantial enough to trigger strict scrutiny.<sup>104</sup> The program’s design, the

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<sup>94</sup> 540 U.S. 93 (2003).

<sup>95</sup> 134 S. Ct. at 1471 (Breyer, J., dissenting).

<sup>96</sup> *Id.* at 1452 n.6.

<sup>97</sup> The Court recently declined an opportunity to consider the issue. In *Republican Party of Louisiana v. FEC*, a three-judge district court rejected a challenge to federal soft money restrictions, concluding that it remained bound by *McConnell*. 219 F. Supp. 3d 86, 93 (D.D.C. 2016). The challengers exercised their statutory right to appeal directly to the Supreme Court, but the Court declined to conduct a full-scale review and instead summarily affirmed the district court. *See* \_\_\_ S. Ct. \_\_\_, 2017 WL 2216928 (May 22, 2017). Justice Thomas and Justice Gorsuch would have noted probable jurisdiction and set the case for oral argument. *Id.* It remains to be seen whether the Supreme Court’s decision to sidestep the case indicates its approval of the soft-money restrictions or whether it is merely a temporary reprieve.

<sup>98</sup> 424 U.S. at 85-90 (describing the presidential public financing program).

<sup>99</sup> *Id.* at 92-93, 96.

<sup>100</sup> 564 U.S. 721 (2011).

<sup>101</sup> *Id.* at 728-29.

<sup>102</sup> *Id.* at 729-30.

<sup>103</sup> *Id.* at 733.

<sup>104</sup> *Id.* at 734.

Court reasoned, amounted to a penalty on privately financed candidates and their allies, who effectively subsidized their adversaries every time they spent.<sup>105</sup> The Court added that the program did not further the government's anticorruption objectives, but instead impermissibly sought to level the electoral playing field.<sup>106</sup> *Arizona Free Enterprise* does not preclude governments from offering lump-sum public grants to candidates,<sup>107</sup> but, as the Court itself acknowledged, such systems are less efficient and attractive because they are more likely to either overfund or underfund publicly financed candidates.<sup>108</sup>

After *Arizona Free Enterprise*, the status of other variants on public financing is uncertain. Many reformers advocate programs in which the government matches contributions that individuals make to candidates up to a certain amount—or perhaps provides a multiple match.<sup>109</sup> Others prefer programs in which the government provides vouchers that individuals can allocate to their preferred candidates.<sup>110</sup> Reformers offer strong arguments for the constitutionality of these programs,<sup>111</sup> but there is no assurance that the current Supreme Court will agree.<sup>112</sup> Contribution matching and vouchers seem to facilitate speech without creating the kind of penalty identified in *Arizona Free Enterprise*, which presumably lowers the level of First Amendment scrutiny. But the Court might nevertheless disapprove of the government putting a thumb on the campaign financing scale. Or it might conclude that such programs are not adequately tailored to advancing the government's anticorruption interests, and instead impermissibly seek to level the electoral playing field.

#### 4. Disclosure Requirements

Regulations requiring those who make election-related contributions and expenditures to disclose their identities have enjoyed a relatively hospitable judicial reception. Even here, however, the doctrine imposes constraints and may impose more in the years ahead. As the Court explained in *Buckley*, while disclosure requirements place “no ceiling on campaign-related activities,” they can nevertheless burden associational

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<sup>105</sup> *Id.* at 736; *see also* *Davis v. FEC*, 554 U.S. 724, 739 (2008).

<sup>106</sup> *Arizona Free Enterprise*, 564 U.S. at 748-53.

<sup>107</sup> *Id.* at 754.

<sup>108</sup> *Id.* at 747; *see also* Overton, *supra* note 15, at 1695 (describing *Bennett* as “a significant blow to traditional public financing”).

<sup>109</sup> *See, e.g.*, Amy Loprest & Bethany Perskie, *Empowering Small Donors: New York City's Multiple Match Public Financing as a Model for a Post-Citizens United World*, 40 *FORDHAM URB. L.J.* 639 (2012); Overton, *supra* note 15.

<sup>110</sup> *See, e.g.*, LESSIG, *supra* note 15.

<sup>111</sup> *See, e.g.*, Richard Briffault, *The Future of Public Funding*, 49 *WILLIAMETTE L. REV.* 521 (2013).

<sup>112</sup> *See, e.g.*, James Sample, *The Last Rites of Public Campaign Financing?*, 92 *NEB. L. REV.* 349 (2013).

rights.<sup>113</sup> To sustain a disclosure requirement, the government must point to “a ‘relevant correlation’ or ‘substantial relation’ between [its regulatory] interest and the information required to be disclosed”; “a mere showing of some legitimate governmental interest” does not suffice.<sup>114</sup> Moreover, when it comes to disclosure, the government need not rely solely on its anticorruption interest. The Court has also recognized a valid governmental interest in supplying the electorate with information potentially relevant to their voting decisions.<sup>115</sup> Applying these principles, strong majorities of the Court have upheld disclosure regimes against facial challenge, but they have left open the possibility that disclosure could excessively burden First Amendment rights in particular situations, such as when it facilitates systematic harassment.<sup>116</sup>

Disclosure opponents are actively pursuing as-applied challenges to disclosure requirements, as well as broader challenges seeking to invalidate provisions as overly broad or burdensome.<sup>117</sup> While some of these challenges have been rejected,<sup>118</sup> others have had at least partial or preliminary success.<sup>119</sup> The Supreme Court may well take up one of these challenges soon.<sup>120</sup> While the Court could ultimately endorse an expansive view of the government’s power to require disclosure, it might well establish new constraints.<sup>121</sup>

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<sup>113</sup> 424 U.S. at 64.

<sup>114</sup> *Id.*; see also *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010);

<sup>115</sup> See *Citizens United*, 558 U.S. at 367; *McConnell*, 540 U.S. at 196; *Buckley*, 424 U.S. at 66; see also Daniel R. Ortiz, *The Informational Interest*, 27 J.L. & POL. 663 (2012).

<sup>116</sup> See *Citizens United*, 558 U.S. at 367; *McConnell*, 540 U.S. at 198–99; *Buckley*, 424 U.S. at 74.

<sup>117</sup> Numerous disclosure lawsuits are pending at various stages of litigation. See, e.g., *Citizens Union of New York v. Cuomo*, No. 16-cv-09592 (S.D.N.Y., complaint filed Dec. 12, 2016) (challenging the constitutionality of New York State’s recently expanded disclosure requirements).

<sup>118</sup> See, e.g., *Indep. Inst. v. FEC*, \_\_\_ F. Supp. 3d \_\_\_, 2016 WL 6560396 (D.D.C. Nov. 3, 2016), *summarily aff’d*, No. 16-743, 2017 WL 737809 (Feb. 27, 2017); *Montanans for Cmty. Dev. v. Motl*, No. CV 14-55-H-DLC, 2016 WL 6469886 (D. Mont. Oct. 31, 2016), *appeal filed*, No. 16-35997 (9th Cir.).

<sup>119</sup> See, e.g., *Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049 (C.D. Cal. 2016), *appeal filed*, No. 16-55786 (9th Cir.); *Thomas More Law Ctr. v. Harris*, No. CV 15-3048-R, 2016 WL 6781090 (C.D. Cal. Nov. 16, 2016), *appeal filed*, No. 16-56902 (9th Cir.); cf. *Van Hollen v. FEC*, 811 F.3d 486, 498–501 (D.C. Cir. 2016).

<sup>120</sup> For proponents of disclosure laws, the Supreme Court’s recent summary affirmance of a lower court decision upholding BCRA’s disclosure requirements against an as-applied challenge is an encouraging development. See *Indep. Inst.* 2017 WL 737809 (Feb. 27, 2017).

<sup>121</sup> See, e.g., Shaw, *supra* note 67, at 21–22 (“[I]t’s a mistake to assume that disclosure, even of core activities like contributions to candidates and parties, is absolutely unassailable, at least as a descriptive matter.”). Some observers have speculated that Justice Gorsuch, like Justice Thomas (and, to a lesser extent, Justice Alito) will embrace a right to anonymous political speech and be highly skeptical of disclosure laws. See, e.g., Dillon Kato, *Law Professor, Former Montana Justice Say Gorsuch Will Back ‘Dark Money’*, MISSOULIAN, Mar. 30, 2017, <http://missoulian.com/news/local/law-professor-former->

## B. Political Limitations

The political barriers to campaign finance regulation are often at least as formidable as the jurisprudential constraints, both at the federal level and in many states. Despite surveys that consistently show high levels of public support for reform across the political spectrum,<sup>122</sup> major legislative and regulatory successes are rare. In the past half century, Congress has only twice passed major reform packages—the Federal Election Campaign Act Amendments of 1974,<sup>123</sup> and the Bipartisan Campaign Reform Act of 2002<sup>124</sup> (and the Supreme Court later invalidated important elements of both).<sup>125</sup> Perhaps unsurprisingly, it is difficult to convince elected officials to rewrite the rules that put them into office.

Those who hoped the public outcry over *Citizens United* might prompt a legislative response have been disappointed. The myriad reform proposals put forward in Congress in recent years have all languished.<sup>126</sup> Even relatively modest measures, such as legislation to strengthen the existing federal disclosure regime, have been stymied.<sup>127</sup> Dishearteningly for

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montana-justice-say-gorsuch-will-back-dark/article\_3b4efc0e-1839-554e-ace6-da70710dab8f.html; Rick Hasen, *Will Gorsuch Break with Scalia, Providing 2d (or 3d) Vote to Allow Flood of Undisclosed Money in Elections*, ELECTION LAW BLOG, Mar. 22, 2017, <http://electionlawblog.org/?p=91744>.

<sup>122</sup> See, e.g., Nicholas Confessore & Megan Thee-Brenan, *Poll Shows Americans Favor Overhaul of Campaign Financing*, N.Y. TIMES (June 2, 2015), <http://www.nytimes.com/2015/06/03/us/politics/poll-shows-americans-favor-overhaul-of-campaign-financing.html> (reporting results of a poll indicating “deep support among Republicans and Democrats alike for new measures to restrict the influence of wealthy givers”); Greg Stohr, *Bloomberg Poll: Americans Want Supreme Court To Turn Off Political Spending Spigot*, BLOOMBERG (Sept. 28, 2015), <http://www.bloomberg.com/politics/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot>.

<sup>123</sup> Pub. L. No. 93-443, 88 Stat. 1263 (codified in scattered sections of the U.S. Code).

<sup>124</sup> Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of the U.S. Code).

<sup>125</sup> See *Buckley v. Valeo*, 424 U.S. 1 (1974); *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>126</sup> This includes proposals for a constitutional amendment to overturn *Citizens United* and other aspects of the Supreme Court’s campaign finance doctrine, proposals for various forms of public financing. see, e.g., Democracy for All Amendment, S.J. Res. 5, 114th Cong.; H.J. Res. 22, 114th Cong.; People’s Rights Amendment, S.J. Res. 18, 113th Cong.; H.J. Res. 23, 114th Cong.; Government by the People Act, H.R. 20 (113th Cong.), H.R. 20 (115th Cong.); Fair Elections Now Act, H.R. 1826 (111th Cong.), S. 751 (111th Cong.).

<sup>127</sup> Perhaps the most notable of these proposals was the Democracy is Strengthened by Casting Light on Spending in Elections Act of 2010 (DISCLOSE Act), H.R. 5175, S. 3628, 111th Cong. (2010). It passed in the House but died in the Senate. See, e.g., Richard Briffault, *Two Challenges for Campaign Finance Disclosure Act* *Citizens United and Doe v. Reed*, 19 WM. & MARY BILL RTS. J. 983, 1011 (2011). Renewed efforts to pass the Act have been unsuccessful. See DISCLOSE Act of 2014, S. 2516, 113th Cong. (2014); DISCLOSE Act of 2013, H.R. 148, 113th Cong. (2013); DISCLOSE Act of 2012, H.R. 4010, 112th Cong. (2012). Congress also rejected the Shareholder Protection Act, which would have required corporations to get director approval before making large political expenditures. See Shareholder Protection Act of 2010, H.R. 4790, 111th Cong. (2010). The Senate’s current majority leader, Senator Mitch McConnell, has long been an outspoken

reformers, the one notable change to federal campaign finance law that Congress has made since *Citizens United* is deregulatory: a substantial increase in the amount of money that donors may contribute to national party committees.<sup>128</sup>

Federal regulators, meanwhile, have done little to fill the legislative void. The Federal Election Commission, which is chiefly responsible for federal campaign finance law, has never been an especially potent regulator.<sup>129</sup> As a six-member body split evenly between Democratic and Republic appointees, it was designed to be weak.<sup>130</sup> In recent years, the FEC has been especially deadlocked and dysfunctional.<sup>131</sup> Reform advocates tend to view it not as a potential ally, but rather as a roadblock that needs to be overhauled or replaced.<sup>132</sup> The FEC's unresponsiveness has prompted reformers to seek out other potential regulators, but again with limited success. The Securities and Exchange Commission, for instance, has failed to adopt proposed rules that would require corporations to disclose more of their political spending;<sup>133</sup> the IRS has not answered calls to tighten

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opponent of reform. See, e.g., Mitch McConnell, Opinion, *The Dangers Disclosure Can Pose to Free Speech*, WASH. POST (June 22, 2012), [http://www.washingtonpost.com/opinions/mitch-mcconnell-how-political-disclosure-could-threaten-free-speech/2012/06/22/gJQApiE2vV\\_story.html](http://www.washingtonpost.com/opinions/mitch-mcconnell-how-political-disclosure-could-threaten-free-speech/2012/06/22/gJQApiE2vV_story.html).

<sup>128</sup> See 52 U.S.C. § 30116(a). This measure, which was slipped into an omnibus spending bill, allows an individual to donate as much as \$1.5 million per election cycle to each political party's national committees. Matea Gold & Tom Hamburger, *Party Fundraising Provision, Crafted in Secret, Could Shift Money Flow in Politics*, WASH. POST (Dec. 10, 2014), [https://www.washingtonpost.com/politics/party-fundraising-provision-crafted-in-secret-could-shift-money-flow-in-politics/2014/12/10/f6856ed0-808d-11e4-9f38-95a187e4c1f7\\_story.html?postshare=9631418263436178&utm\\_term=.9d4e6ae9d330](https://www.washingtonpost.com/politics/party-fundraising-provision-crafted-in-secret-could-shift-money-flow-in-politics/2014/12/10/f6856ed0-808d-11e4-9f38-95a187e4c1f7_story.html?postshare=9631418263436178&utm_term=.9d4e6ae9d330).

<sup>129</sup> See, e.g., Donald J. Simon, *Current Regulation and Future Challenges for Campaign Financing in the United States*, 3 ELECTION L.J. 474, 485 (2004); Michael C. Dorf, *The 2000 Presidential Election: Archetype or Exception?*, 99 MICH. L. REV. 1279, 1287 (2001).

<sup>130</sup> See, e.g., Benjamin Weiser & Bill McCallister, *The Little Agency That Can't: Election-Law Enforcer Is Weak by Design, Paralyzed by Division*, WASH. POST, Feb. 12, 1997, at A1.

<sup>131</sup> See, e.g., Eliza Newlin Carney, *The FEC's Open Hostilities, Dysfunction, and Intimidation Foreshadowed the Trump Era*, THE AMERICAN PROSPECT, Mar. 2, 2017; Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says*, N.Y. TIMES, May 2, 2015; Jonathan D. Salant, *The FEC: A Toothless Watchdog for a \$6 Billion Election*, BLOOMBERG BUSINESSWEEK (May 3, 2012), <http://www.businessweek.com/articles/2012-05-03/the-fec-a-toothless-watchdog-for-a-6-billion-election>.

<sup>132</sup> See, e.g., Common Cause, *Fighting Big Money, Empowering People: A 21st Century Democracy Agenda*, at 6 (July 2015), <http://www.commoncause.org/issues/money-in-politics/21st-century-democracy-agenda/fighting-big-money-empowering-people-a-21st-century-democracy-agenda.pdf> ("A new, real enforcement agency is needed to replace the FEC."); Public Citizen, *Roiled in Partisan Deadlock, Federal Election Commission Is Failing* (2012), <http://www.citizen.org/documents/fec-deadlock-press-statement.pdf>.

<sup>133</sup> This is partly because Congress stepped in to prohibit consideration of such rules. See Michael R. Siebecker, *Political Insider Trading*, 85 FORDHAM L. REV. 2717, 2728 (2017); Jay B. Kesten, *Shareholder Political Primacy*, 10 VA. L. & BUS. REV. 161, 235 (2016); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Hindering the S.E.C. from Shining a Light on*

regulations on the political activities of 501(c)(4) nonprofit groups<sup>134</sup>; and reformers have criticized the Federal Communications Commission for failing to prompt broadcasters to disclose more information relating to political advertisements.<sup>135</sup>

At the state and local level, reform proponents have achieved some notable successes in recent years, but they have experienced setbacks as well. A number of states have enacted measures to strengthen disclosure,<sup>136</sup> and a growing number of jurisdictions have established public financing programs that match individuals' contributions to candidates or provide campaign finance vouchers to residents.<sup>137</sup> Some of these measures were enacted through voter referenda or initiatives that enabled reformers to bypass legislative hurdles.<sup>138</sup> At the same time, however, other states and localities have moved in an antiregulatory direction.<sup>139</sup>

Of course, the very fact that our system requires campaign finance advocates to engage with governments at no fewer than three different levels—federal, state, and local—is itself an important constraint on the regulatory reform enterprise. It vastly increases the resources necessary to achieve change and makes comprehensive solutions nearly impossible. Even as reformers make headway in some jurisdictions, they may find themselves losing ground in others.

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*Political Spending*, N.Y. TIMES DEALBOOK (Dec. 21, 2015), [http://www.nytimes.com/2015/12/22/business/dealbook/hindering-the-sec-from-shining-a-light-on-political-spending.html?\\_r=0](http://www.nytimes.com/2015/12/22/business/dealbook/hindering-the-sec-from-shining-a-light-on-political-spending.html?_r=0).

<sup>134</sup> See, e.g., Linda Sugin, *Politics, Disclosure, and State Law Solutions for 501(c)(4) Organizations*, 91 CHI.-KENT L. REV. 895, 901 (2016). Again, congressional obstruction has been a contributing factor. See Siebecker, *supra* note 133, at 2728 n.61.

<sup>135</sup> See Campaign Legal Center, *FCC Has Failed to Protect Voters' Right to Know Who is Behind Political Ads in Election 2016*, Sept. 23, 2016, <http://www.campaignlegalcenter.org/news/press-releases/fcc-has-failed-protect-voters-right-know-who-behind-political-ads-election-2016>; see also Raju, *supra* note 67.

<sup>136</sup> See, e.g., National Conference of State Legislators, *2015 and 2016 Campaign Finance Enactments* (2016), <http://www.ncsl.org/research/elections-and-campaigns/2015-and-2016-campaign-finance-enactments.aspx>; Emily Shaw, *Change for the Better in State-Level Campaign Finance Disclosure*, Sunlight Foundation (Dec. 9, 2016), <https://sunlightfoundation.com/2016/12/09/change-for-the-better-in-state-level-campaign-finance-disclosure/>.

<sup>137</sup> South Dakota, New York City, Seattle, Portland, and Berkeley are some of the jurisdictions experimenting with public financing. See, e.g., Reid Wilson, *Portland Plans Public Financing for City Campaigns*, THE HILL, Dec. 14, 2016, <http://thehill.com/policy/310456-portland-plans-public-financing-for-city-campaigns>.

<sup>138</sup> See Corey Goldstone, *Voters Approve Numerous Campaign Finance Reform Measures on State/Local Level*, Campaign Legal Center (Nov. 14, 2016), <http://www.campaignlegalcenter.org/news/blog/voters-approve-numerous-campaign-finance-reform-measures-statelocal-level>.

<sup>139</sup> Azeezat Adeleke, *The Sky Isn't the Limit: The Unfortunate Truth About Campaign Finance Limits*, Sunlight Foundation (Aug. 9, 2016), <https://sunlightfoundation.com/2016/08/09/the-sky-isnt-the-limit-the-unfortunate-truth-about-campaign-finance-limits/>.



### C. Practical Limitations

As a practical matter, the campaign finance regulations that have managed to clear the judicial and legislative hurdles described above have not come close to achieving reformers' goals. Legislative compromise and judicial pruning have combined to produce laws that are narrower and weaker than the ones many reform advocates would like to see.<sup>140</sup> As scholars have long recognized, these gaps in the law not only leave existing problems unsolved; they can sometimes generate new ones.<sup>141</sup> This is especially true of regulations that seek to limit money's flow. Such regulations often prompt funders to redirect their spending into channels that remain less regulated. Scholars have described this reality in terms of hydraulics: "political money, like water, has to go somewhere."<sup>142</sup> Given the constraints of politics and doctrine, such evasions are difficult to stop. New loopholes emerge more quickly than old ones can be filled—a problem that is likely to worsen as emerging technologies continue to create new outlets for spenders' cash.<sup>143</sup>

The current federal regulatory system offers a classic example of the perils of partial regulation. Federal law caps direct contributions to candidates, encouraging those who wish to spend in excess of the contribution limits to make independent expenditures.<sup>144</sup> While there may be good reasons to limit direct contributions, a shift toward more independent expenditures (for example, by Super PACs) poses its own problems. To the extent that such spending is truly independent, it shifts responsibility for electoral discourse away from candidates and toward persons and groups that are less accountable to voters.<sup>145</sup> To the extent that outside spending is not truly independent, it operates to circumvent legal limits on contributions to candidates' campaigns. And, whether truly independent or not, outside spending has tended in practice to facilitate

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<sup>140</sup> See *supra* Parts II.A and B.

<sup>141</sup> See, e.g., Anthony J. Gaughan, *The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform*, 77 Ohio St. L.J. 791, 808 (2016); Kang, *supra* note 1, at 40; Issacharoff, *supra* note 46, at 120; Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1800 (1999) ("Campaign finance reform has repeatedly demonstrated the law of unintended consequences."); Issacharoff & Karlan, *supra* note 34, at 1708 (referring to the "paradoxical ability [of campaign finance regulation] to bring about perverse consequences"); Cass Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1400-11 (1994).

<sup>142</sup> Issacharoff & Karlan, *supra* note 34, at 1708; see also Andrias, *supra* note 61, at 496.

<sup>143</sup> See Persily, *Campaign Revolution*, *supra* note 17 ("[R]egulation of campaign activity becomes increasingly difficult once campaigning moves online and traditional legal categories, such as who constitutes the 'media,' become ever fuzzier.")

<sup>144</sup> See, e.g., ERIKA FRANKLIN FOWLER ET AL., POLITICAL ADVERTISING IN THE UNITED STATES 3 (2016); Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1646-50 (2012); Issacharoff & Karlan, *supra* note 34, at 1714.

<sup>145</sup> See, e.g., Michael S. Kang, *The Year of the Super PAC*, 81 GEO. WASH. L. REV. 1902, 1923 (2013); Kang, *supra* note 1, at 44-48.

negative campaigning: While candidates can face blowback if they disparage an opponent too aggressively, outside groups have little to lose.<sup>146</sup>

The point here is not to suggest that regulation inevitably does more harm than good. Many regulatory interventions may have at least some salutary effect. Partial disclosure, for instance, is likely better than none. Similarly, perhaps the benefits of capping direct contributions are, on balance, worth the costs of a corresponding increase in independent expenditures. And perhaps the new generation of state and local public financing systems that focus on empowering small donors will have fewer negative tradeoffs than regulations that target big spenders.<sup>147</sup> The point is simply that history counsels caution. To date, public regulation of campaign finance has produced lackluster results.

### III. LOOKING BEYOND THE LAW

Given the difficulties of pursuing campaign finance regulation and the discouraging history of government intervention, why do campaign finance scholars and activists continue to emphasize legal fixes? Presumably it is because they assume that, despite its limitations, state action is their best or only option. That is an understandable instinct. If the problem of money derives from the choices of private actors, then it is natural to look to the state for solutions. But, just as market failures attract calls for regulation, regulatory failures ought to direct attention back to the market.

This Part considers the potential for private ordering to advance the cause of campaign finance reform.<sup>148</sup> It begins in Part III.A by describing how private actions and forces are already serving to reduce big money's electoral influence. Existing campaign finance commentary has largely overlooked this private ordering phenomenon. It is, in a sense, the flip side of the oft-noted problem of hydraulics: At the same time that some actors are working around the law to keep money flowing into the electoral system, other actors are taking extra-legal countermeasures to thwart them. To be

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<sup>146</sup> See, e.g., Kang, *supra* note 1, at 48 (observing that “some of the worst excesses of political campaigning come from outside groups”); Sitaraman, *supra* note 16, at 782; Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 170 (2010).

<sup>147</sup> See, e.g., Sunstein, *supra* note 141, at 1412-13. Small-donor public financing programs, however, do have their skeptics. See, e.g., Robert E. Mutch, *Small Donor Democracy? Don't Count on It*, OUPBlog (Sept. 12, 2016), <https://blog.oup.com/2016/09/small-donor-democracy-campaign-finance/>.

<sup>148</sup> For purposes of this Article, private ordering encompasses “any decentralized rule-making process in which rules are not determined by the territorial state.” Niva Elkin-Koren, *Copyrights in Cyberspace-Rights Without Laws?*, 73 CHI.-KENT L. REV. 1155 (1998); see also Jorge L. Contreras, *From Private Ordering to Public Law: The Legal Frameworks Governing Standards-Essential Patents*, 30 HARV. J.L. & TECH. 211, 213 (2017) (“The term ‘private ordering’ refers to the use of rules systems that private actors conceive, observe, and often enforce through extra-legal means.”).

sure, private action has not solved the problems that reformers identify, but its mitigating role is real. Indeed, private processes may well be doing more than public regulation to limit big money's clout.

Building on the descriptive account developed in Part III.A, Part III.B assesses the prospects for making further progress outside of legislatures, agencies, and courts. As it turns out, a wide range of actors in the electoral system have incentives to push back against big money, and they have a surprising number of tools at their disposal for doing so. Private ordering strategies, moreover, avoid many of the pitfalls of public regulation, although they do come with their own set of potential drawbacks.

### A. *Private Ordering in Action*

Money's electoral role is not entirely—or even predominantly—a function of law. Much happens extra-legally to constrain wealthy actors from deploying resources to obtain their preferred electoral and policy outcomes. These private interventions can be classified along several dimensions. For the sake of imposing some order on private ordering, this Section sorts them based on their substantive ends, using the three categories set forth in Part I—limiting the big money entering the system, diluting big money's influence, and reining in big-money abuses. The boundaries between the three categories are even fuzzier for private mechanisms than for public ones, but an intervention's predominant first-order effect is generally discernible. Notably, private ordering is occurring on all three fronts. As will be evident from the illustrations below, private campaign finance activities vary significantly in terms of their structure, formality, durability, scope, and more. Part III.B elaborates on these additional dimensions of difference among private campaign finance interventions.

#### 1. *Limiting Big Money*

Although a disproportionate share of election-related funding comes from big spenders,<sup>149</sup> the amount of money they inject into the system is only a fraction of what it could be. Deep-pocketed actors frequently choose not to spend, and candidates and political parties sometimes choose to limit what they might otherwise receive. Such forbearance amounts to an important check on big money.

Consider corporate electoral spending. Many observers predicted that the Supreme Court's decision in *Citizens United* would unleash a tidal wave of corporate money.<sup>150</sup> The notion that *Citizens United* has

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<sup>149</sup> See *supra* notes 39-42 and accompanying text.

<sup>150</sup> The *Citizens United* dissent itself raised the specter of corporations “flood[ing] the market,” “drowning out . . . noncorporate voices,” and “dominat[ing] . . . the airwaves prior to an election.” 558 U.S. at 470, 472; see also Larry E. Ribstein, *First Amendment and*

precipitated a corporate takeover of elections features prominently in political discourse to this day.<sup>151</sup> Corporations, however, have not clamored to exercise their right to spend.<sup>152</sup>

Concerns about negative reactions from shareholders, consumers, and voters, together with doubts about the effectiveness of electoral spending, have kept many companies on the sidelines.<sup>153</sup> The experiences of corporations that chose to spend big have served as cautionary tales. In one high profile example, Target faced a consumer and shareholder backlash when, shortly after *Citizens United*, it gave \$150,000 in corporate funds to a group backing a Republican gubernatorial candidate in Minnesota who opposed same-sex marriage.<sup>154</sup> Tens of thousands of consumers joined calls for a boycott; shareholders filed a resolution asking the company to overhaul its political contribution policy; and the company's CEO ultimately issued a public apology.<sup>155</sup> In another widely publicized incident,

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*Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1021 (2011); Wilson, *supra* note 48, at 2392; Russ Feingold, Op-Ed., *Democracy Hurt by Citizens United Decision*, WASH. POST, Jan. 24, 2010.

<sup>151</sup> See Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CAL. L. REV. 335, 345 (2017) (observing that *Citizens United* “has been cast in calamitous terms, with progressives fearing that it ‘threatens an avalanche of negative political commercials financed by huge corporate wealth’” (quoting Ronald Dworkin, *The Decision that Threatens Democracy*, N.Y. REV. BOOKS (May 13, 2010)); Siebecker, *supra* note 133, at 2736 (discussing poll results that “reflect[] widespread discontent with the ability of corporations to dominate the political process”).

<sup>152</sup> See, e.g., Adam Bonica, *Avenues of Influence: On the Political Expenditures of Corporations and Their Directors and Executives*, 18 BUS. & POL. 367, 367 (2016) (“The anticipated flood of corporate cash has amounted to no more than a trickle.”); Lee Drutman, *Despite Citizens United, Elections Aren’t a Good Investment for Corporations*, WASH. POST (Mar. 27, 2015), [https://www.washingtonpost.com/opinions/despite-citizens-united-politics-isnt-a-good-investment-for-corporations/2015/03/27/f13e0d20-d26c-11e4-ab77-9646eea6a4c7\\_story.html?utm\\_term=.5789e16d8751](https://www.washingtonpost.com/opinions/despite-citizens-united-politics-isnt-a-good-investment-for-corporations/2015/03/27/f13e0d20-d26c-11e4-ab77-9646eea6a4c7_story.html?utm_term=.5789e16d8751); Bill Allison & Sarah Harkins, *Fixed Fortunes: Biggest Corporate Political Interests Spend Billions, Get Trillions*, <https://sunlightfoundation.com/blog/2014/11/17/fixed-fortunes-biggest-corporate-political-interests-spend-billions-get-trillions/> (“As far as we can tell, one thing the Fixed Fortune 200 did not do, for the most part, was take advantage of the new opportunities to spend on politics that the *Citizens United* decision afforded them.”); Theo Francis, *Despite Citizens United, Corporate Super PAC Contributions Trail Individuals, Study Finds*, WALL ST. J., Nov. 2, 2016.

<sup>153</sup> See, e.g., Bambauer & Bambauer, *supra* note 151, at 348-49. Some studies indicate that election-related spending is often not worth the cost for business corporations. See, e.g., Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923 (2013); John C. Coates, *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. EMP. LEGAL STUD. 696 (2012). Another recent study suggests that political divisions among executives within firms also constrains corporate electoral spending. See Bonica, *supra* note 152, at 369.

<sup>154</sup> Jennifer Martinez & Tom Hamburger, *Target Feels Backlash From Shareholders*, L.A. TIMES, Aug. 19, 2010, <http://articles.latimes.com/2010/aug/19/nation/la-na-target-shareholders-20100820>.

<sup>155</sup> *Id.*; Jackie Crosby, *Target Apologizes for Giving to Group Backing Emmer*, STAR TRIBUNE, Aug. 6, 2010, <http://www.startribune.com/target-apologizes-for-giving-to>

Chevron spent some \$3 million in 2014 to support four candidates running for local office in Richmond, California, home to one of the company's large refineries.<sup>156</sup> Chevron's involvement, however, alienated voters and galvanized the opposition, resulting in the defeat of all four of the company's preferred candidates, even though they outspent their opponents twenty to one.<sup>157</sup>

Many companies have gone beyond de facto abstention and have adopted formal policies that either directly restrict election-related expenditures or establish spending protocols that may, as a practical matter, constrain giving. Among large corporations, this has become the norm.<sup>158</sup> Formal policies serve several functions. They can help to allay shareholder concerns about corporate funds underwriting candidates or causes that the shareholders may not support.<sup>159</sup> They can serve a public relations function, allowing companies to assure consumers and voters they are avoiding objectionable conduct.<sup>160</sup> And they can make it easier for corporate officials to decline solicitations from office seekers, political parties, and others without generating ill will—"it's not you; it's the policy," they can profess.

Corporate expenditure policies vary in breadth. A handful of major companies—including blue-chip names such as Accenture, Avon, Colgate-Palmolive, Goldman Sachs, HP, IBM, and Nielson Holdings—have adopted blanket bans on the use of corporate funds for election-related

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group-backing-emmer/100051999/; Jia Lynn Yang & Dan Eggen, *Exercising New Ability To Spend on Campaigns, Target Finds Itself a Bull's-Eye*, WASH. POST, Aug. 19, 2010.

<sup>156</sup> Carolyn Jones, *Chevron's \$3 Million Backfires in Richmond Election*, SFGATE, Nov. 5, 2014, <http://www.sfgate.com/bayarea/article/Chevron-s-3-million-backfires-in-Richmond-5873779.php>.

<sup>157</sup> *Id.*; see also Robert Rogers, *Big Money Politics Suffers Big Blow in Richmond as Chevron Spending Backfires*, EAST BAY TIMES, Nov. 5, 2014, <http://www.eastbaytimes.com/2014/11/05/big-money-politics-suffers-big-blow-in-richmond-as-chevron-spending-backfires/>. Apparently chastened by its defeat, Chevron refrained from spending on Richmond's 2016 city council election. See Karina Ioffee, *Richmond: Amid a Flurry of Campaign Spending, Chevron Visibly Absent*, EAST BAY TIMES, Oct. 21, 2016, <http://www.eastbaytimes.com/2016/10/21/richmond-amid-a-flurry-of-campaign-spending-chevron-visibly-absent/>. Chevron, however, remains one of the most active corporate spenders at the federal level. See Kenneth P. Doyle, *Corporate America Starts Funding Super PACs*, BLOOMBERG BNA, April 27, 2017, <https://www.bna.com/corporate-america-starts-n57982087278/>.

<sup>158</sup> Center for Political Accountability, *The 2016 CPA-Zicklin Index of Corporate Political Disclosure and Accountability*, at 10 (2016), <http://files.politicalaccountability.net/index/2016CPAZicklinIndex.pdf> ("Eighty-nine percent of the S&P 500 companies, or 441, had a detailed policy or some policy governing political spending on their websites.").

<sup>159</sup> See Kesten, *supra* note 133, at 180-81; Siebecker, *supra* note 133, at 2729. Such policies are often adopted in direct response to shareholder activism. See Haan, *supra* note 17, at 307.

<sup>160</sup> After Goldman Sachs pledged not to make electoral expenditures shortly after *Citizens United*, then-New York City public advocate Bill de Blasio hailed the company's decision. See Javier C. Hernandez, *Political Ads Off Limits, Goldman Promises*, N.Y. TIMES, Aug. 3, 2010.

purposes—including indirectly through trade associations.<sup>161</sup> Some of these companies do still have a traditional political action committee funded by persons affiliated with the company (as opposed to the corporation itself).<sup>162</sup> Others, including IBM, lack even that.<sup>163</sup> IBM’s policy declares that the firm’s values “reflect the corporation’s long-standing policy against political contributions of any kind, even when permitted by law.”<sup>164</sup> It elaborates that the company does not “make contributions of any kind (money, employee time, goods or services), directly or indirectly, to political parties or candidates, including through intermediary organizations, such as political action committees, campaign funds, or trade or industry associations.”<sup>165</sup> Though few companies have gone as far as IBM, data compiled by the Center for Political Accountability and the Zicklin Center for Business Ethics at the Wharton School indicates that nearly a third of S&P 500 companies have policies that directly restrict spending to a significant degree.<sup>166</sup> In addition, nearly half of S&P 500 companies provide for regular Board of Directors oversight of political spending, which at least indirectly restrains firm managers.<sup>167</sup> As discussed below, the majority of S&P 500 companies also make voluntary spending disclosures beyond what the law requires.<sup>168</sup> All of these numbers have been on the rise.<sup>169</sup>

While developments like these are not entirely new,<sup>170</sup> several factors likely account for the apparent trend toward corporate forbearance.

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<sup>161</sup> Center for Political Accountability, *supra* note 158, at 55; Paul DeNicola et al., *Handbook on Corporate Political Activity* at 15 (2010), [https://www.conference-board.org/retrievefile.cfm?filename=1189\\_1309335497.pdf&type=subsite](https://www.conference-board.org/retrievefile.cfm?filename=1189_1309335497.pdf&type=subsite).

<sup>162</sup> Goldman Sachs, for instance, maintains a federally registered PAC (“GS PAC”), which is funded “on a voluntary basis by employees of Goldman Sachs . . . . Corporate funds are not contributed to the GS PAC.” Goldman Sachs Statement on Policy Engagement and Political Participation (January 2017), <http://www.goldmansachs.com/investor-relations/corporate-governance/corporate-governance-documents/political-statement.pdf>.

<sup>163</sup> IBM, *Political Expenditures and Public Policy Matters*, <https://www.ibm.com/investor/governance/public-policy-matters.html> (last visited June 21, 2017) (“IBM does not have a Political Action Committee (PAC).”).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*; see also Colgate-Palmolive, *Political Contributions Policy*, <https://www.colgatepalmolive.com/en/us/corp/about/governance/political-contribution-policy> (last visited Feb. 27, 2017); Goldman Sachs Statement, *supra* note 162.

<sup>166</sup> See Center for Political Accountability, *supra* note 158, at 22, 24-25 (reporting that “33 companies had policies whereby *most* political spending was done through [traditional] company PACs”; “24 companies did not have a PAC and spent little to no political money overall”; and “53 companies restricted payments to either 501(c)(4)s or trade associations”—so-called “dark-money” groups).

<sup>167</sup> See *id.* at 26.

<sup>168</sup> See *infra* notes 229-232 and accompanying text.

<sup>169</sup> See Center for Political Accountability, *supra* note 158, at 22, 24-25 (reporting that the number of S&P 500 companies with spending restrictions rose from 124 in 2015 to 143 in 2016).

<sup>170</sup> Even before *Citizens United* corporations had ample opportunities to spend, and during the 1990s, corporations gave substantial soft money to political parties. See, e.g., FOWLER

Rising political polarization means that corporations are more likely to face an outcry when they wade into electoral contests.<sup>171</sup> Heightening that risk, social media and other technologies place corporations under greater scrutiny than ever, and enable protests and boycotts to go viral.<sup>172</sup> Moreover, the fallout from *Citizens United* has placed corporate spending in the public spotlight, prompting shareholders and others to prioritize the issue and to become more organized. Advocacy groups like the Center for Political Accountability, for example, have led a coordinated push for greater transparency and accountability in corporate political spending through shareholder activism.<sup>173</sup>

None of this is to suggest that corporations have gotten out of the campaign finance business entirely. They have not.<sup>174</sup> Traditional corporate PACs continue to make direct contributions to candidates,<sup>175</sup> and millions of corporate dollars end up in the coffers of super PACs and “dark money” groups.<sup>176</sup> In recent months, for example, tobacco, video game, and insurance companies, among others, have funneled substantial sums into a super PAC that has been spending heavily on behalf of Republican candidates in special elections to fill vacant congressional seats.<sup>177</sup> But, even accounting this activity, the amount of corporate money entering the

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ET AL., *supra* note 144, at 20; Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL’Y 643, 644 (2011) But some corporate leaders spoke out against that practice, and a growing number of companies announced policies against soft-money donations even before the Bipartisan Campaign Reform Act banned the practice. *See, e.g.*, Kang, *supra* note 1, at 15; Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1115 (2002).

<sup>171</sup> *See* Ciara Torres-Spelliscy, *Shooting Your Brand in the Foot: What Citizens United Invites*, 68 RUTGERS U.L. REV. 1297 (2016). This may explain why a number of major companies pulled their financial sponsorship of the 2016 major party political conventions. *See, e.g.*, Harper Neidig, *Major Companies Decline to Fund 2016 GOP Convention*, THE HILL, June 16, 2016.

<sup>172</sup> Center for Political Accountability, *supra* note 158, at 5; *see also* Siebecker, *supra* note 133, at 2733 (discussing polls indicating that nearly half of consumers say they would boycott companies that contribute to candidates or causes they oppose).

<sup>173</sup> *See* Center for Political Accountability, *About Us*, <http://politicalaccountability.net/about/about-us> (last visited June 22, 2017). Politicians have also played a role in sustaining the pressure on corporations. For example, as New York City’s Public Advocate, Bill de Blasio publicly urged corporations not to spend and set up a website to track corporate spending policies. *See* Kang, *supra* note 1, at 15.

<sup>174</sup> *See, e.g.*, Bebchuk & Jackson, *supra* note 153, at 930 (“Public companies can, and do, engage in political spending that is never disclosed by channeling that spending through intermediaries.”).

<sup>175</sup> *See* Bonica, *supra* note 152, at 375.

<sup>176</sup> *See* Siebecker, *supra* note 133, at 2724-25. “Dark money” refers to election-related expenditures that are made without public disclosure of their ultimate source. *See id.*; *see also* Potter & Morgan, *supra* note 52, at 385.

<sup>177</sup> *See* Kenneth P. Doyle, *GOP Super PAC’s Corporate Money Counters Democrats in Special Elections*, BLOOMBERG BNA, May 16, 2017, <https://www.bna.com/gop-super-pacs-n73014451059/>; Doyle, *supra* note 157.

system remains “a far cry” from what many anticipated in the wake of *Citizens United*.<sup>178</sup> The bottom line is that corporations frequently forgo lawful spending opportunities.

Many wealthy individuals similarly decline to spend as much on elections as they might. The United States has more than 500 billionaires, and more than 5,000 households worth at least \$100 million.<sup>179</sup> Most of these individuals are politically engaged, and many make at least some political contributions.<sup>180</sup> Only a fraction of these individuals, however, spend truly eye-popping sums.<sup>181</sup> The existence of this small cohort of individual mega-donors confirms that electoral spending cannot be explained by law alone. What separates these big spenders from their superrich compatriots and from wealthy corporations is not the legal ability to spend. Instead, their behavioral differences derive from extra-legal factors. Those who spend lavishly on elections have made a judgment, at least implicitly, that the expected benefits are worth the costs, while those who choose not to spend have concluded otherwise. That cost-benefit calculus will vary among potential spenders. Some will place more value than others on the prospect of advancing an ideological agenda, or on building goodwill that can later be used to lobby on pet issues.<sup>182</sup> Meanwhile, some will be more concerned than others about the negative attention and scrutiny that mega-donor status can bring. One reason more money flows into the system from wealthy individuals than from large public corporations is that individuals, on average, likely face fewer countervailing pressures, such as the prospect of consumer backlash or shareholder discontent.<sup>183</sup>

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<sup>178</sup> Bonica, *supra* note 152, at 368.

<sup>179</sup> Luisa Kroll, *Forbes 2016 World's Billionaires: Meet The Richest People On The Planet*, FORBES, Mar. 1, 2016; Chloe Sorvino, *5,000 U.S. Households Worth More Than \$100 Million, Report Says*, FORBES (June 15, 2015), <http://www.forbes.com/sites/chloesorvino/2015/06/15/5000-u-s-households-worth-more-than-100-million-report-says-2/#1a1b7e404e2d>.

<sup>180</sup> See, e.g., Christopher Ingraham, *The 1 Percent Is Way More Politically Active Than You Are*, WONKBLOG, WASH. POST, Sept. 30, 2014, [https://www.washingtonpost.com/news/wonk/wp/2014/09/30/the-one-percent-is-way-more-politically-active-than-you-are/?utm\\_term=.7e5751bd00d5](https://www.washingtonpost.com/news/wonk/wp/2014/09/30/the-one-percent-is-way-more-politically-active-than-you-are/?utm_term=.7e5751bd00d5); Bonica, *supra* note 152, at 375 (finding that more than 83 percent of Fortune 500 CEOs and directors have made political contributions, with a median lifetime total of \$37,800).

<sup>181</sup> See *supra* notes 39-42 and accompanying text.

<sup>182</sup> Empirical evidence indicates that wealthy individual spenders tend to be motivated in substantial part by ideology, while corporate spenders are more apt to prioritize their bottom lines and to seek to use their contributions to gain access and a sympathetic ear. See, e.g., Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. 531, 601 (2016); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 825-26 (2014); Stephanopoulos, *supra* note 14, at 1475-76; Nolan McCarty, *Reducing Polarization: Some Facts for Reformers*, 2015 U. CHI. LEGAL F. 243, 273 (2015).

<sup>183</sup> See, e.g., Torres-Spelliscy, *supra* note 171, at 1298; Drutman, *supra* note 152.



The discussion thus far has focused on the supply side—the private forces that diminish how much money corporations and other wealthy actors choose to give. There are demand-side restraints as well. Candidates and parties sometimes swear off big money, at least in part. In the wake of Watergate, at least two major party candidates, one from Maryland and one from New York, voluntarily refused to accept contributions of more than \$100 in their 1974 U.S. Senate races.<sup>184</sup> More often, candidates take the smaller step of rejecting money from certain sources, such as political action committees.<sup>185</sup> During the 2008 election cycle, the Democratic National Committee adopted a policy to refuse contributions from federal lobbyists and political action committees.<sup>186</sup> It abandoned the rule early in the 2016 cycle.<sup>187</sup> Candidates and parties also routinely make the largely symbolic gesture of refusing or returning contributions or other financial support from particularly objectionable backers.<sup>188</sup>

Candidates and parties not only make voluntary unilateral decisions to reject certain funds; on occasion, they also enter into agreements with their opponents to restrict contributions or expenditures beyond what the law requires.<sup>189</sup> To take one prominent example, when Hillary Clinton initially ran for the U.S. Senate, she and her opponent, Representative Rick

<sup>184</sup> See *Buckley v. Valeo*, 424 U.S. 1, 21 n.23 (1976).

<sup>185</sup> See, e.g., Kyung M. Song & Justin Mayo, *Cantwell Refuses PAC Money, but Accepts it from Special Interests*, SEATTLE TIMES, Mar. 31, 2012, <http://www.seattletimes.com/seattle-news/cantwell-refuses-pac-money-but-accepts-it-from-special-interests/>.

<sup>186</sup> Matt Kelley, *DNC Will Refuse Funds from Lobbyists and PACs*, USA TODAY, June 5, 2008; Tom Hamburger & Paul Kane, *DNC Rolls Back Obama Ban on Contributions from Federal Lobbyists*, WASH. POST (Feb. 12, 2016), [https://www.washingtonpost.com/politics/dnc-allowing-donations-from-federal-lobbyists-and-pacs/2016/02/12/22b1c38c-d196-11e5-88cd-753e80cd29ad\\_story.html?utm\\_term=.0963bc7bd0dd](https://www.washingtonpost.com/politics/dnc-allowing-donations-from-federal-lobbyists-and-pacs/2016/02/12/22b1c38c-d196-11e5-88cd-753e80cd29ad_story.html?utm_term=.0963bc7bd0dd).

<sup>187</sup> *Id.* Party activists sought to revive the ban in early 2017, but their efforts fell short. Daniel Marans, *DNC Members Vote Down Corporate Money Ban*, HUFFINGTON POST (Feb. 25, 2017), [http://www.huffingtonpost.com/entry/dnc-pac-contributions-ban\\_us\\_58b1ac9ee4b0a8a9b782bb00](http://www.huffingtonpost.com/entry/dnc-pac-contributions-ban_us_58b1ac9ee4b0a8a9b782bb00).

<sup>188</sup> During the 2016 presidential race, for example, Ted Cruz, Rand Paul, and Rick Santorum all returned thousands of dollars given to them by the leader of a white supremacist group. Kathleen Hennessey, *Republicans Reject Donations from White Supremacist Linked to Charleston Shootings*, L.A. TIMES (June 22, 2015), <http://www.latimes.com/nation/la-na-republicans-charleston-donations-20150622-story.html>. During her 2008 presidential campaign, Hillary Clinton returned \$850,000 raised from 260 people by a supporter who was implicated in financial improprieties. Patrick Healy, *Clinton to Return all Hsu-Tainted Money*, N.Y. TIMES, Sept. 10, 2007, <https://thecaucus.blogs.nytimes.com/2007/09/10/clinton-to-return-all-hsu-tainted-money/>. In an effort to avoid such episodes, candidates sometimes adopt donor-related policies and may even run background checks on major supporters. See Derek Willis, *When Politicians Have to Return Money from the Wrong People*, N.Y. TIMES, June 22, 2015, [https://www.nytimes.com/2015/06/23/upshot/when-the-wrong-people-give-money-to-politicians.html?mcubz=1&\\_r=0](https://www.nytimes.com/2015/06/23/upshot/when-the-wrong-people-give-money-to-politicians.html?mcubz=1&_r=0).

<sup>189</sup> See Nagle, *supra* note 17, at 1833; Overman, *supra* note 17, at 1244, 1280-86.

Lazio, agreed not to rely on soft money and asked a number of outside groups to refrain from participating in the race.<sup>190</sup> Such agreements have usually held since candidates fear the political consequences of breaking their word.<sup>191</sup>

Going beyond previous voluntary campaign finance pacts, Elizabeth Warren and Scott Brown entered into a contract during their 2012 U.S. Senate race in Massachusetts to try to keep Super PACs and other outside spenders from interfering in the race. Their agreement, dubbed the “People’s Pledge,” was not legally enforceable, but the idea was that both candidates would have reputational incentives to abide by its commitments rather than risk the bad publicity of a breach.<sup>192</sup> Specifically, the candidates pledged that, if any outside group ran advertisements supporting one of the candidates, that candidate would pay a penalty out of his or her campaign coffers equal to 50 percent of the costs of the advertisements.<sup>193</sup> The penalty mechanism was meant to deter outside spenders from getting involved.<sup>194</sup> And it largely worked: Little outside money entered the race, and the candidates abided by the agreement and paid the penalty on the few occasions when impermissible spending occurred.<sup>195</sup> Compared to other competitive Senate races, small donors provided a larger share of the financing, and the tone of the campaign stayed relatively positive.<sup>196</sup> Since 2012, candidates have signed onto People’s Pledges in a handful of other races, but the idea has not gained significant traction.<sup>197</sup>

## 2. *Diluting Big Money’s Influence*

Beyond directly constraining the giving and receiving of campaign funds, private ordering processes also diminish, at least to some extent, the value of the big money that enters the system. An informal tactic that candidates regularly employ is simply to decry big money’s influence on the system generally and on their opponents specifically. In the 2016 presidential race, Bernie Sanders and Donald Trump both made such rhetoric a centerpiece of their campaign messages. During the Democratic primaries, Sanders repeatedly described the campaign finance system as “corrupt,” with “millionaires and billionaires . . . spending extraordinary

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<sup>190</sup> Nagle, *supra* note 17, at 1831-38; Overman, *supra* note 17, at 1285-86.

<sup>191</sup> See Joshua A. Douglas, *Election Law and Civil Discourse: The Promise of ADR*, 27 OHIO ST. J. ON DISP. RESOL. 291, 310-12 (2012).

<sup>192</sup> Sitaraman, *supra* note 16, at 766-67.

<sup>193</sup> Sitaraman, *supra* note 16, at 757. Sitaraman provides a detailed description of the People’s Pledge and cogently analyzes the virtues, drawbacks, and challenges associated with such arrangements.

<sup>194</sup> *Id.* at 770.

<sup>195</sup> *Id.* at 769.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 758-59. A recent article suggests that political parties could help to make the People’s Pledge more attractive by offering supplemental funds to participating candidates. See Bloomberg, *supra* note 17, at 310.

amounts to buy elections.”<sup>198</sup> He called it “obscene” that Hillary Clinton “keeps going to big-money people to fund her campaign.”<sup>199</sup> Trump, meanwhile, attacked his Republican primary opponents for relying heavily on big money, sometimes describing them as puppets of their donors.<sup>200</sup> He boasted that he did not want or need big money, and seemed to revel in being attacked by his opponents’ wealthy backers.<sup>201</sup> In the general election, he used a similar strategy against Clinton, portraying her as “bought and paid for by Wall Street, lobbyists and special interests.”<sup>202</sup>

By deploying anti-big money language, candidates can taint the big money in a race, turning their opponents’ financial assets into a political liability.<sup>203</sup> This sort of rhetoric may even sway some would-be big spenders to remain on the sidelines. Candidates who condemn big money will likely attract less of it for themselves, even if they remain willing to accept such funds if offered.<sup>204</sup> At the same time, deep-pocketed actors may be deterred

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<sup>198</sup> *Transcript of the Democratic Presidential Debate*, N.Y. TIMES (Jan. 17, 2016), [https://www.nytimes.com/2016/01/18/us/politics/transcript-of-the-democratic-presidential-debate.html?\\_r=0](https://www.nytimes.com/2016/01/18/us/politics/transcript-of-the-democratic-presidential-debate.html?_r=0); *Transcript of Democratic Presidential Debate*, N.Y. TIMES (Feb. 11, 2016), <https://www.nytimes.com/2016/02/12/us/politics/transcript-of-the-democratic-presidential-debate-in-milwaukee.html>.

<sup>199</sup> Igor Bobic, *Bernie Sanders: Hillary Clinton’s Fundraising is ‘Obscene’*, HUFFINGTON POST (Mar. 27, 2016), [http://www.huffingtonpost.com/entry/bernie-sanders-hillary-clinton-obscene-fundraising\\_us\\_56f7e38fe4b0143a9b48755c](http://www.huffingtonpost.com/entry/bernie-sanders-hillary-clinton-obscene-fundraising_us_56f7e38fe4b0143a9b48755c).

<sup>200</sup> Philip Bump, *Donald Trump Says He’d Be ‘Obligated’ to Big Donors. But He’s Raising Money from Them*, WASH. POST (Aug. 25, 2015), [https://www.washingtonpost.com/news/the-fix/wp/2015/08/25/donald-trump-says-pols-are-beholden-to-big-donors-so-why-is-he-raising-super-pac-funds/?utm\\_term=.7b7464ca32be](https://www.washingtonpost.com/news/the-fix/wp/2015/08/25/donald-trump-says-pols-are-beholden-to-big-donors-so-why-is-he-raising-super-pac-funds/?utm_term=.7b7464ca32be); Kenneth P. Vogel & Ben Schreckinger, *Trump Courted Megadonors He Now Scorns*, POLITICO, Nov. 4, 2015, <http://www.politico.com/story/2015/11/donald-trump-sheldon-adelson-paul-singer-koch-brothers-215540>.

<sup>201</sup> See Noah Bierman, *All the Money in the World Isn’t Buying Votes this Primary Season*, L.A. TIMES, Feb. 5, 2016, <http://www.latimes.com/politics/la-na-super-pacs-20160205-story.html>; Laura Reston, *The ‘I’m Rubber, You’re Glue’ Candidate*, NEW REPUBLIC, June 20, 2016, <https://newrepublic.com/article/133872/im-rubber-youre-glue-candidate>.

<sup>202</sup> Donald J. Trump (@realDonaldTrump), TWITTER (July 16, 2016, 8:23 AM), <https://twitter.com/realdonaldtrump/status/754305404302139392?lang=en>.

<sup>203</sup> See, e.g., Robert Litan, *How Citizens United Helps Trump and Sanders, and Other 2016 Twists*, WALL ST. J. (Aug. 31, 2015), <http://blogs.wsj.com/washwire/2015/08/31/how-citizens-united-helps-trump-and-sanders-and-other-2016-twists/>.

<sup>204</sup> Trump’s rhetoric during the 2016 presidential primaries alienated many potential big donors, but Trump ultimately sought and received substantial funds from wealthy backers for the general election campaign. See, e.g., Matea Gold & Anu Narayanswamy, *Six Donors that Trump Appointed Gave Almost \$12 Million with Their Families to Back His Campaign and the Party*, WASH. POST, Dec. 9, 2016, [https://www.washingtonpost.com/news/post-politics/wp/2016/12/09/the-six-donors-trump-appointed-to-his-administration-gave-almost-12-million-with-their-families-to-his-campaign-and-the-party/?utm\\_term=.7c4e621ed044](https://www.washingtonpost.com/news/post-politics/wp/2016/12/09/the-six-donors-trump-appointed-to-his-administration-gave-almost-12-million-with-their-families-to-his-campaign-and-the-party/?utm_term=.7c4e621ed044); Libby Watson, *The Final Stretch: The Chaotic Super PACs Supporting Donald Trump*, Sunlight Foundation, Nov. 1, 2016, <https://sunlightfoundation.com/2016/11/01/the-final-stretch-the-chaotic-super-pacs-supporting-donald-trump/>; David A. Graham, *The Lie of Trump’s ‘Self-Funding’*

from spending on behalf of those candidates' opponents due to the prospect that their support could backfire on its intended beneficiary. Of course, adopting an anti-big money strategy does not guarantee electoral success. Much will depend on the circumstances, including the salience of the race. In low-profile elections, candidates may have a more difficult time garnering the public attention on which this strategy depends.<sup>205</sup>

Candidates who express hostility toward big money typically combine that message with an effort to attract small donors. This is an additional method of reducing big money's relative influence, one common even among candidates who welcome wealthy backers. In the wake of *Citizens United*, some commentators anticipated that small donors would no longer open their wallets since their contributions would be dwarfed by big money.<sup>206</sup> That has not been the case.<sup>207</sup> Candidates often make it a priority to attract small donors, and small contributions continue to flow. For example, during the 2016 Democratic presidential primaries, Bernie Sanders repeatedly touted his millions of donors and their average contributions of \$27.<sup>208</sup> He ended up with seven million individual donors, and nearly 60 percent of his total campaign funds came from people who gave \$200 or less.<sup>209</sup> Meanwhile, despite initially insisting that he was

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*Campaign*, THE ATLANTIC, May 13, 2016, <https://www.theatlantic.com/politics/archive/2016/05/trumps-self-funding-lie/482691/>.

Bernie Sanders, meanwhile, did benefit to some extent from high-end fundraisers and from Super PAC spending, but he appears to have lacked the sort of mega-donors that supported other major candidates, and even the Super PAC money spent on his behalf largely came from small donors. See, e.g., Sam Fritzell, *Bernie Sanders Attracts Some Big Campaign Money Despite Denunciations*, TIME, Dec. 9, 2015, <http://time.com/4141201/bernie-sanders-superpac-money/>; Matea Gold, *Sanders's Outsider Message is Being Boosted, from Outside, by Super PACs*, WASH. POST, Jan. 28, 2016.

<sup>205</sup> Cf. Thomas M. Holbrook & Aaron C. Weinschenk, *Money, Candidates, and Mayoral Elections*, 34 ELECTORAL STUDIES 292 (2014); David Schleicher, *Why Is There No Partisan Competition in City Council Elections? The Role of Election Law*, 23 J.L. & POL. 419 (2007).

<sup>206</sup> See, e.g., Russ Feingold, *The Money Crisis: How Citizens United Undermines Our Elections and the Supreme Court*, 64 STAN. L. REV. ONLINE 145, 147 (2012) (“[W]hen the groups created by *Citizens United* dominate our elections with hundreds of millions of dollars of unregulated money, many may begin to believe that the average participant’s small contribution is irrelevant[.]”); Overton, *Participation Interest*, *supra* note 47, at 1263 (“Candidates now have increased incentives to focus on finding a few wealthy investors to steer multimillion-dollar contributions to supportive outside groups.”); Douglas M. Spencer & Abby K. Wood, *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315, 348 (2014) (“One hypothesis about the rise of overwhelming large expenditures is that it will drown out the voices of smaller donors, or crowd them out altogether.”).

<sup>207</sup> See Spencer & Wood, *supra* note 206, at 352.

<sup>208</sup> See, e.g., Clare Foran, *Bernie Sanders's Big Money*, THE ATLANTIC (Mar. 1, 2016), <https://www.theatlantic.com/politics/archive/2016/03/bernie-sanders-fundraising/471648/>.

<sup>209</sup> See Seema Mehta et al., *Who Gives Money to Bernie Sanders?*, L.A. TIMES (June 3, 2016), <http://www.latimes.com/projects/la-na-pol-sanders-donors/>.

largely self-funding his campaign, Trump ultimately raised more money from small donors than Sanders and Clinton combined.<sup>210</sup> Trump even appears to have eclipsed the small-dollar fundraising of President Obama, who, in 2008 and 2012, generated then-unprecedented levels of support from small donors.<sup>211</sup> Such attempts to attract small donors are by no means limited to presidential campaigns. Candidates at all levels solicit funds from small donors, conveying the message that their contributions are vital to countering deep-pocketed adversaries.<sup>212</sup>

Technology has played a pivotal role in facilitating small-dollar fundraising and increasing its potential to serve as a counterweight to big money.<sup>213</sup> The internet, email, and social media have made it easier and cheaper than ever for candidates to solicit small donors and for donors to make contributions.<sup>214</sup> Online intermediaries have further assisted in connecting donors and candidates.<sup>215</sup> One of the most prominent, ActBlue, describes its mission as “democratiz[ing] power and helping small-dollar donors make their voices heard in a real way.”<sup>216</sup> Politicians and their campaign staffs have also become increasingly adept at using these technological tools. To take just one example, during a 2016 Democratic primary debate, Bernie Sanders announced that he was “going to hold a fundraiser right here, right now, across America,” and he urged people to go to his website and contribute, which they did to the tune of \$8 million.<sup>217</sup>

In addition to denigrating big donors and celebrating small ones, candidates also aim to counter big money’s influence by gaining exposure and communicating with voters on the cheap. Attempting to attract free

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<sup>210</sup> Campaign Finance Institute, *President Trump, with RNC Help, Raised More Small Donor Money than President Obama; as much as Clinton and Sanders Combined* (Feb. 21, 2017), [http://www.cfinst.org/Press/PReleases/17-02-21/President\\_Trump\\_with\\_RNC\\_Help\\_Raised\\_More\\_Small\\_Donor\\_Money\\_than\\_President\\_Obama\\_As\\_Much\\_As\\_Clinton\\_and\\_Sanders\\_Combined.aspx](http://www.cfinst.org/Press/PReleases/17-02-21/President_Trump_with_RNC_Help_Raised_More_Small_Donor_Money_than_President_Obama_As_Much_As_Clinton_and_Sanders_Combined.aspx).

<sup>211</sup> *Id.*; see also Laura MacCleery, *Goodbye Soft Money, Hello Grassroots: How Campaign Finance Reform Restructured Campaigns and the Political World*, 58 CATH. U. L. REV. 965, 999 (2009); Molly J. Walker Wilson, *The New Role of the Small Donor in Political Campaigns and the Demise of Public Funding*, 25 J.L. & POL. 257 (2009).

<sup>212</sup> Democratic politicians, for instance, often invoke the big spending Koch brothers “as a political foil to raise funds.” HASEN, *supra* note 3, at 8.

<sup>213</sup> See, e.g., Overton, *supra* note 15, at 1699

<sup>214</sup> See, e.g., Richard L. Hasen, *Political Equality, the Internet, and Campaign Finance Regulation*, 6 THE FORUM 1 (2008). Some commentators caution, however, that the value of these devices should not be overstated, in part because they can also facilitate big-dollar fundraising. See, e.g., Overton, *Participation Interest*, *supra* note 47, at 1288 & n.146.

<sup>215</sup> See, e.g., Nathaniel J. Gleicher, *Moneybombs and Democratic Participation: Regulating Fundraising by Online Intermediaries*, 70 MD. L. REV. 750 (2011); MacCleery, *supra* note 211, at 1009.

<sup>216</sup> ActBlue, *About Us*, <https://secure.actblue.com/about> (last visited Feb. 28, 2017) (reporting more than \$1.5 billion collected for progressive candidates and causes since 2004).

<sup>217</sup> Foran, *supra* note 208.

media attention is a classic strategy along these lines,<sup>218</sup> and technological innovations have ushered in new tactics. Technology, after all, does more than reduce the transaction costs of raising money; it can also cut the costs of organizing supporters and disseminating a political message.<sup>219</sup> Trump's prolific use of Twitter offers a prime example.<sup>220</sup> And social media platforms can empower average citizens as well, giving them the potential to go viral and reach audiences that can be as large as the audiences for conventional paid advertising.<sup>221</sup> It is not a stretch to conceive of these technologies as alternative currencies that can serve some of the same functions as money, potentially offsetting the value of large aggregations of wealth.

Again, the point here is not to suggest that these methods of empowering the average citizen have solved or could solve the problem of big money. A number of commentators have sounded cautionary notes about their potential.<sup>222</sup> Small-donor fundraising strategies may not be easy to replicate, and they may worsen rather than alleviate political polarization.<sup>223</sup> Technological advances, meanwhile, not only provide new channels of influence for the mass public; they also give the wealthy new

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<sup>218</sup> Trump had significant success on this front during the 2016 presidential election. *See, e.g.,* Mary Harris, *A Media Post-Mortem on the 2016 Presidential Election*, MEDIAQUANT, Nov. 14, 2016, <https://www.mediaquant.net/2016/11/a-media-post-mortem-on-the-2016-presidential-election/>; Josh Nass, *Trump's PR Miracle, Explained*, THE HILL, Nov. 17, 2016, <http://thehill.com/blogs/pundits-blog/presidential-campaign/306570-trumps-pr-miracle-explained>.

<sup>219</sup> *See, e.g.,* Marvin Ammori, *A Shadow Government: Private Regulation, Free Speech, and Lessons from the Sinclair Blogstorm*, 12 MICH. TELECOMM. & TECH. L. REV. 1 (2005); *cf. ELLICKSON, supra* note 18, at 285-86.

<sup>220</sup> *See, e.g.,* Persily, *Can Democracy Survive, supra* note 17; Tamara Keith, *Commander-in-Tweet: Trump's Social Media Use and Presidential Media Avoidance*, NPR (Nov. 18, 2016), <http://www.npr.org/2016/11/18/502306687/commander-in-tweet-trumps-social-media-use-and-presidential-media-avoidance>. President Obama pioneered the use of platforms such as Twitter. *See* Lyrrisa Lidsky, *The Public Forum 2.0*, 91 BOS. U. L. REV. 1975, 2027 n.324 (2011).

<sup>221</sup> *See, e.g.,* K.K. Duviver, *E-Legisating*, 92 OR. L. REV. 9, 44 (2013) ("The Internet may be able to empower traditionally less-represented groups to inexpensively organize and mobilize to influence elected officials on the same level as their richer counterparts."); Sarah Tran, *Cyber-Republicanism*, 55 WM. & MARY L. REV. 383, 412 (2013) ("American adults of any race, age, gender, economic status, diet, sexual preference, religion, or other defining characteristic can influence the political processes by contributing their input on social media sites to an issue that goes viral.").

<sup>222</sup> *See, e.g.,* Overton, *Participation Interest, supra* note 47, at 1288 & n.146 ("Market forces alone will not sufficiently expand participation in the near future.").

<sup>223</sup> *See, e.g.,* Victoria Bassetti, *Forget Bernie Sanders. Small Donors Alone Won't Save Politics*, BRENNAN CENTER FOR JUSTICE (July 11, 2016), <https://www.brennancenter.org/blog/forget-bernie-sanders-small-donors-alone-wont-save-politics>; Ian Vandewalker & Lawrence Norden, *Small Donors Still Aren't as Important as Wealthy Ones*, THE ATLANTIC, Oct. 18, 2016, <https://www.theatlantic.com/politics/archive/2016/10/campaign-finance-fundraising-citizens-united/504425/>.

opportunities to use their resources to communicate and organize.<sup>224</sup> Again, the takeaway is simply that much is happening beyond the law, and extra-legal activities and forces are having at least some mitigating effect on big money's influence.

### 3. *Minimizing Big-Money Abuses*

A third category of private activities serve to channel money away from particularly objectionable uses and to assist the public in making informed electoral choices. This category is closely linked to the previous one since limiting what money can buy and giving voters information to assess big money's role will tend to diminish the influence that big money wields. The activities described here, however, have more of a consumer protection flavor than the activities discussed above.

One classic device for protecting political consumers is campaign finance disclosure. By law, the federal government and most states and localities require some election-related contributions and expenditures to be publicly disclosed by the spender or recipient.<sup>225</sup> But legal disclosure regimes are incomplete. Voluntary disclosure has long helped to fill at least a few of the gaps. Instances of voluntary disclosure occurred even before the first federal disclosure laws were enacted. In 1908, the major party presidential candidates agreed to make their campaign finances public.<sup>226</sup> Both candidates wanted to assure voters that they were not being bankrolled by Wall Street.<sup>227</sup> Likewise, modern candidates sometimes make voluntary disclosures in the name of transparency, either unilaterally or by agreement.<sup>228</sup>

In recent years, corporations have made especially visible strides toward voluntary campaign finance disclosure, often after a nudge from shareholders and advocacy groups. A majority of large public corporations now disclose more about their political expenditures than the law requires.<sup>229</sup> In dozens of instances, these corporate policies are the

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<sup>224</sup> See Overton, *Participation Interest*, *supra* note 47, at 1288 & n.146; Persily, *Campaign Revolution*, *supra* note 17.

<sup>225</sup> See 52 U.S.C. § 30104 (setting forth federal reporting requirements); National Conference of State Legislatures, *State Campaign Finance Disclosure Requirements, 2015-16 Election Cycle* (last updated July 17, 2015), <http://www.ncsl.org/Portals/1/documents/legismgt/elect/StateCampaignFinanceDisclosureRequirementsChart2015.pdf>.

<sup>226</sup> ROBERT MUTCH, *BUYING THE VOTE* 6-7 (2014).

<sup>227</sup> *Id.*

<sup>228</sup> See, e.g., Michael Beckel, *One Simple Way the Senate Could Embrace the Internet in 2017*, CENTER FOR PUBLIC INTEGRITY (Feb. 2, 2017), <https://www.publicintegrity.org/2017/02/02/20658/one-simple-way-senate-could-embrace-internet-2017>; Neal P. Goswami, *Dunne Discloses Raising \$717,855 in Voluntary Filing*, VERMONT PRESS BUREAU, June 15, 2016.

<sup>229</sup> See Eduardo Porter, *Corporations Open Up About Political Spending*, N.Y. TIMES (June 9, 2015), [http://www.nytimes.com/2015/06/10/business/corporations-open-up-about-political-spending.html?\\_r=0](http://www.nytimes.com/2015/06/10/business/corporations-open-up-about-political-spending.html?_r=0).

byproduct of agreements that public companies have reached with shareholder groups, which routinely bring resolutions seeking greater transparency.<sup>230</sup> In the first two months of 2017 alone, shareholders formally filed more than 90 proposals pertaining to corporate political activity.<sup>231</sup> The Center for Political Accountability, a principal backer of these efforts, estimates that “145 leading American companies . . . have adopted [its] political disclosure and accountability model.”<sup>232</sup> Questions have been raised, however, about the effectiveness of such corporate disclosure regimes.<sup>233</sup>

While some actors choose to provide more information than the law requires, others focus on compiling, organizing, and publicizing both voluntary and required disclosures. Organizations that operate in this space include the Center for Responsive Politics, the Sunlight Foundation, and the National Institute on Money in Politics.<sup>234</sup> By translating raw disclosure reports and data into more usable forms, with search functionalities, charts, and more, these groups help to promote public oversight of the electoral process.<sup>235</sup> The groups also frequently interface with journalists, enhancing the ability of media outlets to serve as campaign finance watchdogs and to share key findings with a large audience.<sup>236</sup>

While the media’s efforts to illuminate where and how money is flowing serve to rein in big-money abuses, critics simultaneously chide the media for exacerbating the problem of money by disseminating paid

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<sup>230</sup> See Haan, *supra* note 17, at 264.

<sup>231</sup> See Douglas Chia & Gary Larkin, *This Year’s Proxy Season will Shine a Light on Corporate Political Spending*, THE HILL, May 2, 2017, <http://thehill.com/blogs/pundits-blog/finance/331612-own-stocks-what-to-expect-during-this-years-proxy-season>.

<sup>232</sup> Center for Political Accountability, *supra* note 158, at 23.

<sup>233</sup> See *infra* note 265 and accompanying text.

<sup>234</sup> See Center for Responsive Politics, *Our Vision and Mission: Inform, Empower & Advocate*, <https://www.opensecrets.org/about/>; see also National Institute for Money in State Politics, *Mission & History*, <http://www.followthemoney.org/about-us/mission-and-history/> (last visited Feb. 28, 2017); Sunlight Foundation, *Our Mission*, <https://sunlightfoundation.com/about/> (last visited Feb. 28, 2017). The Center for Political Accountability also recently launched a tool to help track corporate spending. See Track Your Company, <http://www.trackyourcompany.org/> (last visited June 27, 2017); see also Eliza Newlin Carney, *Shareholders Demand Disclosure—and Republicans Push Back*, THE AMERICAN PROSPECT, May 4, 2017, <http://prospect.org/article/shareholders-demand-disclosure-and-republicans-push-back>.

<sup>235</sup> According to the Center, its vision “is for Americans, empowered by access to clear and unbiased information about money’s role in politics and policy, to use that knowledge to strengthen our democracy.” Center for Responsive Politics, *Our Vision and Mission: Inform, Empower & Advocate*, <https://www.opensecrets.org/about/>.

<sup>236</sup> A RAND Corporation study described the National Institute for Money in State Politics as “a driving force behind informed public discussion of state campaign finance in the academic, journalistic, and advocacy communities.” Geoffrey McGovern & Michael D. Greenberg, *Shining a Light on State Campaign Finance: An Evaluation of the Impact of the National Institute on Money in State Politics* xi (2014), <http://www.followthemoney.org/assets/press/RAND-report-Aug-2014/RAND-NIMSP-Report.pdf>; see also *id.* at 20.



political ads, and they urge media outlets to show restraint. Advocacy groups sometimes appeal to outlets to reject certain types of ads. The League of Women Voters, for instance, engaged in a largely unsuccessful effort after *Citizens United* to persuade media outlets “to refuse political advertising paid for by secret money.”<sup>237</sup> During the 2012 election cycle, the Annenberg Public Policy Center organized a “Stand By Your Ad” campaign to encourage broadcasters to refrain from running false or misleading ads.<sup>238</sup> The campaign generated tens of thousands of emails to station managers asking for ads to be pulled, and some requests were honored.<sup>239</sup> In the days before the election, Annenberg even bought advertisements on stations that had complied with removal requests to thank them.<sup>240</sup> Annenberg, however, did not renew its effort in 2016. Individual candidates also routinely ask media outlets to pull particularly offensive ads, using the threat of defamation or libel lawsuits as a cudgel,<sup>241</sup> and outlets occasionally do relent.<sup>242</sup>

Notably, even when they are not facing direct outside pressure, media outlets do engage in at least a modicum of self-regulation when it comes to election ads. Most major outlets have detailed policies describing the sort of ads—political and otherwise—they will and will not accept.<sup>243</sup> Occasionally, outlets choose to steer clear of political advertisements

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<sup>237</sup> Press Release, League of Women Voters, *League Calls on Media to Stop Secret Political Advertising* (Oct. 15, 2010), <http://lww.org/press-releases/league-calls-media-stop-secret-political-advertising-0>.

<sup>238</sup> Annenberg Public Policy Center, *APPC’s FlackCheck.org Launches “Stand by Your Ad” To Fight Deception in Super PAC and Other Third Party Political Advertising*, Feb. 21, 2012, <https://www.annenbergpublicpolicycenter.org/appcs-flackcheckdotorg-launches-stand-by-your-ad-to-fight-deception-in-super-pac-and-other-third-party-political-advertising/>; League of Women Voters, *Stations: Stand By Your Ad – Fact Sheet* (May 2012), <http://lww.org/files/StationsStandbyYourAdFactSheet.pdf>.

<sup>239</sup> Annenberg Public Policy Center, *In Election’s Closing Days, Ad Campaign Urges Battleground Stations to Reject Deceptive Outside Group Ads and Increase On-Air and Online Fact Checking*, Oct. 21, 2012, <https://www.annenbergpublicpolicycenter.org/ad-campaign-urges-battleground-stations-to-reject-deceptive-outside-group-ads-and-increase-on-air-and-online-fact-checking/>.

<sup>240</sup> *Id.*

<sup>241</sup> See Kerry L. Monroe, *Unreasonable Access: Disguised Issue Advocacy and the First Amendment Status of Broadcasters*, 25 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 117, 120, 146 (2014) (“During election season, broadcasters receive a constant flow of cease and desist letter from candidates claiming to have been defamed by ads sponsored by political action committees and other noncandidate advertisers.”).

<sup>242</sup> To take a recent example, several Wisconsin television stations pulled an ad run against Russ Feingold in his 2016 U.S. Senate race after campaign lawyers sent letters documenting the ad’s false claims. Daniel Bice, *Three TV Stations Pull Tomah Ad Critical of Russ Feingold*, *MILWAUKEE J. SENTINEL*, May 8, 2016.

<sup>243</sup> See, e.g., *Fox Broadcasting Company Advertising Guidelines* (2013-14), <http://www.fox.com/sites/default/files/FBCADVERTISERGUIDELINESFINAL2013-2014.pdf>; *CBS Local Digital Media Advertising Guidelines*, <http://policies.cbslocal.com/guidelines/advertising/> (last visited Feb. 28, 2017).

entirely, perhaps deeming them inconsistent with their brands.<sup>244</sup> Overall, however, traditional media outlets seem to doing less self-regulation today than in the past, perhaps because of the pull of advertising revenue.<sup>245</sup> In contrast, social media outlets and search engines may be trending toward more self-regulation,<sup>246</sup> especially after those outlets received criticism for their role in spreading so-called “fake news” during the 2016 election.<sup>247</sup> A full discussion of that emerging issue is beyond the scope of this Article.<sup>248</sup>

### B. Opportunities and Challenges for Private Reform

What lessons should be drawn from this survey of the private ordering terrain? A committed proponent of campaign finance regulation might contend that it merely highlights the inadequacy of private pushback against big money and thus confirms the necessity of robust government action. That response, however, presumes that private interventions have already reached their full potential, which is unlikely given that attention to and investment in extra-legal correctives has been relatively modest. Cataloging the existing private order sheds light on prospects for additional private action and on challenges such efforts might face. That analysis, in turn, offers grounds for guarded optimism about private reform.

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<sup>244</sup> Disney.com, for instance, includes “[p]olitics (lobbyists, PAC sites, political campaigns)” on its list of “[i]nappropriate ad content.” <http://mediakit.go.com/disney/disneyADguidelines.html>. On rare occasion, outlets have declined to run ads for a particular candidate. During the 2016 election cycle, BuzzFeed made headlines for terminating an ad deal with the Republican Party. See Callum Borchers, *BuzzFeed’s Unprecedented Donald Trump Ad Ban Baffles the News Biz*, WASH. POST (June 7, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/06/07/buzzfeeds-unprecedented-donald-trump-ad-ban-baffles-the-news-biz/?utm\\_term=.2483d91bda7b](https://www.washingtonpost.com/news/the-fix/wp/2016/06/07/buzzfeeds-unprecedented-donald-trump-ad-ban-baffles-the-news-biz/?utm_term=.2483d91bda7b).

<sup>245</sup> The major television networks, for example, used to have blanket policies against accepting non-electoral political advocacy ads, but they have since changed their tune. Compare Nat Ives, *On the Issue of the Iraq War, Advocacy Ads Meet with Rejection from TV Networks*, N.Y. TIMES, Mar. 13, 2003, with Meg James, *CBS Defends Decision To Run Politically Sensitive Tim Tebow Ad During Super Bowl*, L.A. TIMES, Jan. 27, 2010.

<sup>246</sup> See Persily, *Campaign Revolution*, *supra* note 17 (describing content and advertising policies of online platforms).

<sup>247</sup> After the 2016 election, Facebook and Google updated their advertising policies to make clear that they would not integrate ads on fake news websites, thereby depriving those sites of an important source of revenue. See Persily, *Can Democracy Survive*, *supra* note 17, at 72-73 (2017); Elizabeth Dwoskin et al., *Why Facebook and Google Are Struggling To Purge Fake News*, WASH. POST, Nov. 15, 2016; Jack Nicas, *Google To Bar Fake-News Websites from Using its Ad-Selling Software*, WALL ST. J., Nov. 14, 2016. Some commentators have expressed concern about having social media companies get more involved in overseeing election-related content. See, e.g., Jonathan Zittrain, *Engineering an Election*, 127 HARV. L. REV. F. 335 (2014).

<sup>248</sup> For incisive commentary on this topic, see, for example, Persily, *Can Democracy Survive*, *supra* note 17; Persily, *Campaign Revolution*, *supra* note 17 (predicting that “[t]he terms of service for platforms chiefly used for political communication will become more important than formal law”).

An initial takeaway from the litany of extra-legal activities described in the previous Section is that the menu of private reform options is extensive. First, at least five distinct types of parties can act and be acted upon: (1) potential big spenders, (2) the mass public, (3) candidates and office holders, (4) political parties, and (5) the media. Actors within all of these categories have incentives, or might be incentivized, to lessen big money's electoral role. These actors also have an abundance of extra-legal tools and points of leverage to help them achieve their goals. They can exert pressure on other members of their group and on players in each of the other groups in virtually limitless combinations.<sup>249</sup>

Second, private campaign finance interventions can take several distinct structural forms.<sup>250</sup> Private order can emerge from decisions by individuals and entities to show self-restraint or self-initiative—in other words, to refrain voluntarily from legally permissible acts (such as spending large sums) or to engage voluntarily in acts not legally required (such as making optional disclosures).<sup>251</sup> It can emerge from mutual agreements among actors to conduct themselves in particular manner, perhaps on penalty of a privately enforceable sanction (e.g., the People's Pledge or corporate disclosure policies negotiated with shareholders).<sup>252</sup> And it can emerge when actors create mechanisms to reward or punish other actors for engaging in favored or disfavored conduct (e.g., Stand By Your Ad).<sup>253</sup>

Third, and relatedly, private interventions can vary significantly in terms of their level of formality and institutionalization. They can be highly organized and law-like (e.g., the People's Pledge), completely ad hoc (e.g., candidates' use of anti-big money rhetoric), or somewhere in between (e.g., media advertising policies).<sup>254</sup> Private actions may even alter money's electoral role without anyone consciously intending that result.

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<sup>249</sup> In contrast, while public regulatory regimes can act upon an array of private actors, it is the government that does the acting, whether on its own initiative or at the behest of private parties.

<sup>250</sup> Scholars of private ordering have recognized these structural options in other contexts as well. *See, e.g.,* ELLICKSON, *supra* note 18, at 126-27.

<sup>251</sup> *See id.* at 126 (referring to self-imposed “rules and sanctions” as “first-party control”). Ellickson distinguishes self-restraint based on personal ethics from restraint based on social forces, describing the latter a type of third-party control. *Id.* at 126-27. In practice, the underlying motives for self-restraint will often be mixed and difficult to parse.

<sup>252</sup> *See id.* at 126 (describing a “promisee-enforced contract” as “a system of second-party control” in which “the person acted upon administers rewards and punishments depending on whether the promisor adheres to the promised course of behavior”).

<sup>253</sup> *See id.* at 126-27 (describing the imposition of rules and sanctions on parties that may not have agreed to them as “third-party control”).

<sup>254</sup> Public regulatory regimes, in contrast, are necessarily quite formalized, even when they rely more on general standards than on specific rules. *Cf. Louis Kaplow, Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992) (distinguish rules from standards based on “the extent to which efforts to give content to the law are undertaken before or after individuals act”).

Together, these features of private ordering give private reform a significant edge over public regulation in terms of freedom and flexibility. Reformers can pursue private solutions without getting mired in legislative and bureaucratic quagmires, thwarted by constitutional constraints, or hemmed in by jurisdictional boundaries. Avoiding those obstacles may open the door to more holistic approaches, and enable more efficient responses to emerging issues.<sup>255</sup>

Reformers may also be able to pursue at least some extra-legal measures without encountering the same degree of opposition that public regulatory advocacy generates. After all, a core theme of reform opponents is that election discourse should be free from government interference. Private reform does not raise that anti-regulatory objection. Consequently, it may divide campaign finance reform's usual critics. Those who are principled regulatory skeptics but have no particular affinity for big money may be willing to make peace with private reform. Those who are big-money devotees may resist, but they will no longer have the luxury of casting their opposition in anti-regulatory (or constitutional) terms. Instead, they will have to establish that our electoral system is better off when big money flows through it—perhaps not an impossible argument, but certainly a tougher one.

While these are all important virtues of private reform, the picture is not entirely rosy. The previous Section's survey of the private ordering terrain also points to countervailing considerations and to potential comparative advantages of public regulation. For starters, although private interventions face fewer formal barriers to adoption than public regulations, practical challenges often arise, perhaps most notably in the form of coordination and collective action problems. Private interventions that rely on broad public buy-in can be difficult to organize, sustain, and replicate. Even the most engaged citizens have limited capacity to protest, boycott, or contribute.<sup>256</sup> To complicate matters further, most actors in the electoral system have crosscutting commitments and values that make it harder for private reform efforts to gain traction. Average voters, for instance, may dislike a candidate's reliance on big money, but they may be willing to look the other way if that candidate aligns with their substantive policy preferences.<sup>257</sup> Similarly, candidates and political parties might prefer to eschew big money and avoid incurring political debts to wealthy backers,

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<sup>255</sup> See ELLICKSON, *supra* note 18, at 252.

<sup>256</sup> See, e.g., Mary Emily O'Hara, #NotMyPresident's Day: Endless Protests Raise the Specter of 'Resistance Fatigue', NBCNEWS, Feb. 20, 2017, <http://www.nbcnews.com/news/us-news/notmypresident-s-day-endless-protests-raise-specter-resistance-fatigue-n722351>.

<sup>257</sup> See, e.g., Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J. L. & POL. 683, 713 (2012) ("Even if a voter is troubled by reports of a candidate's donors, if the voter thinks that candidate dominates her opponent on experience, character, or the most salient issues, the voter will be unable to act on her campaign finance concerns.").

but they also want to win. Parties, moreover, might find themselves divided between their various stakeholders, with grassroots activists trying to push big money out at the same time party leaders are clamoring for more.<sup>258</sup> Media outlets, meanwhile, might be torn between competing impulses to profit from paid advertisements and sensationalistic coverage, to serve as credible checks and watchdogs, and perhaps to advance the political agendas of their owners.<sup>259</sup> Together, these dynamics can create real headwind for private reformers. From a comparative perspective, however, the amount of private ordering activity that is already occurring suggests private reform generally remains easier to initiate than public regulation.

A related challenge for private reform concerns the staying power of private interventions once they get off the ground. Laws and regulations can be difficult to enact, but, once enacted, they tend to endure (at least absent judicial invalidation).<sup>260</sup> Private action, in contrast, usually lacks a similar level of entrenchment. Policy entrenchment is by no means an unalloyed good. In the regulatory context, it is sometimes synonymous with ossification and unresponsiveness.<sup>261</sup> But the relatively ephemeral nature of private interventions means that successes are not locked in. Instead, ongoing efforts may be needed to keep reform going, heightening the prospects for retrenchment and inconsistent results.<sup>262</sup>

Public regulation, moreover, has several core strengths that private reform efforts will typically struggle to match. As others have observed, public lawmaking processes may be more cumbersome than private ordering, but they potentially offer more transparency, more democratic accountability and legitimacy, and more uniformity and predictability.<sup>263</sup> The government also has unique enforcement capabilities that can help to ensure compliance even among resistant subgroups that private reformers may struggle to influence.<sup>264</sup> These relative weaknesses of private reform loom large in Sarah Haan's recent analysis of corporate commitments to disclose their electoral spending. While Haan concludes that these

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<sup>258</sup> For discussion of political parties' heterogeneous constituents and tension between them, see, for example, Andrias, *supra* note 61, at 453, 501-02; Joseph Fishkin & Heather K. Gerken, *The Party's Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175 (2015); Kang, *supra* note 182.

<sup>259</sup> See, e.g., Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1 (1999); Callum Borchers, *The Head of CBS Stated the Obvious About Why the Media Likes Donald Trump. It Still Feels Wrong*, WASH. POST, Dec. 10, 2015.

<sup>260</sup> See, e.g., Michael Sant'Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 354 (2014).

<sup>261</sup> See generally Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992)

<sup>262</sup> Consider, for instance, the Democratic National Committee's decision to jettison its policy against lobbyist and PAC contributions, or the fact that the Annenberg Center did not run its Stand By Your Ad campaign in 2016.

<sup>263</sup> See Ellen D. Katz, *Private Order and Public Institutions*, 98 MICH. L. REV. 2481, 2481-82 (2000).

<sup>264</sup> See ELLICKSON, *supra* note 18, at 249-50.

agreements have “generated some improvements” in disclosure, she identified important shortcomings, including non-transparent adoption processes, inadequate compliance mechanisms, and gaps in coverage.<sup>265</sup> It is certainly appropriate to lament deficiencies like these, and perhaps to regard private ordering as a second-best alternative in at least some circumstances. But if government action is not forthcoming, then private reform may be the only game in town.

#### IV. TOWARD A PRIVATE REFORM AGENDA

The discussion thus far suggests that it may be time for academics and advocates alike to reprioritize and pursue the underexplored possibility of extra-legal reform. Drawing on Part III’s survey of the private ordering landscape, this Part sketches out some potential options for future reform. The first set of proposals aims at building and deepening social norms regarding electoral spending. The second set seeks to use big money to fight big money. These are tentative suggestions, not detailed policy plans. The hope is that this discussion will lay the foundations for future work on private campaign finance reform that more fully develops—or perhaps critiques—these ideas and others.

##### A. *Shifting Social Norms*

Many scholars have addressed the importance of social norms as a substitute for or supplement to formal legal rules.<sup>266</sup> According to one canonical definition, “norms” refer to “informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both.”<sup>267</sup> Entrepreneurial actors can create and strengthen norms by building consensus about the propriety or impropriety of certain conduct, ensuring that the conduct is noticed, and extolling or condemning the conduct.<sup>268</sup> In the campaign finance context, reformers could work to develop two complementary norms to constrain big money’s influence: a norm against making outsized election-related expenditures, and a norm in favor of making small ones. The first norm is principally relevant to the affluent few, the second to the broader public. Nascent versions of these norms arguably

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<sup>265</sup> See Haan, *supra* note 17, at 264, 269-70; see also Siebecker, *supra* note 133, at 2734 (contending that voluntary corporate disclosure policies should be supplemented by mandatory disclosure rules).

<sup>266</sup> See, e.g., CRISTINA BICCHIERI, *THE GRAMMAR OF SOCIETY: THE NATURE AND DYNAMICS OF SOCIAL NORMS* (2006); ELLICKSON, *supra* note 18; ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* (1977); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 339 (1997); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

<sup>267</sup> McAdams, *supra* note 266, at 339.

<sup>268</sup> See *id.* at 346.

already exist. Once bolstered, the norms would together serve to reduce the amount of big money in politics and its relative clout.<sup>269</sup>

Many wealthy actors already show some alignment with a norm against outsized expenditures. As previously noted, the majority of corporations and individuals with the financial wherewithal to spend big decline to do so.<sup>270</sup> Actors who do inject sizable sums into the campaign finance system have concluded that the benefits of doing so exceed the sum of the outlay itself plus whatever disapprobation or other disutility the expenditure generates. To alter that calculus, an initial step is simply to be more vocal in denouncing big spenders, portraying them as idiosyncratic outliers even among the affluent, while simultaneously highlighting and praising the conduct of those actors who refrain from spending.

Existing reform-minded groups are well positioned to assist in this norm-building process. Such groups already vociferously criticize big money, though usually in an effort to push for legal change. All it would take is a slight shift in messaging to make their approach more norm-oriented. In particular, they could communicate directly with deep-pocketed actors and urge them to modify (or continue) their behavior,<sup>271</sup> and they could simultaneously encourage the mass public, candidates, and political parties to repudiate big spenders and to extol abstainers.<sup>272</sup>

In addition, because subgroups within society sometimes maintain their own distinct social norms,<sup>273</sup> affluent actors might be especially helpful in encouraging forbearance on the part of their big spending compatriots. A concrete step along these lines would be to facilitate a campaign finance version of the well-known Giving Pledge spearheaded by Warren Buffett and Bill and Melinda Gates.<sup>274</sup> The Giving Pledge is a public commitment by billionaires to give the majority of their wealth to charity during their lifetimes. The pledgers—now more than 150 of them<sup>275</sup>—generate good will for themselves and place implicit pressure on other

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<sup>269</sup> Some might question calls for a small-donor norm on the ground that such a norm accepts the inevitability or desirability of resource-intensive campaigning. They might prefer norm-building efforts that aim to make campaigns less dependent on money, such as encouraging citizens to become campaign volunteers. This Article's suggestion of building a small-donor norm is not meant to denigrate this potential alternative path.

<sup>270</sup> See *supra* notes 152-181 and accompanying text.

<sup>271</sup> The Center for Political Accountability has pursued such a strategy as it endeavors "to change corporate political spending norms." Center for Political Accountability, *supra* note 173.

<sup>272</sup> This could include encouraging voters to reject candidates who rely heavily on big money, encouraging consumers to place economic pressure on big spenders, and encouraging politicians to refuse the largesse of deep-pocketed backers.

<sup>273</sup> See, e.g., ELLICKSON, *supra* note 18, at 249-50.

<sup>274</sup> See *The Giving Pledge*, <https://givingpledge.org/> (last visited Feb. 28, 2017).

<sup>275</sup> Laura Lorenzetti, *17 More Billionaires Join Buffett and Gates' Giving Pledge This Year*, FORTUNE, June 1, 2016.

billionaires to join the effort.<sup>276</sup> In contrast to the Giving Pledge, which asks the wealthy to part with their money, a Democracy Pledge would ask them to keep it—or, more to the point, to keep their resources out of elections.

Judgments would have to be made about the scope of such a pledge. An ambitious version could ask wealthy actors not only to refrain from making independent expenditures, whether directly or through intermediaries, but to limit their direct contributions as well.<sup>277</sup> Somewhat less ambitious versions could focus solely on independent expenditures, or could ask pledgers to commit not to spend except defensively—that is, unless countering big money that someone else injects first. Even more modestly, pledgers could eschew dark money and commit to full disclosure of any election-related spending. Given the overwhelming public disapproval of big money, Democracy Pledgers would receive the same sort of approbation as Giving Pledgers, and at a much lower financial cost. Moreover, as with the Giving Pledge, there is the potential to create a virtuous cycle, with initial commitments helping to generate further ones as social pressures and expectations build.<sup>278</sup> If anything, it may be easier to build momentum with a Democracy Pledge since every additional pledge should help to assure prospective pledgers that, by limiting their own spending, they will not be disadvantaging themselves relative to their wealthy peers.

Similar efforts could be pursued to establish a norm in favor of small-dollar contributions. Some steps are already being taken. The emphasis many candidates place on attracting small donors has helped to highlight that becoming a funder can be an important way to participate in the electoral process, even for people of relatively modest means. Among some politically active segments of the population, especially those with clear ideological commitments, a norm of small-dollar contributing likely already exists.<sup>279</sup> But this represents just a small proportion of the public. About 10 percent of Americans report that they contribute to campaigns or otherwise spend money on elections.<sup>280</sup> Among the least well-off and

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<sup>276</sup> Ezra Rosser, *Offsetting and the Consumption of Social Responsibility*, 89 WASH. U. L. REV. 27, 84 n.199 (2011); see also *The Giving Pledge, Frequently Asked Questions*, <https://givingpledge.org/faq.aspx> (last visited Feb. 28, 2017).

<sup>277</sup> Limiting direct contributions could mean capping individual contributions below the legal maximum and/or setting an aggregate contribution ceiling of the kind the Supreme Court invalidated in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

<sup>278</sup> Cf. ROBERT D. PUTNAM ET AL., *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 177 (1993) (“Stocks of social capital, such as trust, norms, and networks, tend to be self-reinforcing and cumulative. Virtuous circles result in social equilibria with high levels of cooperation, trust, reciprocity, civic engagement, and collective well-being.”).

<sup>279</sup> Cf. Pildes, *supra* note 182, at 825 (discussing evidence that “individual donors are more ideologically extreme and more polarized than non-donors”); Adam Bonica, *Leadership, Free to Lead*, BOSTON REV., July 22, 2011 (“As a group, small donors are fiercely partisan and have concentrated their support on the most ideologically polarizing candidates.”).

<sup>280</sup> See Overton, *Participation Interest*, *supra* note 47, at 1289 & n.146.



among minority groups, these numbers are even lower.<sup>281</sup> Roughly speaking, Americans are at least five or six times more likely to vote than they are to contribute.<sup>282</sup> Developing a norm of contributing could begin to tap into a massive market of potential small donors.

To build a small-donor norm, the underlying objective is to increase the amount of esteem people garner when they contribute and/or the amount of opprobrium they experience when they do not. Because the population of potential small donors is large and diverse, shifting behavior in the direction of more small donations will likely require a sustained and multifaceted effort. But even raising participation rates by a few percentage points could have a meaningful impact on the way elections are funded.

In terms of developing strategies to move the needle on small-dollar contributions, two analogies may be helpful. The first potential model is get-out-the-vote efforts, which help to promote the norm of voting.<sup>283</sup> While candidates and parties have always worked hard to encourage their supporters to turn out,<sup>284</sup> established nonpartisan programs also encourage people to vote, regardless of whom they support.<sup>285</sup> These nonpartisan programs promote voting as an important and laudatory activity—a badge of good citizenship.<sup>286</sup> There have not yet been comparable nonpartisan efforts to promote small-dollar contributing as an expectation of engaged citizenship. Such programs could extend the norm of giving from those with the clearest partisan allegiances to a wider cross-section of the public. They might specially target groups with low giving rates, just as voting organizations like the Rock the Vote focus on a demographic (young people) that tends to be underrepresented at the polls. Among other things, reformers could work to normalize the practice of contributing through such seemingly trivial steps as creating a campaign finance version of the

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<sup>281</sup> See, e.g., McElwee et al, *supra* note 38, at 6.

<sup>282</sup> See *id.*

<sup>283</sup> See Overton, *Participation Interest*, *supra* note 47, at 1261 (“Just as civic norms encourage all citizens to vote, a key goal of campaign finance should be to encourage everyone to make a financial contribution to a political candidate or cause of his or her choice.”); cf. Hasen, *Voting Without Law?*, *supra* note 23, at 2135.

<sup>284</sup> See James A. Gardner, *Anti-Regulatory Absolutism in the Campaign Arena: Citizens United and the Implied Slippery Slope*, 20 CORNELL J. L. & PUB. POL’Y 673, 712 (2011) (“The primary function of election campaigns is to mobilize supporters.”).

<sup>285</sup> Rock the Vote, which focuses on young voters, may be the highest profile example. See *About Rock the Vote*, <https://www.rockthevote.com/about-us/> (last visited Feb. 28, 2017).

<sup>286</sup> See, e.g., DONALD P. GREEN & ALAN S. GERBER, GET OUT THE VOTE!: HOW TO INCREASE VOTER TURNOUT (2004).

ubiquitous “I Voted” stickers,<sup>287</sup> or encouraging contributors to share the fact that they donated on social media.<sup>288</sup>

Second, reformers could look to innovators in the charitable sector, who seek to deepen a norm of charitable giving and volunteer service. The possibilities are many. Consider the mushrooming popularity of Giving Tuesday—a movement that encourages people to give to charity on the Tuesday after Thanksgiving.<sup>289</sup> Campaign finance reformers could similarly designate a particular day or days during an election cycle as special donor days on which substantial public attention is directed toward making political contributions. Reformers might also produce and distribute contribution guides (akin to guides of charitable organizations, or nonpartisan voter guides) that provide information about candidates and a mechanism for contributing to them.<sup>290</sup>

None of these norm-building ideas will be a silver bullet. Reformers will need to pursue a range of interventions, and progress will likely be incremental. But small successes may lead to tipping points and feedback loops capable of generating more dramatic change.<sup>291</sup> For instance, as norms against big money and in favor of small money take hold, one of the major political parties could decide that the time is right to disavow big money entirely. That party could commit to receiving financing only from small donors and could ask its candidates to do the same. This may seem unlikely today, but it is more than a pipe dream. If party leaders and activists believed that big money was drying up or becoming more politically toxic,

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<sup>287</sup> See, e.g., Stefano Dellavigna et al., *Voting To Tell Others*, 84 REV. ECON. STUD. 143 (2017) (“If individuals care about what others think of them, they may derive pride from telling others that they voted or feel shame from admitting that they did not vote.”); Derek Thompson, *Why the ‘I Voted’ Sticker Matters*, THE ATLANTIC, Nov. 6, 2012, <https://www.theatlantic.com/business/archive/2012/11/why-the-i-voted-sticker-matters/264628/> (“The ‘I Voted’ sticker is a signal and an advertisement. It binds people together in solidarity and reminds others to join the group.”).

<sup>288</sup> See, e.g., Zittrain, *supra* note 247, at 335-36 (discussing Facebook experiment to allow users to identify themselves as voters and to see notices that friends had voted).

<sup>289</sup> See *About #Giving Tuesday*, <https://www.givingtuesday.org/about> (last visited Feb. 28, 2017). In 2015, Giving Tuesday donors made more than 1 million charitable gifts, raising a total of \$116.7 million online. Summary Report of #GivingTuesday 2015, [https://www.givingtuesday.org/sites/default/files/2016-10/ImpactLab\\_GivingTuesday2015\\_Rnd5\\_0.pdf](https://www.givingtuesday.org/sites/default/files/2016-10/ImpactLab_GivingTuesday2015_Rnd5_0.pdf). In 2016, online Giving Tuesday donations rose 44 percent to \$168 million. Charisse Jones, *Giving Tuesday Charitably Tally Jumps 44% To Smash Record*, USA TODAY, Nov. 30, 2016.

<sup>290</sup> Cf. Woods Bowman, *Workplace Giving: A Case Study of the Combined Federal Campaign*, 41 NEW DIRECTIONS FOR PHILANTHROPIC FUNDRAISING 27 (2003) (describing program that encourages federal employees to make charitable contributions); Cynthia Canary, *Know Before You Go: A Case for Publicly Funded Voters’ Guides*, 64 OHIO ST. L.J. 81 (2003) (discussing nonpartisan voter guides as a device for educating voters and encouraging participation).

<sup>291</sup> See, e.g., Leigh Osofsky, *Concentrated Enforcement*, 16 Fla. Tax. Rev. 325, 354-55 (2014) (“[S]ome scholars have suggested that norms may be subject to tipping points, becoming much more widespread once some threshold is reached.”).

or that small donors were able to fill the void, branding themselves as the party of small money could become the right strategic move. And if that party's strategy were to succeed, it could push the other party in the same direction. Given the current jurisprudential and political climate, a norm-building project seems at least as likely to bear fruit as the pursuit of public regulatory options.

### B. *Fighting Big Money with Big Money*

A separate private reform strategy is to harness big money to counter big money. This approach seeks to enlist support from wealthy actors who want to stem the current big-money tide. Many wealthy actors likely fit that bill. As previously discussed, most affluent individuals and entities are not big spenders, whether because of pressure from shareholders or consumers or because they simply believe that the electoral system should not be so disproportionately financed by the fortunate few.<sup>292</sup> These actors may be concerned about losing influence relative to their peers who are making expenditures and may want to see those big spenders sidelined.<sup>293</sup> In addition, at least some of those who currently make large expenditures are likely doing so reluctantly, whether in an effort to placate powerful officials or to counter the spending of business competitors or ideological adversaries.<sup>294</sup> They would prefer not to spend, but find themselves trapped in what amounts to a prisoners' dilemma.<sup>295</sup> Consistent with this account, a survey of corporate executives by the business-led Committee for Economic Development found widespread dissatisfaction with the campaign finance status quo and an overwhelming desire for reform.<sup>296</sup> The

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<sup>292</sup> See *supra* Part III.A.2.

<sup>293</sup> Consider public corporations. The conventional wisdom is that they have seen their electoral clout rise since *Citizens United*. See, e.g., Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts' Role in Eroding "We the People's Ability to Constrain Our Corporate Creations"*, 51 HARV. CLCR L. REV. 423, 433-46 (2016). In reality, their influence may be waning relative to individual mega-donors. See, e.g., MARK S. MIZRUCHI, *THE FRACTURING OF THE AMERICAN CORPORATE ELITE* (2013); Porter, *supra* note 229; Eduardo Porter, *Business Losing Clout in a G.O.P. Moving Right*, N.Y. TIMES, Sept. 3, 2013.

<sup>294</sup> See, e.g., Jennifer Mueller, *The Unwilling Donor*, 90 WASH. L. REV. 1783, 1789 (2015) (describing the plight of the "unwilling donor"—"the donor who does not want to give, or does not want to give at the requested levels, but feels he has no choice"); cf. *Citizens United*, 558 U.S. at 468 (Stevens, J., concurring in part and dissenting in part) ("A system that effectively forces corporations to use their shareholders' money both to maintain access to, and to avoid retribution from, elected officials may ultimately prove more harmful than beneficial to many corporations.").

<sup>295</sup> See, e.g., Anne Tucker, *Rational Coercion: Citizens United and a Modern Day Prisoner's Dilemma*, 27 GA. ST. U. L. REV. 1105 (2011).

<sup>296</sup> See Hart Research Associates, *American Business Leaders of Campaign Finance and Reform* (2013), [https://www.ced.org/pdf/Campaign\\_Finance%2C\\_Hart\\_and\\_AmView.pdf](https://www.ced.org/pdf/Campaign_Finance%2C_Hart_and_AmView.pdf) (reporting that 85% of business executives surveyed said that the campaign finance system "is in poor shape or broken," and 87% said that the system "needs major reforms or a complete overhaul"). In this regard, it is also telling that no for-profit corporation asked the

bottom line is that, while the wealthy may seem like unlikely reform allies, their interests will often point them in that direction. They may simply need concrete options around which to mobilize.

This Section suggests two possibilities for using big money to advance reformers' goals. The first suggestion draws inspiration from the People's Pledge that Elizabeth Warren and Scott Brown adopted in an effort to keep outside money at bay during their 2012 U.S. Senate race. As discussed earlier, candidates who take the pledge agree to pay a penalty from their campaign coffers whenever an outside expenditure is made on their behalf, thus creating a disincentive for backers to make such an expenditure.<sup>297</sup> But the People's Pledge has largely failed to catch on because it requires opposing candidates to agree about the desirability of restricting outside money, which is unlikely whenever one candidate expects that outside spending will give her an edge.<sup>298</sup> And even when candidates do take the pledge, they can always renege if they later conclude that outside spending may benefit them enough to outweigh the expected reputational costs of breaking the agreement.<sup>299</sup>

Rather than having candidates mutually pledge to ward off outside spending, reformers could take matters into their own hands with help from deep-pocketed collaborators. Step one would be to assemble a large pool of funds. Step two would be to announce that those funds would be used to counter—and outdo—any infusion of big money into particular election races. In other words, if a mega-donor were to spend \$1 million to support a certain candidate, the fund would respond by spending at least that amount—or perhaps double or triple that amount—to assist that candidate's opponent. A mega-donor who sees this as a credible threat is unlikely to spend that \$1 million in the first place. As a result, the money in the fund would remain unspent and could be returned to the funders after the election. The funders might thus thwart would-be big spenders without actually spending a dime of their own.<sup>300</sup>

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Supreme Court to invalidate the federal ban on corporate independent expenditures (although a business advocacy organization, the Chamber of Commerce, did so). *See Citizens United*, 558 U.S. at 413 (Stevens, J., concurring in part and dissenting in part).

<sup>297</sup> *See supra* notes 192-194 and accompanying text.

<sup>298</sup> Sitaraman, *supra* note 16, 779, 799. Brown and Warren may have been willing to reach an agreement because it was not apparent which of them would have an edge in outside spending.

<sup>299</sup> *Cf.* Sitaraman, *supra* note 16, at 784.

<sup>300</sup> A recent student comment proposes a creative variant on this idea—Super PAC insurance. *See* Warsaw, *supra* note 17. Warsaw suggests establishing a for-profit insurance company that would collect premiums from a candidate's supporters and then spend on behalf of that covered candidate (through an affiliated Super PAC) if that candidate is the target of independent expenditures. As Warsaw recognizes, however, the insurance model creates significant complexities and legal compliance issues, including the need to set appropriate premiums, collect those premiums, satisfy investors, and avoid federal restrictions on coordination between campaigns and outside groups. *See id.* at 227-

Myriad logistical and design issues would have to be addressed to implement such a scheme, but they should not be any more insurmountable than analogous issues raised by the People's Pledge. Among other things, reformers would have to delineate the type of expenditures that would trigger a response.<sup>301</sup> They also would have to develop a system for monitoring offending expenditures and for responding effectively and expeditiously. That might mean, for example, creating advertisements in advance for potential deployment, incurring at least some expenses that donors would not recoup. If the funders were amenable, organizations executing this sort of strategy could even make advances purchases of advertising slots to use for responsive spending if necessary, but otherwise run nonpartisan ads urging people to vote or to become small-dollar donors.

A second option for using big money to fight big money would focus on the media, relying primarily on corporate advertising dollars to provide the necessary leverage. The bulk of money spent on elections is used to buy ads,<sup>302</sup> generating billions of dollars in revenue for media outlets.<sup>303</sup> As CBS President Les Moonves memorably put it, "Super PACs may be bad for America, but they're very good for CBS."<sup>304</sup> The money media outlets earn from election ads, however, is just a small fraction of the revenue they receive every year from companies that run ads to promote their goods and services.<sup>305</sup> That commercial advertising money is something media outlets cannot afford to lose. If even a handful of large companies declared that they would only advertise on outlets that complied with a code of conduct for election-related advertising (or declared that they would reward complying outlets by purchasing additional ads), they would fundamentally alter the media's economic calculus.

The notion of having corporations become involved in countering the excesses of big-money political advertising is not a stretch. It aligns with broader trends in corporate social activism. While corporations have been reluctant to inject money into election campaigns, the business community

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46. If affluent actors can be persuaded to establish a fund for responsive spending, that seems like a far simpler approach.

<sup>301</sup> Cf. Sitaraman, *supra* note 16, at 770-74 (discussing the need to define the offending expenditures in the context of the People's Pledge).

<sup>302</sup> See, e.g., McDonald, *supra* note 48, at 407.

<sup>303</sup> During the 2016 election cycle (which began in 2015), nearly \$10 billion was spent on advertising in local, state, and national races. Sean J. Miller, *Digital Ad Spending Tops Estimates*, CAMPAIGNS & ELECTIONS (Jan. 4, 2017), <https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates>. The largest fraction of that spending was for television ads, but television's share has been on the decline as online advertising has surged. *Id.*

<sup>304</sup> Callum Borchers, *The Head of CBS Stated the Obvious About Why the Media Likes Donald Trump. It Still Feels Wrong*, WASH. POST (Dec. 10, 2015).

<sup>305</sup> In 2014, Procter & Gamble alone spent about \$4.6 billion on advertising, and the 200 largest U.S. advertisers spent a combined \$137.8 billion. <http://www.businessinsider.com/10-biggest-advertising-spenders-in-the-us-2015-7>

has not hesitated in recent years to engage with public policy issues.<sup>306</sup> In some instances, that has meant using economic leverage, such as shifting business away from states that have adopted or considered legislation to restrict LGBT rights.<sup>307</sup> Companies also regularly pull advertisements from media outlets that have acted objectionably.<sup>308</sup> From a public relations perspective, it makes good sense for corporations to become more active in campaign finance reform efforts. Popular discourse often portrays corporations as campaign finance villains even though, in reality, wealthy individuals tend to be the more troublesome big-money culprits.<sup>309</sup> Taking high profile action against outsized election expenditures would help corporations change the narrative. And it would be an extremely popular stand, likely generating more goodwill across the political spectrum than positions corporations have recently taken on many other policy issues.

Again, an array of details would need to be worked out, including the contents of the code of conduct that commercial advertisers would ask media outlets to apply to electoral ads. Corporations could seek to preclude outlets from running all outside advertising, or at least all outside advertising funded by big spenders.<sup>310</sup> Alternatively, they could focus on disclosure and insist that outlets only run ads that identify the true underlying sponsor.<sup>311</sup> They might also seek to establish certain formatting standards for ads, such as requiring sponsorship information to be prominently displayed, or prohibiting so-called native ads, which are confusingly embedded into a website's own content.<sup>312</sup> Although this would

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<sup>306</sup> See Global Strategy Group, *Business and Politics: Do They Mix?*, at 2 (Jan. 2016), [http://www.globalstrategygroup.com/wp-content/uploads/2016/01/GSG-2016-Business-and-Politics-Study\\_1-27-16-002.pdf](http://www.globalstrategygroup.com/wp-content/uploads/2016/01/GSG-2016-Business-and-Politics-Study_1-27-16-002.pdf).

<sup>307</sup> See, e.g., Aaron K. Chatterji & Michael W. Toffel, *The Power of C.E.O. Activism*, N.Y. TIMES, Apr. 1, 2016; Knowledge@Wharton, *How North Carolina's Anti-Discrimination Law Is Redefining Corporate Activism* (Apr. 7, 2016), <http://knowledge.wharton.upenn.edu/article/schweitzer-werner-wolff-lgbt-corporate-boycotts/>.

<sup>308</sup> Hundreds of advertisers, for example, have severed ties with the news website Breitbart in recent months due to concerns about racist and misogynistic content on the site. See, e.g., Rachael Revesz, *Breitbart Loses Advertising Deals with 935 Companies Due to Grassroots Campaign*, THE INDEP., Feb. 2, 2017.

<sup>309</sup> See notes 152, 183 and accompanying text.

<sup>310</sup> By law, radio and television broadcasters (but not other media outlets) are required to accept paid advertisements from federal candidates; they need not accept ads from outside groups like super PACs. See 47 U.S.C. §§ 312(a)(7), 315; see also Monroe, *supra* note 241, at 120, 145.

<sup>311</sup> Cf. Persily, *Campaign Revolution*, *supra* note 17 (suggesting that “internet portals could require more robust disclosure than the law currently mandates”).

<sup>312</sup> See, e.g., Jack Murtha & Chava Gourarie, *Do BuzzFeed's Native Political Ads Cross a Line?*, COLUM. JOURNALISM REV. (2016), [http://www.cjr.org/analysis/a\\_major\\_player\\_in\\_the.php](http://www.cjr.org/analysis/a_major_player_in_the.php).

be more fraught, they even could set content standards in an effort to guard against false or misleading ads run by outside spenders.<sup>313</sup>

At least two objections might be made to these proposals to pit big money against big money. The first is that they unduly inhibit electoral discourse.<sup>314</sup> This criticism rests on the notion that more speech—including the speech big money facilitates—is inherently better than less.<sup>315</sup> It is an objection to any restriction on money in politics, public or private, and defenders of public regulation have endeavored to answer it in detail.<sup>316</sup> For purposes of this Article, it suffices to say that concerns about limiting speech have less bite in the context of private ordering than governmental regulation.<sup>317</sup> Social and market forces routinely and inevitably shape whether and how individuals and entities choose to spend or speak, and even the most vocal defender of the “more speech” maxim likely accepts the value of these forces in shielding us from unbridled cacophony. If discourse and private exchange prompt big spenders to exit the electoral arena, then that may simply represent a new market equilibrium.<sup>318</sup>

Second, some may see it as hypocritical for those who oppose big money’s electoral influence to turn to big money to bring about change. Critics leveled a similar charge against Larry Lessig after he established a

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<sup>313</sup> Radio and television broadcasters are legally barred from turning away candidate ads based on their content, but they are allowed—and, indeed, have at least some legal duty—to avoid false and misleading ads from non-candidates. *See* Monroe, *supra* note 241, at 145-46; Erwin G. Krasnow et al., *Political Advertising Handbook for the Radio Account Executive* 11 (2015-16), <http://www.rab.com/public/political/2016PoliticalHandbook.pdf>. FCC, *Complaints About Broadcast Advertising* (last visited June 25, 2017), <https://www.fcc.gov/consumers/guides/complaints-about-broadcast-advertising> (“The FCC expects broadcasters to be responsible to the community they serve and act with reasonable care to ensure that advertisements aired on their stations are not false or misleading.”); *cf.* Nathaniel Persily, *The Campaign Revolution Will Not Be Televised*, *The American Interest*, Oct. 10, 2015 (noting that internet platforms could “develop more sophisticated and indeed, restrictive, rules for misleading statements than ones that would be permitted by the First Amendment”).

<sup>314</sup> The same objection applies to the previous Section’s suggestion to build an anti-big money norm.

<sup>315</sup> *Cf.* *Citizens United v. FEC*, 558 U.S. 310, 361 (2010) (“[I]t is our law and our tradition that more speech, not less, is the governing rule.”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>316</sup> *See, e.g.,* *Citizens United*, 558 U.S. at 470-75 (Stevens, J., dissenting); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 399-402 (Breyer, J. concurring); Wilson, *supra* note 48 at, 2385-88; Owen Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470 (1997).

<sup>317</sup> *Cf.* Eugene Volokh, *Deterring Speech: When Is It “McCarthyism”? When Is It Proper?*, 93 CAL. L. REV. 1413, 1414 (2005) (accepting the propriety of social norms that deter particular kinds of speech and suggesting that private condemnation and economic action that discourage speech are less concerning than the “government’s coercive investigatory tools”).

<sup>318</sup> *Cf.* *Buckley v. Valeo*, 424 U.S. 1, 57 (1976) (“In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.”).

super PAC—Mayday PAC—to elect campaign finance reform proponents to Congress.<sup>319</sup> Lessig responded by urging them to “embrace the irony.”<sup>320</sup> The private ordering proposals outlined here, however, differ from Lessig’s super PAC in ways that significantly diminish any arguable hypocrisy. Mayday PAC used big money to do exactly what reformers believe it should not do—namely, facilitate the election of candidates who support the policies of their wealthy backers.<sup>321</sup> In contrast, the proposals here do not enlist big money to promote particular candidates or regulatory agendas. Instead, they rely on big money to *prevent* would-be spenders from exerting outsized electoral influence. And to the extent there is residual tension, reformers are free to decide that practicality should trump purity.

## V. BROADER IMPLICATIONS

This Article’s primary objective has been to draw greater attention to private ordering in campaign finance. This Part widens the lens and seeks to situate private campaign finance reform within a broader institutional context. It begins by considering the interplay between legal and extra-legal campaign finance reform efforts. It then addresses the issue of hydraulics: To the extent private reforms manage to push big money out of elections, where will that money go, and what are the likely implications?

### A. Law’s Role in Campaign Finance

While this Article seeks to give private ordering in campaign finance its due, it does not mean to suggest that law is unimportant or irrelevant. Far from it. The legal and extra-legal orders inevitably interact with and influence one another.

As an initial matter, private ordering occurs against a legal backdrop, with law helping to define the field on which private actors operate.<sup>322</sup> Because the existing campaign finance regulatory system is riddled with gaps, one function of private reform is to supplement and complement the legal regime. For instance, private intervention can help to rein in the outside expenditures of super PACs and similar entities that the law currently leaves unconstrained. Likewise, private reform can promote information disclosures in excess of what the law requires. Beyond gap filling, private reform can work alongside legal structures to advance objectives that the law has not prioritized or cannot pursue. In particular,

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<sup>319</sup> See Nicholas Confessore, *Spending Big to Fight Big Donors in Campaigns*, N.Y. TIMES, July 28, 2014; Evan Osnos, *Embrace the Irony*, THE NEW YORKER, Oct. 13, 2014.

<sup>320</sup> *Id.*

<sup>321</sup> See, e.g., Bob Bauer, *The Mayday PAC and Progressive Politics*, MORE SOFT MONEY HARD LAW, Sept. 4, 2014, <http://www.moresoftmoneyhardlaw.com/2014/09/mayday-pac-progressive-politics/>.

<sup>322</sup> A substantial literature addresses how private ordering occurs in the shadow of the law. For a classic treatment, see generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).



because private reformers are not subject to the same constitutional constraints as governmental actors, they are free to pursue equality and antidistortion objectives that public campaign finance regulation may not.<sup>323</sup>

Beyond serving as a mere backdrop, law can facilitate private action.<sup>324</sup> For all its limitations, legally mandated campaign finance disclosure plays an especially important part in shaping the private order.<sup>325</sup> Disclosure laws make it easier for consumers, shareholders, and voters to monitor big spenders; they help candidates enforce pledges to counter outside expenditures; and they help the media and other watchdogs to do their jobs. Disclosure laws would also assist the private reforms suggested in Part IV. For this reason, reformers would do well to continue pushing to strengthen those laws.<sup>326</sup> Along similar lines, it is conceivable that the proliferation of public matching fund or voucher programs at the state and local level would give a boost to private reform by helping to build a norm of broad-based participation in electoral funding.<sup>327</sup>

Of course, law can hinder private action as well. While a rollback of disclosure laws would not thwart private reform entirely, it would make some reforms more difficult to achieve. Recognizing this, big money's defenders might well double down on their anti-disclosure efforts both legislatively and in the courts if they see private interventions gaining momentum. Disclosure's critics might even point to the success of private actions such as consumer boycotts to argue that they need anonymity to protect their spending from being unduly chilled.<sup>328</sup> Notably, reform opponents have already turned to the law in an attempt to stymie at least one private reform effort, introducing legislation that would inhibit shareholders' ability to press corporations for greater political transparency.<sup>329</sup>

Just as law shapes the private order, the private order can shape the law, which can, in turn, further reshape the private order. It is a dynamic

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<sup>323</sup> See, e.g., Haan, *supra* note 17, at 307.

<sup>324</sup> ELLICKSON, *supra* note 18, at 284 (“It is worth stressing that legal policies themselves influence the vitality of informal systems of social control.”); Tehila Sagy, *What’s So Private About Private Ordering?*, 45 LAW & SOC’Y REV. 923 (2011).

<sup>325</sup> Cf. ELLICKSON, *supra* note 18, at 285 (“Legal rules can also affect how easy it is for people to obtain information they need to engage in informal social control.”).

<sup>326</sup> See, e.g., Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L. J. 1443 (2014); Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683, 683 (2012).

<sup>327</sup> See Overton, *Participation Interest*, *supra* note 47, at 1294; Overton, *supra* note 15, at 1695.

<sup>328</sup> Cf. Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473 (2013).

<sup>329</sup> Eliza Newlin Carney, *Shareholders Demand Disclosure—and Republicans Push Back*, THE AMERICAN PROSPECT, May 4, 2017, <http://prospect.org/article/shareholders-demand-disclosure-and-republicans-push-back>.

process, and its ultimate trajectory is unclear. One possibility is that private reform could generate momentum for legal change. If private reform lessens big money's influence or increases the salience of campaign finance issues, then the political winds could shift in favor of governmental intervention. Reformers might value such a development even if private reforms are working as they hope. Laws, after all, can serve to strengthen norms, and the government's resources and enforcement capabilities might buttress extra-legal interventions.

A second possibility is that progress on the private front could weaken prospects for new governmental interventions by suggesting to lawmakers or courts that public regulation is unnecessary.<sup>330</sup> That would be an unwelcome development for reform proponents to the extent that private reforms are unable to achieve certain ends that public ones might. Bear in mind, however, that the chances of major regulatory change are already low, so any incremental decline might be immaterial. Moreover, to the extent that private reforms do make meaningful strides in combatting big money, then it really may be less necessary for government to step in.

### *B. The Hydraulics of Private Campaign Finance Reform*

For campaign finance reformers, money's persistence is a persistent problem. As previously discussed, public regulatory measures—particularly those that try to stem the flow of money into the electoral system—have often disappointed their supporters because funders tend to find alternative outlets for their cash.<sup>331</sup> Because private actors can typically respond and adapt more easily than government regulators,<sup>332</sup> private interventions may outperform public ones in the “cat-and-mouse” game between those who want to inject resources into the election system and those who want to stop them.<sup>333</sup> Suppose, for instance, that reformers established a fund as discussed in Part IV to deter and counter outside spending, and a super PAC invoked a technicality to skirt the guidelines on prohibited expenditures. Without having to resort any elaborate judicial or legislative process, the reformers could presumably update their guidelines immediately or simply determine that the expenditures violated the spirit of the rules so as to trigger countervailing spending.

Unfortunately, even if private reform makes strides to diminish big money's electoral role, it will not automatically usher in the sort of egalitarian political order to which many proponents of campaign finance reform aspire. Electoral spending, after all, is just one way for wealthy actors to advance their ideological and policy objectives. The wealthy also use their money to underwrite non-electoral public discourse that seeks to

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<sup>330</sup> See Sitaraman, *supra* note 16, at 802; Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1665 (1998).

<sup>331</sup> See *supra* Section II.C.

<sup>332</sup> See *supra* note 255 and accompanying text.

<sup>333</sup> Kang, *supra* note 1, at 53.

shift public opinion in their preferred direction, as well as lobbying to win over government officials. In fact, many of the same actors who spend big on elections already spend even more on these other activities.<sup>334</sup>

Neutralizing big money's role in elections may simply prompt the wealthy to redirect resources toward these alternative channels of political influence.<sup>335</sup> That means financing more think tanks, advocacy groups, and media outlets to propagate their views, and hiring more professional lobbyists to crowd the corridors of power. Hydraulic pressure, in other words, does not merely redirect money from one type of electoral activity to another; it can also redirect money from elections to other forms of democratic engagement. This danger is not specific to private campaign finance reform, but to the extent private interventions successfully manage the hydraulics of money in elections in ways that public regulation has not, reformers will have to grapple next with the hydraulics of money in the political system writ large.

The upshot is not that reform is a hopeless enterprise, only that the struggle will continue even if victories are won against big money on the electoral front.<sup>336</sup> Scholars and activists are doing important work to understand and address the dominance of the wealthy interests in public discourse<sup>337</sup> and in lobbying,<sup>338</sup> and there remains much more work to be done. Progress on campaign finance could help pave the way for advances in these other areas. In the meantime, as with reforming campaign finance,

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<sup>334</sup> See, e.g., Richard Briffault, *Lobbying and Campaign Finance* 19 STAN. L. & POL'Y REV. 105, 107 (2008); Drutman, *supra* note 152.

<sup>335</sup> See Levinson, *supra* note 56, at 136 ("The problem, in a nutshell, is that 'the political power that comes from wealth is portable across political processes.' . . . As a result, regulatory efforts to limit the advantages of money in politics confront a 'hydraulic problem': restricting the flow through one channel just redirects the dollars into other channels." (quoting Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 166 (2013)); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1498 (2016) ("The hydraulic problem applies not just to campaign finance efforts but to any effort to cabin the influence of money in politics.").

<sup>336</sup> Cf. Sitaraman, *supra* note 335, at 1499 ("It may be that restricting the channels most easily abused might still be a net positive in improving outcomes.")

<sup>337</sup> Tabatha Abu El-Haj, *Beyond Campaign Finance Reform*, 57 B.C. L. REV. 1127, 1133 (2016) (urging more "attention to the ways that law can enhance the civic and political organizations of ordinary Americans"); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 100 (2016) (contending that "regulation can strengthen civil society by giving organizations a formal role in the democratic process"); Andrias, *supra* note 61, at 496 (advocating reforms "aimed at involving organizations of citizens in governance and politics" as a counterweight to concentrated economic power).

<sup>338</sup> See, e.g., Heather Gerken & Alex Tausanovitch, *A Public Financing Model for Lobbying: Lobbying, Campaign Finance, and the Privatization of Democracy*, 13 ELECTION L.J. 73 (2014) (proposing a public financing program for public interest lobbying); Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191 (2012) (defending the constitutionality of lobbying regulations); Kang, *supra* note 1, at 52 (endorsing greater regulation of lobbying).

those who are thinking about reform in these related contexts would do well not to focus on legal remedies alone, but to look outside the law as well.

#### CONCLUSION

Neither public regulation nor private ordering has achieved reformers' goals. The problem of money in elections is persistent and vexing. For those dissatisfied with the campaign finance status quo, one option—the path most traveled—is to continue to press to change the doctrine or the law. But with public regulatory options more constrained than ever, it may be time for scholars and advocates to refocus on the underexplored possibility of private reform. Private interventions are already having at least a modest ameliorative effect on big money's electoral influence, and entrepreneurial reformers could be well positioned to make further headway.