The Political Value of Cash—Hard to Prove, Harder to Solve

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Lawyers, at least liberal and progressive ones, largely take for granted that the preponderance of the evidence supports the conclusion that money *can* distort the behavior of government officials (and frequently does). Equally accepted is the assumption that laws regulating the flow of money in elections can increase accountability to the electorate, either by correcting for distortions directly or by incentivizing political actors to periodically tack back to the median voter's preferences. In fact, these two assumptions are evident in the legal efforts to dismantle the campaign finance jurisprudence established by *Buckley v. Valeo* in 1976, and reaffirmed with a vengeance in *Citizens United v. FEC*.[1]

The most consistent calls in progressive legal circles, in other words, are for more campaign finance reform. This is a mistake, in my view. Those serious about curtailing the political influence of moneyed elites need to face up to the fact that campaign finance reforms, as an effective anti-plutocracy strategy, have been tried and have failed. In light of the goals of this convening, I will begin by describing the current state of what I call the "curtailing money in politics" efforts, with a particular focus on its empirical research needs. I will proceed to explain why I believe it is time to move beyond the traditional paradigm.

CURTAILING UNDUE POLITICAL INFLUENCE BY REGULATING MONEY IN POLITICS

While the public blames *Citizens United* for the explosion of money in politics and the outsized political influence of the wealthy, legal experts know that the primary significance of *Citizens United* was the Court's return to *Buckley*'s exceedingly narrow understanding of the regulatory rationale available to legislatures that seek to limit the flow of money in elections.[2] Even the green light *Citizens United* sent to corporate political spending was not that significant since savvy, well-represented corporations already knew how to spend money on elections.[3]

Wealthy individuals have long been entitled to spend unlimited amounts of money to influence elections. This has been true since 1976 when *Buckley* held that the only compelling reason to regulate the flow of money in political campaigns is to prevent corruption or the appearance of corruption. More specifically, *Buckley* held that

[1] Citizens United v. FEC, 558 U.S. 310 (2010); Buckley v. Valeo, 424 U.S. 1, 55-58 (1976).
[2] *See, e.g.*, Michael Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. 531 (2016); Heather K. Gerken, *The Real Problem with* Citizens United: *Campaign Finance, Dark Money, and Shadow Parties,* 97 MARQUETTE L. REV. 904, 910 (2014).
[3] Nathaniel Persily, *The Floodgates Were Already Open: What Will the Supreme Court's Campaign Finance Ruling Really Change*, SLATE (Jan. 25, 2010, 2:30 PM).

individuals have a First Amendment right to spend as much money as they wish on independent efforts to elect candidates since such expenditures pose no risk of illicit temptation to candidates. The regressive effects of such a constitutional principle were rejected on the grounds that legislative efforts to create speech equality are "wholly foreign to the First Amendment."[4] Legislatures may, however, limit campaign contributions insofar as large contributions could lead to corruption.

The primary significance of *Citizens United* was the Court's return to *Buckley*'s underlying assumption that corruption exists only where there is a quid pro quo exchange of money for political benefit. In the years following *Buckley*, the Rehnquist court had significantly chipped away at *Buckley's* narrow conception, suggesting that the appearance of preferential access and undue influence constitute a form of corruption that campaign finance legislation can address.[5] In *Citizens United,* Justice Kennedy reversed course, asserting that "governmental interest in preventing corruption or the appearance of corruption . . . [is] limited to [preventing] *quid pro quo* corruption."[6]

Faced with the exponential growth of spending on elections and the increased public outcry over the mounting evidence that the financiers of elections exercise incredible political influence, key liberal and progressive public interest organizations have renewed their efforts to revisit the constitutional constraints on campaign finance legislation established by *Buckley*. The current vacancy on the Supreme Court, especially in light of the Republican Party's apparent implosion, has given liberal and progressive election lawyers hope, and two main camps are emerging.

The more strategically minded camp seeks to undermine *Buckley* by working within the corruption paradigm. It is confident it can persuade a new Court to return to the Rehnquist court's broad conception of corruption, which included concerns about the preferential access that large contributions seem to grant. Its hope is that it can convince the new Court that this broader conception also justifies the regulation of certain types of independent expenditures (such as from single-candidate super PACs) to the degree that those expenditures also secure increased access and influence for donors.

As Daniel P. Tokaji and Renata E. B. Strause note, litigators in this camp crave studies "demonstrating . . . that wealthy individuals and groups in fact do enjoy superior access and influence."[7] Qualitative studies are of particular value to litigators, who must tell vivid stories. Moreover, to the degree that reformers seek to regulate independent expenditures and party fundraising, these studies should focus particularly on the trajectory from *independent expenditures* or *party contribution* to access and influence. In sum, the main empirical research needs for this strategy are:

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[4] *Buckley*, 424 U.S. at 48-49.

[5] *See, e.g.*, McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003); Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

[6] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 359 (2010); *see also* McCutcheon v. Fed. Election Comm'n, 134 S.Ct. 1434 (2014).

[7] Daniel P. Tokaji & Renata E. B. Strause, *How Sausage Is Made: A Research Agenda for Campaign Finance and Lobbying*, 164 U. PA. L. REV. ONLINE 223, 225 (2016), http://www.pennlawreview.com/online/164-U- Pa-L -Rev-Online-223.pdf.

- ✓ Studies documenting the path from large campaign donations to access to legislators; and relatedly from lobbyists to the details of laws enacted, amendments proposed, and bills shelved in legislative committees or earlier.

- ✓ Evidence that large contributions to groups of officeholders (such as party committees) can have the same effect as large contributions to individual candidates in terms of access and influence.[8]

- ✓ Studies investigating whether large independent expenditures by super PACs and other such organizations give rise to unequal access; and how often threats of such expenditures are used to coerce the behavior of elected officials.[9]

The second camp, more ambitiously, seeks a reversal of *Buckley's* central holding that legislatures cannot regulate campaign finance in the interest of political equality. This camp strives for judicial recognition of the idea that fostering political equality and preventing the rise of a plutocracy is a compelling, fundamentally democratic justification for legislative efforts to restrict the role of money in politics. The approach is driven by two facts: First, there is very little evidence of quid pro quo corruption; and, second, preventing corruption does not address the central concerns of many about the role private money plays in elections. Thus, while this second camp shares the concern that the unrepresentative origins of campaign dollars affect policy outcomes, it is equally concerned about the sheer volume of money required to win an election in the United States. In its view, this affects both who is a viable candidate as well as who is likely to be elected, frequently creating a barrier for socioeconomically disadvantaged candidates, female candidates, and candidates who are not white.

The primary hurdles this camp must overcome are the Court's hesitations about equality as a rationale for campaign finance regulation. While many of the liberal Justices likely share Justice Stevens' view that "'there is no good reason to allow disparities in wealth to be translated into disparities in political power,'"[10] they tend to worry that efforts to significantly limit money in elections will protect incumbents.[11] They typically also fear that such laws will not be content or viewpoint neutral.[12] It does not help that measuring political equality remains incredibly contested and difficult.

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[8] *Cf.* Kang, *supra* note 2, at *passim*.

[9] *Cf.* Daniel P. Tokaji & Renata E. B. Strause, The New Soft Money: Outside Spending in Congressional Elections 71-97 (2014).

[10] Davis v. Fed. Election Comm'n, 554 U.S. 724, 756-57 (2008) (Stevens, J., concurring and dissenting in part) (quoting Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1390 (1994)).

[11] I myself worry that strict limits on campaign spending could make it even more difficult educate and turnout voters. While I am not particularly sanguine about how much information voters get from television ads, I so worry that strict limits on electioneering spending will undermine voter mobilization efforts, which are incredibly expensive. In this regard, evidence that limiting the role of money in politics does not affect voter turnout or the level of voter knowledge about the candidates running in the election would also help.

[12] See Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 467 (1996).

The most important research need for the progressive camp, therefore, is empirical data demonstrating that campaign finance laws which limit spending (both contributions and independent expenditures) do not necessarily make it more difficult to challenge incumbents. Ideally, the empirical studies would offer judges a formula for predicting when campaign finance regulations are incumbency protecting. Litigators in this camp will also appreciate studies documenting the effect of unlimited spending on candidate selection. This could take the form of:

- ✓ Qualitative studies based on interviews with incumbents, failed candidates, political operatives, lobbyists, and industrialists;

- ✓ Qualitative studies comparing successful and failed candidacies of African-Americans and Latinos in majority-minority opportunity districts, in particular.

- ✓ Qualitative studies documenting the experiences of female candidates for elected office.

Finally, both camps will be particularly interested in case studies from states and municipalities that are poised to pass progressive campaign finance legislation, insofar as each will be setting up test cases.

BEYOND CURTAILING MONEY

While the most consistent calls among legal advocates are for yet more campaign finance reform, my own view is that it is time for those serious about curtailing the political influence of moneyed elites to come to terms with the fact that few experts believe campaign finance legislation has ever been particularly effective, even in the hands of a more liberal Supreme Court.[13] The basic regulatory problem has been that money tends to find its way into the political process through loopholes. *Citizens United* has merely multiplied and expanded the loopholes available.

The history of campaign finance regulation has been one of plugging leaks. The source of this regulatory problem is the First Amendment itself, which demands the existence of some outlet for electoral and political influence — whether in the form of advocacy, lobbying, news media or basic research. In the twenty-first century, these avenues require

[13] *See, e.g.*, Heather K. Gerken, *Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1147, 1148 (2011) ("[W]e should admit that the results of the 'take money out of politics' approach have been underwhelming. . . . Donors simply find new, less transparent ways to gain influence in the process."); Thomas B. Edsall, *Can Anything Be Done About All the Money in Politics*? N.Y. TIMES, Sept. 17, 2015 ("There are some clear conclusions to be drawn from the 50-year struggle by reformers to place limits on the role of money in politics. Foremost is that when the goal of reformers has been to bar large donations from corporations, unions and the rich, their efforts have a brief half-life and end in failure."). This is not to deny that campaign finance laws can serve other important ends, including providing better cues to voters about candidates through endorsements and disclosures. *See generally* Robert Bauer, *Getting a Handle on the Super PAC Problem*, Stanford Law Symposium (Feb. 5, 2016), available at http://www.moresoftmoneyhardlaw.com/wp-content/uploads/2016/02/SuperPACs.pdf.

money. In a capitalist economy, where wealth is not equally distributed, the practical effect is regressive. Changing the composition of the Supreme Court will make a difference to what campaign finance regulations are in place, but it is unlikely to significantly undermine the political influence of those with money to spend on politics.[14]

What we desperately need, therefore, is a fundamental rethinking of law's role in the money in politics problem. It is time to stop following the money and to shift to figuring out what explains why ordinary voters are unable to use elections to curtail the apparent ability super-wealthy donors have to thwart legislation that runs against their interests, while manipulating the details of laws passed to their advantage.

From the outside at least, what the recent empirical research on American democracy appears to demonstrate is a fundamental weakening of the channels of democratic accountability — one that facilitates the translation of economic capital into political power. If that is right, a more promising legal reform agenda would ask two questions: What are the fundamental causes of that weakening? And are there legal reforms that could be adopted to enhanced democratic accountability?

Two sources of the weakening of policy responsiveness and electoral accountability stand out. The first is the state of political parties and the fact that elections appear increasingly incapable of tethering government officials to the preferences of their constituents. The second, and arguably the more important, is that the United States has witnessed a transformation in its civic associations, one that has undermined the organizational capacity of middle-class Americans.

Political Parties and the Failure of Responsiveness

Stronger and more ideologically distinct than in any prior era, the Democratic and Republican parties today are closer to the ideal called for by the APSA's 1950 Committee on Political Parties than ever before. Yet, responsible party government has not emerged. Instead, the new norm is gridlock in Congress and aggrandized presidential power to make up for Congress's inability to act. This is in part due to the fact that general elections no longer function to push incumbents back toward the median voter because those incumbents are so worried about the nomination process. To the extent there is accountability today, it is almost entirely to party donors and ideological activists. This explains why the two major political parties are neither responsive nor effective.

If responsible party government is not working out as theorized, the obvious question is what would make political parties more accountable to the electorate? The most obvious solution is increasing party competition, but — and here is the catch — that is off the table, as far as law is concerned. The Court has been offered such theories for decades and is singularly unreceptive to a structural approach to the First Amendment — notwithstanding

[14] For an elaboration of this argument see Tabatha Abu El-Haj, *Beyond Campaign Finance Reform,* 57 B.C. L. REV. (forthcoming 2016).

evidence that the lack of partisan competition significantly unmoors political parties and candidates from the interests of their constituents.[15]

Progressive-minded lawyers need nothing less than a new theory of how to achieve responsive governance through political parties and elections. In a current project, I posit that political parties might be better able to produce democratic accountability if law sought to bolster their associational qualities. Much of the influence of moneyed elites appears to arise out of access and personal ties, and the shared worldviews that result. This poses the interesting possibility that an alternative path to accountability lies in the promotion of parties as integrated, cross-class membership organizations rather than as the elite producers of distinct brands. It is time to explore their capacity to increase political participation and information transmission through broad, social ties and social networks and to investigate whether this would further processes of democratic accountability. Rather than viewing political parties primarily as speakers and prioritizing the leadership's control over its brand above all, legal reformers ought to attend to how to strengthen (including through money) those segments of the party that are most likely to draw voters into politics, especially through personal ties.

While many law of democracy scholars are increasingly preoccupied with the state of political parties, most remain wedded to responsible party government theory. This can be seen in the calls to deregulate the financing of parties.[16] The combination of relatively strict campaign finance regulation for parties and haphazard, court-driven deregulation of other aspects of campaign finance law, it is argued, has significantly strengthened the more ideologically extreme informal party network, fomenting partisan polarization and legislative gridlock. Restoring responsible party government, we are told, requires deregulatory reforms that redirect the money in elections toward the formal party apparatus. Shoring up the party leadership's control of its brand will breed moderation and legislative compromise.

Cracks in the consensus, however, are emerging as some scholars articulate skepticism about the call to deregulate party financing. Deregulating to shore up the power of the formal party leadership, they warn, will simply encourage political parties to court the same wealthy donors that super PACs currently court with little effect.[17] A few go further. In a similar vein to my current project, they argue that reforms should be "targeted . . . to *build up the institutional parties as . . . engines of broad participation in politics.*"[18] But they have yet to call for a new theory of accountability through parties or to empirically defend their reform alternative.

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[15] Insofar as legislators have zero incentive to increase partisan competition, I assume pro-competition reforms would have to be court-driven.

[16] See, e.g., Ian Vandewalker & Daniel I. Weiner, *Stronger Parties, Stronger Democracy: Rethinking Reform* (Brennan Center for Justice 2015); Richard H. Pildes, *Romaticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 805 (2014).

[17] Kang, *supra* note 2, at 4-5, 52-58.

[18] *See, e.g.,* Joseph Fishkin & Heather K. Gerken, *The Party's Over:* McCutcheon, *Shadow Parties, and the Future of the Party* System, 2015 SUP. CT. REV. 175; Vandewalker & Weiner, *supra* note 16, at 3; Joseph Fishkin & Heather K. Gerken, *The Two Trends that Matter for Party Politics*, NYU L. REV. ONLINE (2014).

Short of a new theory, one potentially feasible route to resuscitating responsible party government in its own terms exists — increasing turnout during the party primary. With the rise of safe districts, the party primary has increasingly become the decisive election. Low and unrepresentative turnout during party primaries (particularly in off-cycle elections) ties elected officials' political careers to the preferences of the party's base, including to the preferences of wealthy donors capable of funding primary challenges.

Increasing turnout during primaries could potentially undermine the wedge party primaries currently drive between elected officials and their constituents. The new primary voters, however, would need to be representative and informed for the strategy to work. How to realize this goal is by no means straightforward. For one, party insiders have no interest in expanding the primary electorate. This means that in the absence of laws establishing compulsory voting, we will need to rely on other civic groups to get voters to the polls. For another, the new voters, like primary voters today, will be unable to rely on party labels as cues about primary candidates. Any strategy will need to develop alternative, easily digested, sources of information about primary candidates. These difficulties are especially acute in down-ballot elections where the media tends to not to cover primary elections in much depth. Once again, empirical work could help this reform strategy. For example, what can be learned by the mobilization efforts directed at young and Latino voters this election cycle by non-party organizations? Similarly, how promising are efforts like CrowdPac.org, especially if expanded to focus more systematically on contested primaries?[19]

Civic Associations and the Lost Counterweight to Elite Interests

The chain of political accountability has also been weakened by the transformation of civic associations in the United States since the 1970s. Civic associations today are not well positioned to serve their central functions in our democracy — mobilizing social and political movements, enhancing voters' ability to monitor the behavior of elected officials while in office, and bringing voters out on Election Day. Based in Washington, D.C. and largely financed by foundations, contemporary civic associations are lacking in a broad network of actively engaged members. Apparently, and perhaps relatedly, promoting broad, informed electoral participation has fallen off their priority list in favor of lobbying and litigation.

As a result, the electorate today is disorganized and uninformed in ways that significantly undermine its political power.[20] The problem is particularly acute for middle class Americans, who need civic associations to present an effective counterweight to the political power of elites and super-elites.

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[19] *About*, CrowdPac.org, https://www.crowdpac.com/about (last visited May 6, 2016) (providing voters with an ideological measure of the candidates running the race as well as the opportunity to share the ballot they create with friends and associates).

[20] Unfortunately, market incentives to provide useful political information disappeared at precisely the same time that the organizations that might have offset the collective action problems voters face in obtaining information have also weakened. This makes the votes of even those who do turnout less powerful.

Although farther afield from the current priorities of election lawyers, a key legal reform agenda ought to focus on how to rejuvenate the associational life of ordinary Americans in the twenty-first century such that civic associations are more effectively available to promote democratic accountability. This project is likely, among other things, to require reconsidering the current regulatory preference for tax deductions over affirmative payouts and revising the tax code with respect to non-profit organizations.

Ultimately, what I am increasingly persuaded of is that there are no shortcuts when it comes to addressing the problem of the undue political influence of moneyed elites. Enhancing democratic accountability must be approached the hard way — by organizing, mobilizing and informing voters about the substance of politics.

The feasibility of such a project depends on answering a quite distinct set of empirical questions. Empirical research must be directed to investigations of the outliers: Those states, localities, and elections in which ordinary Americans (or subgroups of them) are well-organized, well informed, and capable of providing an effective check. The most helpful sort of empirical research, in other words, would move beyond documenting the crisis of representation and toward offering an empirical basis for deciding which institutional structures are likely to strengthen rather than weaken chains of accountability. If social ties, organization, and information are the key to the accountability puzzle, the important questions become:

- ✓ What does it take in terms of organization, knowledge and turnout for middle class, ordinary voters to be capable of monitoring elected officials and demanding democratic responsiveness?

- ✓ Does political information travel better through social networks? If so, how strong must the social ties be? And can those ties be formed online?

- ✓ What kinds of contemporary civic organizations prove effective at representing middle-class interests? How can they be fostered?

- ✓ Does the socio-economic exclusivity of political party networks, in fact, affect their policy ideas and actions? Would increasing the socio-economic diversity of political party networks improve the odds that political parties would represent middle class interests? Do state and local political parties or campaigns with more party activists with ties to ordinary voters produce more informed turnout?

CONCLUSION

To reiterate, the goal of law, and empirical research, in my view, must be to figure out how to mitigate the degree of political inequality in society by empowering ordinary Americans in politics rather than by curtailing the flow of money in elections — if only because of the significant constraints the First Amendment imposes on the latter project. Our attention should be focused on what kinds of intermediary associations (civic groups and political

parties) would be better able to promote democratic accountability. Legal reform, in particular, should attend to the ways that law can enhance the civic and political organizations of ordinary Americans while continuing to increase the representativeness of the electorate that turns out for decisive elections.