Fixing the Supreme Court's Mistake: The Case for the Twenty-Eighth Amendment

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If the Supreme Court's constitutional decisions have forced our democratic system far off course, then we need to overturn those decisions. And the best way to do that is to amend the Constitution.

A fundamental principle of American democracy is "one person, one vote."[1] That principle means, in its most literal sense, that every person gets to vote once and that every person's vote counts equally. More broadly, it means *political equality*: that every person should have an equal influence in the democratic process. But when wealthy donors exert more influence than ordinary voters, that principle is mocked.

To fulfill the promise of "one person, one vote," we must bring together people of different views for important conversations about how to organize our democracy itself. But the Supreme Court has made that work vastly more difficult through its constitutional decisions in the area of campaign finance, which have hobbled our reform efforts. And to get past this problem, we must overturn the Supreme Court's constitutional decisions on campaign finance.

That is a delicate proposition in a book filled with thoughtful reform proposals that do *not* require constitutional change. But it is fundamental. After 40 years of Supreme Court decisions—some holding steady, others

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[1] In the early 1960s, the Supreme Court derived the "one person, one vote" principle from the forward march of "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments." Gray v. Sanders, 372 U.S. 368, 381 (1963).

flipping as the composition of the Court itself changes—many of the most basic policy options have been taken off the table. The beauty of our system is supposed to be that the 50 states are "laboratories of democracy." But the laboratories have been told that they cannot use certain equipment. So promising reforms that could be tried in a city government, then perhaps a small state, then a big state, and finally at the federal level, never make it past the whiteboard.

To be sure, a constitutional amendment would not by itself fix our system—it would lay the foundation for further reforms. But right now, Supreme Court precedent prevents many potentially effective reform proposals from even being tested. So a constitutional amendment that would eliminate judicially imposed obstacles to campaign finance reform deserves serious consideration.

The Twenty-Eighth Amendment would overturn *Citizens United v. Federal Election Commission* and the Supreme Court's entire line of cases starting with *Buckley v. Valeo*.[2] It would establish political equality as a legitimate public goal for campaign finance reforms, and allow federal, state, and local governments to set limits on fundraising and spending in elections.

This is as American as apple pie. When James Madison wanted to persuade the young republic to ratify the Constitution, he argued that the people who would elect Congress's House of Representatives would be "[n]ot the rich, more than the poor; … not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune," but rather "the great body of the people of the United States."[3] At the same time, our constitutional history is the history of *improving* upon the Founders' imperfect vision. In the 231 years since the Constitution was written, we have amended the Constitution 27 times—seven times to expand democracy and the right to vote.[4] The arc of our constitutional democracy may be long, but it bends toward political equality.

Across many different polls and surveys, and literally hundreds of ballot resolutions in states red, blue, and purple, about 75 percent of Americans support a constitutional amendment to overturn *Citizens United* and

[2] *See* Citizens United v. FEC, 558 U.S. 310 (2010); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

[3] The Federalist No. 57, at 348–49 (James Madison) (Clinton Rossiter ed., 1961).

[4] *See* U.S. Const. amends. XIV, § 1 (guaranteeing equal protection of the laws), XV (prohibiting denial of vote based on race), XVII (providing for direct election of U.S. Senate), XIX (prohibiting denial of vote based on sex), XXIII (granting voters in the District of Columbia the ability to vote for president), XXIV (prohibiting denial of vote in federal elections based on failure to pay a poll tax), XXVI (prohibiting denial of vote to persons aged 18 or older based on age).

Buckley.[5] This depth and breadth of support defies "left" v. "right" analysis. Take just one state, Wisconsin, that was closely divided in the 2016 presidential election.[6] In that *exact same election*, 18 mostly rural Wisconsin communities passed resolutions calling for a constitutional amendment to overturn *Citizens United* by margins ranging from 65 percent to 91 percent.[7] Not much in American life has 91 percent support—even *apple pie itself* polls only at 81 percent favorable.[8]

The people understand that the Supreme Court has broken the system, and that "We the People" can fix it. Let us turn now to the case for the Twenty-Eighth Amendment.

I. THE NEED FOR AN AMENDMENT

A. *Why We Need to Overturn the Supreme Court's Constitutional Precedent*

The experience of the past century has taught us that coming up with an optimal system of campaign finance is difficult. That reflects the messy but wonderful process of democratic compromise and the complexity of human affairs. So cities, states, and occasionally Congress do their best, muddle through, and pass campaign finance reform measures that reflect the politics of the passable.

But that task has been made much more difficult by the unhelpful intrusion of the courts. If a campaign finance system is ineffective because the

[5] This rough figure holds across a broad range of popular votes and polls. In the November 2012 election in Montana, the state's citizens voted for Republican presidential candidate Mitt Romney over his Democratic opponent President Barack Obama by a margin of 55% to 45%. The exact same electorate supported Initiative No. 166, calling for a constitutional amendment to overturn *Citizens United*, by 75% to 25%. In Colorado in the November 2012 election, a similar measure (Amendment 65) passed by 74% to 26%. Other direct popular votes in support of a constitutional amendment have passed by margins ranging from 52% (Brecksville, Ohio, 2012) to 91% (Monona, Wisconsin, 2017). An examination of the popular vote across multiple votes in different places and times shows a strong central tendency at about 75%. For example, examining the popular votes on amendment resolutions in 2012 local elections in Illinois, in alphabetical order by name of municipality, the first ten results are: 75%, 70%, 72%, 74%, 72%, 73%, 63%, 75%, 86%, 66%. For data on these votes, see *State and Local Support*, United For The People, http://united4thepeople.org/state-and-local-support-2/. Polls tend to produce similar results. *See Polling*, United For The People, http://united4thepeople.org/resources/#Polling, for a sample of polling data.

[6] *See 2016 Fall General Election Results*, Wis. Elections Comm'n, http://elections.wi.gov/elections-voting/results/2016/fall-general (Nov. 8, 2016).

[7] *See State and Local Support*, United For The People, http://united4thepeople.org/state-and-local-support-2/.

[8] *See* YouGov, *Omnibus Poll*, Huff. Post (April 10–11, 2013), http://huff.to/2n5fMOp (question 1).

politics do not favor a better system, that is bad enough. But if the democratic branches (elected legislatures, or the voters through direct democracy) do enact meaningful reform, and courts selectively strike out certain elements of it, then the problem runs much deeper.

A visitor from another area of law might be surprised to see how unusual this situation is. Take, for example, environmental law, which is arguably more complex, and certainly not less important, than campaign finance. By and large, in environmental law, courts are not the final arbiters of what is possible. To be sure, there is plenty of litigation and room for critical judicial decisions. But that litigation, and the judicial role, most often involves the interpretation of a statute. If the Supreme Court rules that the Environmental Protection Agency has misinterpreted a term in the Clean Air Act, and Congress disagrees, Congress can amend the act. That is certainly not easy in our increasingly polarized politics, but at least there is a pathway to a democratic fix. At the margins, there are some limits involving the division of responsibilities between administrative agencies and the legislature, or between the federal government and states. Yet in environmental law, there are very few total gaps: policy options that, courts will say, simply cannot be done at all. Environmental policy is constrained by technology, economics, practicality, and politics (itself heavily influenced by campaign finance!). But in an important (if only theoretical) sense, almost anything is legally possible.

That is a very different scenario from campaign finance law. In a "dejudicialized" environment, we might see hundreds of different approaches, striking different balances across Congress, states and territories, and our cities and towns. Unfortunately, these efforts must contend with the additional problem that a micromanaging Supreme Court has removed critical arrows from the policy quiver. Laws that were designed with two complementary parts must function with only one. Carefully negotiated political compromises are ripped apart, leaving in their place unbalanced policies that no legislature ever enacted or ever *would* enact. Systems designed to confront one problem are shoehorned into solving another problem, and then called inadequate because they are not perfectly designed to solve the problem that was not their focus in the first place.

The net result resembles a house from which walls, studs, and joists have been removed willy-nilly. Now the house bulges in strange places, canters at odd angles, and is beset with unexpected holes in the floor and leaks in the roof. The building can be patched here and there, with scraps of plywood, jerry-rigged buttresses, and plastic sheeting. But the building is fundamentally unsound.

Imagine that you first began to think about how to address the problem of money in politics without the benefit of detailed legal advice on what the Supreme Court would permit. Perhaps you are running for city council or the state legislature, exasperated by the way that campaign funders influence and control the agenda. Suppose that you began sketching out possible ideas, without any constraints, and then presented them to a lawyer versed in campaign finance. You would quickly learn that the Supreme Court's constitutional decisions have imposed the following limitations on your ideas for how to improve the system.

1. In Most Situations, the Only Legitimate Goal of Campaign Finance Reform is Preventing "*Quid Pro Quo*" Corruption

The first question is: what is the goal? Starting from a blank slate, you might imagine a long list of goals or reasons for limiting the influence of money in politics. You might start with *equal citizenship*. As noted above, the "one person, one vote" principle is fundamental to our democracy.[9] But we increasingly see a "wealth primary," where wealthy donors select the candidates who will be allowed to present their ideas to voters, filtering out (at very early stages) those whose views, no matter how popular they might be with actual voters, are displeasing to the donor class.[10] This donor class is wealthier, whiter, older and more disproportionately male than the electorate as a whole.[11] And because it is virtually impossible for a candidate to mount a serious political campaign unless she is either herself affluent or has affluent connections, the views of the affluent are always over-represented, and the views of the masses are under-represented—if represented at all.[12]

[9] *See* Gray v. Sanders, 372 U.S. 368, 381 (1963); *see also* Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

[10] The term "wealth primary" was coined by Jamin Raskin (now a U.S. Representative) and John Bonifaz in 1993. *See* Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 Yale L. & Pol'y Rev. 273 (1993). The concept has been popularized recently by Lawrence Lessig. *See, e.g.*, Lawrence Lessig, "Equality," A Speech Delivered at Stetson Law School (Feb. 27, 2014), https://vimeo.com/8793140 (video). It has also been called the "money primary." *See* Ari Berman, *How the Money Primary Is Undermining Voting Rights*, The Nation (May 19, 2015), www.thenation.com/article/how-money-primary-undermining-voting-rights/.

[11] *See* Adam Lioz, *Stacked Deck: How the Racial Bias in Our Big Money Political System Undermines Our Democracy and Our Economy*, Demos (Dec. 2014), https://goo.gl/TJ2mQX (90% of $200+ federal contributions came from predominantly white neighborhoods); Adam Bonica et al., *Why Hasn't Democracy Slowed Rising Inequality?*, J. Econ. Persp., Summer 2013, at 103, 111–12 (over 40% of total money contributed in federal elections comes from 0.01% of voting age population).

[12] See the chapters by Timothy Kuhner and Nicholas Stephanopoulos in this book.

You might also consider *preventing systemic or institutional corruption.* Besides the election itself, in matters of *policy and legislation*, campaign funders have more influence and access than ordinary voters. Candidates and officials are likely to become biased toward, and improperly dependent upon, those funders, rather than their own constituents or any sense of the "general public interest."[13]

You might then consider a host of other worthy goals: preventing "drowning out" of less-funded voices; protecting the integrity of the electoral process; protecting the time of officials and candidates so that they may focus on legislation and constituent service rather than fundraising; and many others. As a final thought, you might also consider *preventing "quid pro quo" corruption.* Bribery—giving a politician money expressly in exchange for performance of a favor, e.g., for killing a bill in committee—is already illegal. But it can still happen. Contribution limits act as a bulwark to supplement bribery laws because the less money that can be given in the first place, the less effective it will be as a bribe.

But outside of a few very specialized contexts, such as political spending by foreign nationals, the Supreme Court has rejected *all* potential goals for regulating money in politics except the very last one on our list.[14] Nowadays, the only basis accepted by the Supreme Court for regulating political contributions and expenditures is the prevention of *quid pro quo* corruption or its appearance.[15] Although that is a legitimate goal, it should not be the *only* goal.

And the goal matters. If someone challenges a local, state, or federal campaign finance rule in court, the court must satisfy itself that the law is closely related to the goal of preventing *quid pro quo* corruption. For example, the Supreme Court has convinced itself that regulating contributions to campaigns for and against ballot measures (initiatives, referenda, voter instructions, and so on) is unconstitutional. Under the Supreme Court's analysis, there is no candidate being elected in a ballot measure and hence no risk of corruption, so contribution limits serve no legitimate goal.[16]

This is an overly cramped framework, and it does not match the way most Americans think about money in politics. If given the chance, many

[13] Lawrence Lessig describes this form of corruption as "dependence corruption." *See* Lawrence Lessig, Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It 17–20, 226–47 (2011).

[14] *See* Citizens United v. FEC, 558 U.S. 310 (2010); Randall v. Sorrell, 548 U.S. 230 (2006); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

[15] McCutcheon v. FEC, 134 S. Ct. 1434 (2014).

[16] Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981).

communities would consider adopting campaign finance laws that explicitly aim at broader goals, such as promoting equal citizenship, rather than just preventing *quid pro quo* corruption. But under Supreme Court precedent, they cannot.

2. You Cannot Set Overall Campaign Spending Limits

One of the most obvious forms of campaign finance reform is to set a maximum budget for a political campaign for a given office, and require all candidates to stick to that budget. Limiting the demand for money by capping how much can be spent takes the pressure off *raising* so much money in the first place. Election rules for high school and college student government offices often feature maximum spending limits.[17]

In other domains, it is taken for granted that spending limits can promote healthy competition and prevent dominance by big spenders. That is one reason why all four major professional sports leagues in the United States have some form of "salary cap."[18]

But we do not have to look so far for analogies. If you have ever attended a public meeting of local government—whether the traditional New England town meeting, in which the people directly debate and vote on all major proposals, or a city council hearing, in which the public can testify to city councilmembers—you have probably seen a time limit. A timekeeper announces that all speakers will have a certain amount of time to speak (five minutes is common), and then will be cut off. Presidential debates, court arguments (including at the Supreme Court), and debates in the U.S. House of Representatives all follow similar rules. Time limits ensure a fair debate by making sure that each side has an equal chance to make its case.

Putting these two principles together, some communities experimenting with campaign finance reform would like to try overall campaign spending limits. How well does this work? We do not really know, because the Supreme

[17] *See* Flint v. Dennison, 488 F.3d 816 (9th Cir. 2007) (upholding $100 candidate spending limit for state university student government).

[18] The National Football League and the National Hockey League impose "hard caps" on total team payroll. Major League Baseball imposes a "competitive balance tax" (sometimes called "luxury tax") on teams that pay more than a league-determined threshold. The National Basketball Association imposes both a "soft cap" (with certain exceptions) and a competitive balance tax. *See generally Salary Cap*, Wikipedia, https://en.wikipedia.org/wiki/Salary_cap. Of course, as with sports leagues, a spending limit can have other benefits. Spending limits save money, as donors feel less obligated to engage in an arms race against other donors, and time, as candidates spend less time fundraising.

Court told us in the 1976 case of *Buckley* that it is forbidden. But we do have some clues.

In 1974, the City of Albuquerque, New Mexico enacted total campaign spending limits for candidates for mayor and city council. Two years later, the Supreme Court decided *Buckley*, which held that campaign spending limits are unconstitutional. But a funny thing happened in Albuquerque: nobody filed a lawsuit to challenge the spending limit. And courts can only decide cases that are brought to them. So for 27 years, Albuquerque conducted its municipal elections under overall campaign spending limits set at twice the annual salary of the office sought. The public and the candidates (both winning and losing) were all happy with the system. It prevented fundraising from getting out of control, and enabled years of healthy competition. Unfortunately, the system came crashing down when a mayoral candidate finally decided to challenge it in court in 2001.[19] Since the campaign spending limits were contrary to the Supreme Court's *Buckley* decision, a federal judge in New Mexico struck them down.

The accidental experiment from Albuquerque is promising. Of course, not all jurisdictions would choose a system like that. Yet if given the chance, many communities would consider adopting campaign finance laws that limit overall campaign spending. But, again, under Supreme Court precedent, they cannot do so.

3. Contribution Limits Cannot Be "too Low"

The Supreme Court allows local, state, and federal governments to set limits on contributions to political campaigns. That is the good news. But if a contribution limit strikes a judge as "too low," it will be struck down as violating the First Amendment.

That is a problem for many local and state governments. There are many reasons for contribution limits that might seem relatively low. An obvious reason is helping to protect equal citizenship. Many people cannot afford to give $27, let alone $270, let alone $2,700, to political candidates. But some can. If donors can contribute up to $2,700, then a $2,700 donor will have more influence—perhaps 100 times more influence—than a $27 donor. Setting the contribution limit at a lower limit, though, would nullify this advantage. If the contribution limit was set at $270, then the wealthy $2,700 donor has no greater financial influence than the middle class $270 donor. And if the limit was set at $27, then the wealthy donor would have no more financial influence

[19] Homans v. City of Albuquerque, 366 F.3d 900 (10th Cir. 2004).

than an unemployed or low-income worker, student, or retiree who struggles to give $27 at most.

Of course, low contribution limits may not be ideal in every situation. They presumably work best when campaign expenses are low, whether through natural market economics (e.g., a smaller jurisdiction with inexpensive campaign methods) or through legally mandated campaign spending limits (which, as noted above, the Supreme Court has rejected). They might also be viable in expensive but very high-profile races (perhaps only the presidential election) where a candidate can successfully use Internet fundraising to base an expensive campaign primarily on small grassroots donors.

These are legitimate policy debates. But they have been foreclosed by court decisions. As noted above, basing low contribution limits on a desire to protect equal citizenship is prohibited by Supreme Court precedent. They must be based on the need to prevent corruption, which is often difficult to establish.[20] And worse yet, courts now scrutinize contribution limits to determine whether they are "too low" according to a hazy set of criteria.[21]

4. You Cannot Limit Outside Spending

Not all political campaigning comes from the campaigns themselves. Sometimes, people or organizations outside the campaign want to buy advertising or otherwise indirectly fund campaigns by supporting candidate X or opposing candidate Y. In small amounts, this is as American as apple pie. Who would criticize the fifth-grader who, inspired by a local election, spends her own money to buy poster-board and markers to make handmade signs?

But as the dollars increase, outside spending tends to raise most of the same problems as direct campaign contributions and spending. And in recent years, the proportion of outside money has exploded. When the Supreme Court decided *Buckley*, big-money outside spending was a relatively uncommon phenomenon. Perhaps a wealthy individual or small group of wealthy individuals might buy a newspaper advertisement—indeed, that seems to have been the Supreme Court's exact concern in *Buckley*. But we are way past that. Back

[20] In the Court's 2014 *McCutcheon v. FEC* decision, for example, the Court essentially reasoned that, if one member of Congress cannot be corrupted by a single $2,700 contribution, then there is no risk of corruption in allowing a wealthy donor to make very large (e.g., half a million dollars) contributions to party committees, so long as those contributions could be mathematically accounted for as a set of smaller $2,700 contributions. *See* McCutcheon v. FEC, 134 S. Ct. 1434 (2014). This neat syllogism ignores how *party based* corruption can work. *See, e.g.*, Michael D. Gilbert & Emily Reeder, *Aggregate Corruption*, 104 Ky. L.J. 651 (2016); Michael S. Kang, *Party-Based Corruption and* McCutcheon v. FEC, 108 Nw. U. L. Rev. Online 240 (2014).

[21] *See* Randall v. Sorrell, 548 U.S. 230 (2006).

in 2014, it was newsworthy when twice as much of the total money spent in a Florida congressional race came from outside groups as from the candidates themselves.[22] In 2016, that ratio barely raised eyebrows; the new threshold is when *three* times as much is spent by outside groups as by candidates.[23]

Unfortunately, the Supreme Court has ruled that outside spending is largely immune from limits. There is an exception: If an outside spending group "coordinates" its spending with the official campaign team, e.g., by discussing media strategy, then the spending can be treated as if it were a contribution directly to the campaign, and subject to contribution limits. The Supreme Court's theory is that if the outside spending group is *not* coordinating its spending with the campaign, then there is no opportunity for that "*quid pro quo*" corruption to occur.

But political campaign professionals are good at toeing lines. No matter how strictly the lines against "coordination" between outside spending groups and campaigns are drawn, in the information age any reasonably competent outside spending group can figure out how to spend tens of millions of dollars in useful support of a campaign without crossing those lines. That money may not be as useful to candidates as money given directly to their campaigns—but there is so much more of it.

In today's campaign environment, outside spending is impossible to ignore.

If given the chance, many communities would consider adopting campaign finance laws that limit high-dollar outside spending. But under Supreme Court precedent, they cannot.

5. You Cannot Limit Corporate or Union Political Spending

Corporate and labor union political spending was, until 2010, prohibited or limited in federal elections, and in 24 states. Two reasons were generally offered.

First, corporations and unions should not be able to convert special state-granted legal privileges into extra political influence. Corporations, for example, can use their state-granted legal powers of limited liability and

[22] Some $12.5 million was spent in the March 2014 special election for Florida's 13th Congressional District. Of that total, the candidates (Republican David Jolly and Democrat Alex Sink) spent just 31.2%. The remainder was spent by national political party committees and various nonprofits and super PACs. *See* Michael Beckel, *Outside Groups Dwarf Candidate Spending in Florida Special Election*, Center for Public Integrity (Mar. 6, 2014), www.publicintegrity.org/2014/03/06/14337/outside-groups-dwarf-candidate-spending-florida-special-election.

[23] *See Races in Which Outside Spending Exceeds Candidate Spending, 2016 Election Cycle*, Center for Responsive Politics, www.opensecrets.org/outsidespending/outvscand.php?cycle=2016.

perpetual life to amass enormous sums of money from customers who give them money for goods or services, not to support (indeed, usually without knowing) the corporation's political spending plans. If money spent in election campaigns was thought to somehow reflect intensity or breadth of support, then corporate political spending can distort the campaign financing ecosystem by flooding elections with money that does not correlate to any public support. For example, consider a corporation with a relatively small number of employees that makes virtually all its money by exporting products to foreign customers. It might accumulate large sums of money to spend in elections, but that money does not in any meaningful way reflect public support for the corporation's political objectives. Labor unions' money generally derives from worker fees, but in some circumstances unions can similarly come to dominate political spending out of proportion from public support for their objectives.

The second rationale is that, fundamentally, corporate executives and union officials engaged in political spending are playing with other people's money. As for unions, in some cases private-sector workers are *required* to pay fees to the union. While the Supreme Court has held that unions must segregate political spending from workplace representation, and give dissenting workers the ability to opt out of the portion of a fee attributable to political spending,[24] in many cases the default is "in." In the case of corporations, the money ultimately "belongs" (at least in some senses) to shareholders, who generally do not have the ability (either legally or practically) to control, opt out of, or even *learn* management's choices for political spending.

But these reasons for restricting political spending by corporations and unions were rejected in *Citizens United* and a follow-up case, *American Tradition Partnership v. Bullock*,[25] that extended *Citizens United* to the states in 2012. As of this writing, direct corporate and union contributions to candidates can be prohibited, but corporate and union outside spending cannot be limited at all.

6. You Cannot Design a Voluntary Public Finance System with "Rescue" Provisions for Clean-Money Candidates Facing Privately Financed Opponents

Voluntary public financing systems have enjoyed some success in state and local races. These come in different versions: block grants, matching grants,

[24] *Comms. Workers of America v. Beck*, 487 U.S. 735 (1988); *cf. Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018) (invalidating agency fee requirements for public employees).

[25] Am. Tradition Partnership, Inc. v. Bullock, 565 U.S. 1187 (2012).

and in the newest variation, "citizen vouchers" given directly to voters to send to candidates. Under the right conditions, these systems can succeed.[26]

The problem comes when a clean-money candidate faces a wealthy self- or donor-funded opponent who has declined to opt into the system. One approach that had been used in federal law was to allow the clean money candidate a higher contribution limit if she faced a self-financed opponent whose spending exceeded certain levels. The Supreme Court struck that down.[27] Another approach, used in many state "clean elections" systems, was to provide additional "rescue funds" of public money to a clean-money candidate in this situation. The Court struck that down too.[28]

The remaining solutions to this problem tend to involve flooding the system with *much more* public money, so that publicly financed campaigns can compete more effectively with wealthy donor-financed or self-financed campaigns. But this puts the taxpayers in an insane financial arms race with the wealthiest 0.1 percent of the country. It may not be politically sustainable to devote so much taxpayer money to trying to outspend quixotic billionaires, and even if it is, it is a sad commentary if the only Court-approved way to make a public campaign financing system work is to divert ever-increasing amounts from the public treasury to advertising.

B. What Is to Be Done?

What, then, *can* we do in the face of this cramping judicial precedent? The problems identified above—tools missing from the reform toolbox, because the Supreme Court pulled them out—do not completely eliminate all possibilities for reform. Some measures, like improved disclosure rules, contribution limits, and certain limited voluntary public financing, can be designed to (hopefully) survive judicial challenge. And there are other fine reform solutions that can be pursued even in this current legal environment—this book is filled with them.

If we take the current constraints imposed by the Supreme Court as an unalterable given—if we accept that money deserves the same constitutional protections as speech, that "*quid pro quo*" corruption is the only democratic value that can justify limiting the flow of money, that spending can rarely, if ever, be limited, that corporations deserve the same protections as citizens

[26] For a fuller discussion of how the public financing of elections in the United States works, see the chapters by Richard Briffault and Adam Lioz in this book.

[27] Davis v. FEC, 554 U.S. 724 (2008).

[28] Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011).

and voters, and all the rest—then we can try to muddle through and make a terrible system marginally better.

But what if we do not have to take those constraints as given?

These shackles on reform are not inevitable. For now, we must treat them as part of constitutional law, but they are not in the Constitution itself. They were not given to us by the Founders, but imposed on us by the Supreme Court.

The Supreme Court could undo its own mischief. But it seems unlikely that the Supreme Court will be disposed to overrule *Citizens United*, let alone *Buckley*, in the next few years. And even if the composition of the Supreme Court shifts in a favorable direction, it is unlikely to overrule *Buckley* in one fell swoop. Cases have to be developed and presented, and the Supreme Court prefers to move incrementally. By the time that an opportunity to overrule *Buckley* is before the Court, the pendulum may have swung in the opposite direction. Moreover, it is unhealthy for democracy to focus on an incredibly tiny body of elite judges—really, one, since critical decisions these days tend to be 5-4—appointed in a hyper-partisan environment. In fact, such focus on the Justices replicates the injury to democracy by depriving Americans of the chance to participate in defining their own self-government, in favor of an inaccessible process centered entirely in Washington, D.C, and run by an especially elite class of judges with life tenure.[29]

The Founders gave us a sounder mechanism for amending the Constitution. And we can use it again now.

II. WHAT THE CONSTITUTIONAL AMENDMENT WILL DO

A. *What Is a Constitutional Amendment and How Do We Pass One?*

The Founders of our Constitution foresaw the need to amend it from time to time. Article V of the Constitution provides:

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three

[29] *See* Jeff Clements, *Justices Matter But Amendments Matter More*, The Hill (Feb. 26, 2016), http://thehill.com/blogs/congress-blog/campaign/270766-justices-matter-but-amendments-matter-more.

> fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress …

An amendment is written as a separate, stand-alone text that is appended to the end of the Constitution.[30] Once ratified, it becomes a full part of the Constitution, with the same force as if it had been there since 1787, but also capable of providing a new interpretive "lens" on provisions adopted before the new amendment.

Over the past 231 years, we have amended the Constitution 27 times—17 of them since the initial Bill of Rights was passed by the First Congress. Of those 17, more than half (nine) were ratified within the last century. On average, amendments have been passed about once a generation, often in batches at moments of great national significance:

- *Bill of Rights:* In 1791, with the Constitution just recently ratified and the memory of the Revolutionary War still fresh, we passed the first ten amendments, known as the Bill of Rights.[31]
- *Reconstruction Amendments:* In a five-year period during the post-Civil War Reconstruction, we passed the Thirteenth (banning slavery), Fourteenth (guaranteeing due process of law and equal protection from state governments), and Fifteenth (prohibiting denial of the vote based on race) Amendments.
- *Progressive Amendments:* During a 20-year period in the Progressive ferment of the early twentieth century, we passed six amendments, including the Sixteenth (authorizing a federal income tax), Seventeenth (requiring direct popular elections of the Senate), and Nineteenth (prohibiting denial of the vote based on sex) Amendments.[32]

[30] This was not specified in the Constitution itself. When Congress began debating the initial batch of amendments that forms our Bill of Rights, James Madison thought that the "original" text of the Constitution should be revised by amendments. But he lost that argument, and so now we have a chronological record embedded in the Constitution itself: the full original 1787 text of the Constitution, including portions of which are obsolete or repealed, followed sequentially by amendments in their order of ratification.

[31] In the decade following the ratification of the Bill of Rights, Congress passed three more amendments that might be called the Technical Correction Amendments: the Eleventh (overturning a Supreme Court decision on whether states could be sued in federal court by citizens of another state), the Twelfth (revising presidential election procedures, and itself later superseded), and the Twenty-Seventh (preventing Congress from raising its own salary mid-term), which was passed by Congress in 1789 but, due to various oversights and a remarkable historical re-discovery, not ratified until 1992.

[32] The Progressive Amendments also included Prohibition, passed by the Eighteenth Amendment and then later repealed by the Twentieth.

- *Voting Rights Amendments*: In a ten-year period during the great social upheaval of the 1960s and early 1970s, we passed the Twenty-Third (giving residents of the District of Columbia a vote for president), Twenty-Fourth (banning the poll tax in federal elections; soon after extended by the Supreme Court to state elections), and Twenty-Sixth (giving the right to vote to 18-year-olds) Amendments.[33]

Put another way, the history of our Constitution is one of constitutionally fertile "amendment eras" separated by a little over 40 years on average. Setting aside the unusual circumstances of the ratification of the Twenty-Seventh Amendment,[34] the last amendment era ended in 1971. If history is any guide, we are about due. Perhaps the paroxysm of American politics illustrated (and perhaps caused) by the election of President Trump highlights this need.

Importantly, of the 17 post-Bill of Rights amendments, seven (the Eleventh, Thirteenth, Fourteenth, Sixteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth) were passed and ratified to correct and reverse specific Supreme Court rulings with which the American public disagreed:

- The Eleventh Amendment, ratified in 1795, provides that federal courts do not have jurisdiction over a suit against a state by citizens of another state. That overturned *Chisholm* v. *Georgia*.[35]
- The Thirteenth and Fourteenth Amendments, ratified in 1865 and 1868, ban slavery and prohibit states from denying due process or equal protection of the laws. They overturned *Dred Scott v. Sandford* and *Barron v. Baltimore*.[36]
- The Sixteenth Amendment, ratified in 1913, grants Congress the authority to enact income taxes without apportioning them by state. That overturned *Pollock v. Farmers' Loan & Trust Co.*, in which the Court held that Congress lacked this power.[37]
- The Nineteenth Amendment, ratified in 1920, prohibits states from denying women the right to vote. That overturned *Minor v. Happersett*.[38]
- The Twenty-Fourth Amendment, ratified in 1964, prohibits states from conditioning the right to vote in federal elections on the payment of

[33] Over the course of the twentieth century, we also passed three amendments pertaining to presidential succession (the Twentieth, Twenty-Second, and Twenty-Fifth) after specific eye-opening problems.

[34] *See supra* note 31.

[35] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

[36] Dred Scott v. Sandford, 60 U.S. 393 (1857); Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[37] Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895).

[38] Minor v. Happersett, 88 U.S. 162 (1875).

a poll tax. That overturned *Lassiter v. Northampton County Board of Elections* and *Breedlove v. Suttles*.[39]

- The Twenty-Sixth Amendment, ratified in 1971, prohibits states from denying the right to vote on the basis of age to any citizen aged 18 or older. That overturned *Oregon v. Mitchell*.[40]

B. What Would a Campaign Finance Amendment Say?

Most amendment advocates agree that a constitutional amendment, to be effective, must overturn not only *Citizens United*, but *Buckley v. Valeo*, the 1976 Supreme Court decision that set the foundations for the Court's focus on "corruption," its rejection of spending limits, and what followed. Yet there are several different options for the text beyond that. Unsurprisingly, there are multiple views on how best to structure the amendment.

The first key question is whether the amendment should focus only on money in politics, or address other issues as well. The *Citizens United* case brought together two sets of issues: campaign finance, and the constitutional status of corporations. Many advocates support overturning *both* the Supreme Court's money in politics cases (going back to *Buckley v. Valeo*) *and* its cases extending constitutional rights to corporations, including outside of the context of campaign finance.[41] Others support only the first goal. Of those who support both goals, some argue that both must be accomplished in a single amendment, while others believe that passing an amendment on campaign finance alone will be more expedient than passing a combined amendment, and may indeed accelerate passage and ratification of a later amendment undoing the Court's extension of constitutional rights to corporations. And many support simultaneously addressing other democracy-related issues, such as an explicit right to vote, a national popular vote for president, or gerrymandering reforms.

The second question, with respect to money in politics, is whether the amendment should be *enabling*, *mandatory*, or *self-executing*. An enabling amendment grants Congress and the states the *power* to enact campaign finance reform and clears away judicial obstacles. A good structural model for this is the Sixteenth Amendment. In 1895, the Supreme Court ruled in

[39] Lassiter v. Northampton County Bd. of Elec., 360 U.S. 45 (1959); Breedlove v. Suttles, 302 U.S. 277 (1937).

[40] Oregon v. Mitchell, 400 U.S. 112 (1970).

[41] The details of the latter topic are beyond the subject of this chapter (or this book), but it is essential to understand the context. For more information, see Adam Winkler, We the Corporations: How American Businesses Won Their Civil Rights (2018); Jeff Clements, Corporations Are Not People (2d ed. 2014). *See also* John C. Coates, IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 Const. Comment. 223 (2015).

Pollock v. Farmers' Loan & Trust Co. that Congress does not have the power to enact income taxes unless they are apportioned among the states based on their population.[42] The Sixteenth Amendment, which was passed to overturn *Pollock*, provides: "The Congress *shall have power* to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[43] That is an enabling amendment: it provides that Congress *has the power* to tax incomes without apportionment by state, but it does not *require* Congress to do anything. Similarly, an enabling amendment for campaign finance would give Congress and the states the breathing room to take action without judicial intervention, but would not require any specific legislation.

By contrast, a *mandatory* amendment would *require* Congress and the states to pass laws limiting money in politics. Some amendment advocates argue that, after all the effort to pass an amendment, it would be deeply disappointing if Congress and the states did not actually enact any reforms under their newly restored authority. This concern is not far-fetched. By analogy, while it has been clear for over 40 years that states may enact contribution limits, 11 states choose not to do so. They allow unlimited contributions to political candidates. At the same time, a mandatory amendment raises questions as to who exactly would enforce this requirement—we do not have good legal models for how anyone can force Congress to pass a law—or what standards a court might use to determine whether the legislatures had met their requirements.

Finally, a *self-executing amendment* would impose the limits right there in the text of the constitutional amendment. This is not hard to write; for example, an amendment could specify a dollar limit on contributions to campaigns for Congress.[44] This approach eliminates the possibility of the legislature doing nothing, or of doing something inadequate. On the other hand, it locks policy into constitutional text. That means that, if Congress or the states realized that changes were needed, those later changes might require *another* constitutional amendment. This is the lesson of the Eighteenth Amendment, which enacted Prohibition as a self-executing amendment: "[T]he manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject

[42] Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895).

[43] U.S. Const. amend. XVI (emphasis added).

[44] Such an amendment could include an inflation mechanism adjustment to avoid the problem of dollar values meaning less over time. The Seventh Amendment provides a jury trial right in federal court for certain civil suits "where the value in controversy shall exceed twenty dollars." U.S. Const. amend. VII. Twenty dollars may have been a significant figure in 1791, but at this point the $20 threshold is meaningless.

to the jurisdiction thereof for beverage purposes is hereby prohibited."[45] When the public realized that Prohibition was unsustainable, it required another constitutional amendment to undo it: The Twenty-First Amendment repealed the Eighteenth Amendment, and replaced it with an enabling provision that gave control to states.[46]

In the field of campaign finance, which changes rapidly as political fundraising and spending techniques evolve, the process of experimentation by state and local governments is critical. Arguably, if a major part of the problem thus far has been that democratic deliberation has been cramped by *supposed* constitutional mandates, it might be best not to replicate that by creating *actual* constitutional mandates that could impede healthy policy compromises.

Until 2014, there were about a dozen distinct amendment bills floating in Congress at any given time.[47] In early 2014, most of the major campaign finance reform organizations supporting an amendment converged on a consensus text, known as Democracy For All Amendment (or DFAA). Here is the full text of the DFAA, as it became amended through the Senate process, with 55 co-sponsors:

> Section 1. To advance democratic self-government and political equality, and to protect the integrity of government and the electoral process, Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections.
>
> Section 2. Congress and the States shall have power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections.
>
> Section 3. Nothing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press.

This text has several notable features.

- *Enables the consideration of broader democratic values as legitimate goals of campaign finance reform.* Through the preamble to Section 1, the DFAA explicitly advances goals beyond just corruption: democratic self-government, political equality, and the integrity of government and

[45] U.S. Const. amend. XVIII § 1.

[46] U.S. Const. amend. XXI.

[47] *See Constitutional Amendments*, United For The People, http://united4thepeople.org/amendments/.

the electoral process. This, alone, overturns a central holding of *Buckley*, *Citizens United*, and *McCutcheon v. Federal Election Commission*:[48] that corruption (or, worse yet, only *quid pro quo* corruption) is the only basis for campaign finance legislation.

- *Enables the regulation of spending, including from non-candidates.* This overturns key holdings of *Buckley* and other cases by allowing spending limits for campaigns and outside spenders.
- *Distinguishes natural persons from artificial entities created by law*. This overturns *Citizens United* by allowing Congress and the states to treat real people differently from corporations and, if they choose, prohibit the latter from campaign spending entirely.
- *Provides a savings clause for freedom of the press*. The first two sections of the DFAA authorize Congress to set limits on fundraising and spending to influence elections. By itself, this does not authorize the government to restrict press freedoms. However, out of an abundance of caution, the DFAA includes a savings clause to make it clear that, in cases where political campaigning may tread perilously close to activities protected by the freedom of the press, the DFAA does not authorize the government to abridge that freedom.[49]

The DFAA may not be the final word. Other amendment bills are still available as vehicles.[50] In 2017, a new collaborative process entitled "Writing the 28th Amendment" was launched under the leadership of the organization American Promise.[51] That 18-month project brings together constitutional scholars, citizen leaders and elected officials from both sides of the aisle in a deliberative process that may yield a different bill or set of bills.

C. How Would Courts Analyze Campaign Finance Laws after the Amendment?

It is important to emphasize what would be different, and what would not be different, in the ability of the states and federal government to regulate

[48] McCutcheon v. FEC, 134 S. Ct. 1434 (2014).

[49] Defining the boundaries of "freedom of the press" is not a simple task, but neither is it impossible. The writings of Sonja West are an excellent starting point. *See, e.g.*, Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. Rev. 1025 (2011).

[50] The most prominent of these other amendment bills is the We the People Amendment, championed by Move to Amend. *See* H.R.J. Res. 48, 115th Cong. (2017), www.congress.gov/bill/115th-congress/house-joint-resolution/48/.

[51] *See Writing the 28th Amendment*, American Promise, www.americanpromise.net/writing_the_28th_amendment.

campaign finance after this amendment. Some people have made the counter-intuitive claim that the DFAA would have no effect at all! They suggest that Congress and the states *already* have the power to set limits on raising and spending money to influence elections—it is just that this power is limited by the First Amendment—and that unless a new amendment repeals the First Amendment, it will have zero effect.

But this is absurd. The DFAA's explicit assertion of the power to set limits on raising and spending money to influence elections by candidates and others, coupled with the foregrounding of constitutional values besides corruption and the authority to distinguish corporations from natural persons, would clearly overrule *Buckley* and all the cases that followed, including *Citizens United*. In so doing, it would overrule the Supreme Court's interpretations of how the First Amendment applies campaign finance reform measures.

In its place, the Supreme Court would either decline to review campaign finance laws, or create a new jurisprudence. Many of the foundational theoretical questions, such as the definition and limits of political equality, have already been tackled in academic literature and (unsuccessful) legal briefs under the current constitutional framework. Other questions would be worked out as courts generally try to do: answering questions in specific factual scenarios, applying the values and principles set before them to new conditions.

This may seem like an invitation to mischief, but it is how our Constitution has always worked. The men (unfortunately, all men) who wrote and ratified the First Amendment agreed on the need to protect "the freedom of speech"; they could not have agreed on, or even considered, how a court should evaluate all the myriad hypothetical scenarios that might possibly arise under this provision in 1787, let alone in the twenty-first century. In evaluating campaign finance laws under the Twenty-Eighth Amendment, the Justices of the Supreme Court will work from, to varying degrees depending on their methodological preferences, the text (including preamble), history, and structure of the amendment, viewed in the context of the entire Constitution—including, for contrast purposes, the Court's own precedent that the amendment is clearly intended to repudiate.

It is true that sometimes, after a new amendment passes, Justices who lived through the transition can be stingy in its application. For example, the Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." While there is some historical dispute as to the precise object of this clause, it appears likely that it was intended to make the Bill of Rights applicable against state governments as well as the federal government. But in

1873, the Supreme Court adopted an unusually cramped view of this clause, holding that it refers primarily to a narrow set of federal rights, such as the right to travel between states.[52] (That is still technically the law; the Supreme Court eventually applied the Bill of Rights to state governments through an entirely different clause that was probably not designed for that purpose.)

The same occurred shortly after the passage of the Sixteenth Amendment, which was adopted in 1913 and provides that "Congress shall have power to lay and collect taxes on *incomes, from whatever source derived*, without apportionment among the several States, and without regard to any census or enumeration."[53] The whole purpose of the Sixteenth Amendment was to overrule the Supreme Court's 1895 decision in *Pollock v. Farmers' Loan & Trust Co.* But in 1920, the Court struck down a federal income tax law, claiming that Congress could not treat stock dividends as "income" and that *Pollock* was still good law for this point![54] The Court stated that "[a] proper regard for [the Sixteenth Amendment's] genesis, as well as its very clear language, requires also that this amendment shall not be extended by loose construction."[55] Justice Oliver Wendell Holmes dissented, stating:

> I think that the word "incomes" in the Sixteenth Amendment should be read in a sense most obvious to the common understanding at the time of its adoption. For it was for public adoption that it was proposed. The known purpose of this Amendment was to get rid of nice questions as to what might be direct taxes, and I cannot doubt that most people not lawyers would suppose when they voted for it that they put a question like the present to rest. I am of opinion that the Amendment justifies the tax.[56]

Eventually, the Court came to recognize that when the people passed an amendment, they meant something by it. And it is no argument against an amendment to suggest that the Justices of the Supreme Court might ignore it—that argument proves too much, as the Supreme Court can just as easily ignore the *existing* text of the Constitution.

At the same time, it is *not* true that, after passage of the Twenty-Eighth Amendment, the Supreme Court would not apply *any* constitutional scrutiny to campaign finance legislation. Among other things, the rest of the

[52] The Slaughter-House Cases, 83 U.S. 36 (1873).

[53] U.S. Const. amend. XVI (emphasis added).

[54] Eisner v. Macomber, 252 U.S. 189 (1920). *See also* David H. Gans & Ryan Woo, *Reversing Citizens United: Lessons from the Sixteenth Amendment*, Constitutional Accountability Center (Jan. 20, 2012), www.theusconstitution.org/wp-content/uploads/2017/12/20120120_Issue_Brief_David_Gans_Ryan_Woo_Reversing_Citizens_United.pdf.

[55] *Eisner*, 252 U.S. at 206, 218.

[56] *Id.* at 219–20 (Holmes, J., dissenting).

Constitution still applies. For example, suppose a law set different spending limits for black candidates and white candidates. That would violate the Fourteenth Amendment's Equal Protection Clause. Or suppose a law set a special limit on spending money on political advertisements to promote socialism. That would violate the First Amendment's protection against abridging the freedom of speech—because the law, by singling out one particular political viewpoint to receive a special limit, is viewpoint-based.[57]

Again, the Sixteenth Amendment provides a useful analogy. Despite the different subject matter (income taxation), it is the amendment most similar in form to the DFAA, in that it authorizes the government to do something that the Supreme Court had previously said it could not. One can imagine someone in 1913 raising the objection that the Sixteenth Amendment, by granting Congress "power to lay and collect taxes on incomes," would enable Congress to discriminate by race in income tax, charging higher rates for black taxpayers than white taxpayers, or imposing special income taxes on supporters of a disfavored political party or religion. But we would see those arguments as foolish. The Sixteenth Amendment's conferral of power did not repeal the First Amendment's protection of freedom of speech or religion, or the Fourteenth Amendment's Equal Protection Clause. The same logic will apply to the Twenty-Eighth Amendment.

D. Will the Twenty-Eighth Amendment Change the Bill of Rights?

According to some amendment opponents, the Twenty-Eighth Amendment would amend the First Amendment. They argue that this is unprecedented,

[57] Some other amendment proposals take the form of "Nothing in this Constitution shall prohibit Congress and the States from" setting limits. *See, e.g.*, *Restore Democracy Amendment*, Citizens Take Action, https://citizenstakeaction.org/restore-democracy-amendment/ (providing that "nothing in this Constitution shall prevent" Congress or states from imposing limits on contributions or expenditures). These formulations risk the problems described above, such as laws that set different spending limits based on viewpoint or race. To work around this problem, some amendment bills in Congress have included a "Nothing in this Constitution…" clause but then added exceptions *within* that clause. For example, one amendment bill in the 114th Congress provided that "Nothing in this Constitution shall be construed to prohibit Congress or any State from imposing *content-neutral limitations* on contributions or expenditures…" H.R.J. Res. 24 § 1, 114th Cong. (2015), www.congress.gov/bill/114th-congress/house-joint-resolution/24/text (emphasis added). This drafting approach, however, requires the amendment to include an exhaustive list of which requirements *do* apply, with the burden of writing a mini-Constitution into the amendment and the risk of omitting something important. The DFAA's formulation, by retaining all previous constitutional history, avoids this problem entirely. It is also worth noting that no constitutional amendment yet passed uses a formulation like "nothing in this Constitution."

and that this very novelty, alone, should give us strong pause. Sometimes this is reduced to the shorthand of "we have never amended the First Amendment (or the Bill of Rights) before."[58]

The Twenty-Eighth Amendment would not, however, amend the First Amendment. The portion of the First Amendment that amendment opponents believe to be at issue states that "Congress shall make no law … abridging the freedom of speech …"

Before even addressing campaign finance, it is important to step back and understand the indeterminacy of this command. The First Amendment does not say "Congress shall make no law abridging speech." It says Congress shall make no law abridging "the freedom of speech." But what is "the freedom of speech"? It is generally accepted that "the freedom of speech" does not prevent the government from regulating or prohibiting: providing national security secrets to foreign spies; child pornography; malicious libel; copyright infringement; criminal extortion; noisy amplified announcements in residential neighborhoods at 3 a.m.; and many other things that are, in some ways, "speech."

The First Amendment also does not say anything about raising or spending money in elections by individuals or corporations. The Supreme Court interpreted "the freedom of speech" to include these activities. And when the people disagree with a Supreme Court interpretation of the Constitution, a constitutional amendment is a legitimate response. The Twenty-Eighth Amendment would not change one word of the First Amendment. Rather, it would correct an *erroneous judicial interpretation* of the First Amendment with respect to raising and spending money in elections.

We have lived under *Buckley*'s functional equation of political money with "the freedom of speech" for so long that it may be hard to remember a different way of looking at things. But it is important to remember that *Buckley* itself overturned a very thoughtful decision of the U.S. Court of Appeals for the District of Columbia Circuit (a particularly influential appellate court that is sometimes called the "second highest court in the land") that rested on a very different analysis. In the D.C. Circuit, the highly respected Judge Skelly Wright drew upon two different analogies from then-recent Supreme Court law in analyzing the contribution and spending limits of the Federal Election Campaign Act.

[58] For example, Senator Ted Cruz of Texas used this argument at a Senate Judiciary Committee hearing on the proposed constitutional amendment. *See Examining a Constitutional Amendment to Restore Democracy to the American People Before Sen. Comm. on the Judiciary*, www.judiciary.senate.gov/meetings/examining-a-constitutional-amendment-to-restore-democracy-to-the-american-people (video starting at 1:03).

The first analogy was the "sound truck" case, *Kovacs v. Cooper*.[59] *Kovacs* came from an era when sound trucks were a crucial part of political campaigns. These trucks would drive around a city with amplified loudspeakers and blare political messages. The problem was, with a loud sound truck circling around the neighborhood, no one else could get a word in edgewise. In *Kovacs*, the Supreme Court upheld a local noise ordinance that limited operation of these sound trucks. In the Court's view, "the freedom of speech" did not include the freedom of those with the loudest amplification technology to drown out the voices of those without. By analogy, the Court of Appeals reasoned in its original decision in *Buckley* (which was later overturned by the Supreme Court) that "the freedom of speech" does not include the freedom of those with the most money to dramatically outspend those with less and thereby drown out their influence.[60]

The second analogy was the principle of "one person, one vote" as articulated in several cases over the 1960s. Under this principle, the Supreme Court struck down arrangements in various states under which one legislative district might have a wildly different population than another, yet both would have the same number of votes in the legislature.[61] These arrangements gave voters in the less-populated districts more influence, per person, than voters in the more-populated districts. They got, in essence, more votes. By analogy, the Court of Appeals reasoned in its original decision in *Buckley* (which, again, the Supreme Court overturned), allowing a small number of major financial donors to have an outsized influence on electoral and policy outcomes violated the "one person, one vote" principle.

Of course, the Supreme Court rejected these analogies drawn by the appellate court. And the Supreme Court is authorized, as the nation's highest court, to interpret the Constitution. But when the Court reaches an interpretation with which the American people profoundly disagree, the people are entitled to respond with a counter-interpretation—as we have done seven times before.

It is sometimes said that previous amendments have been about *expanding* rights, rather than restricting them. But this argument is not quite correct. As a simple factual matter, the Eleventh Amendment took away citizens' rights to sue other states in federal court. And certainly the Sixteenth Amendment, enabling Congress to collect federal income taxes, does not expand individual rights.

[59] Kovacs v. Cooper, 336 U.S. 77 (1949).

[60] Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975), *rev'd*, 424 U.S. 1 (1976) (per curiam).

[61] Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962).

But more importantly, sometimes expanding equality can be painted as diminishing a previously enjoyed, but unearned and illegitimate, "right" to dominate others. For example, the Thirteenth Amendment could be claimed to have abolished the "right" of slaveholders to own slaves—a "right" legitimated by the Constitution and the Supreme Court in *Dred Scott*. The Thirteenth Amendment therefore abolished the "right" of white people to own black people. Similarly, the Nineteenth Amendment could be claimed to have abolished the "right" of men to control elections—a "right" seemingly enshrined in the Fourteenth Amendment.[62] The Twenty-Fourth Amendment could be claimed to have abolished the "right" of citizens with enough money to pay a poll tax to control elections. And so forth.

Indeed, a slaveholder could argue that the Thirteenth Amendment actually repealed his Fifth Amendment rights! According to the Fifth Amendment, "private property" may not be "taken" by the government "without just compensation."[63] As grotesque at it seems now, in the legal framework of the *Dred Scott* era, before the Thirteenth Amendment, slaves were "private property" under the law. A slaveholder could object that the government, by freeing the slaves, was "taking" property without compensation.

To be sure, political dominance by wealthy elites through the power of their wallets is not comparable to the horrors of slavery. The point is simply that amending the Constitution to expand equality can often be portrayed as diminishing someone else's (illegitimate) advantages or "rights." What is important to understand is that the very process of amendment pronounces that the previous exercise of domination should never have been a "right" in the first place. Consider, for example, the Nineteenth Amendment. Before the Nineteenth Amendment, men had the right to vote, and also the "right" to a disproportionate exercise of power through that vote. The Nineteenth Amendment, by guaranteeing the right to vote to women, did not take it away from men—men still have the right to vote. But it did proclaim that the disproportionate political power held by men by virtue of being born male was not a "right" after all. Similarly, the Twenty-Eighth Amendment will not deprive

[62] The Fourteenth Amendment includes a now mostly obsolete provision that was intended to discourage Southern states from denying the vote to black citizens by reducing a state's representation in Congress to the extent that it denied or abridged the right to vote "to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States." U.S. Const. amend. XIV, § 2. The mechanism of the provision, however, reinforced the presumption of male-only suffrage. The original thrust of that provision is now mostly obsolete because of the Fifteenth Amendment and the federal Voting Rights Act, and its focus on male citizens of age 21 or older is largely supplanted by the Nineteenth and Twenty-Sixth Amendments.

[63] U.S. Const. amend. V.

wealthy donors of their freedom of speech. Instead, it will represent a collective determination that the power of wealth to disproportionately influence our politics and democracy is not a right, but a form of domination.

III. HOW WE GET THERE

As noted above, Article V of the Constitution provides two formal mechanisms for initiation of an amendment: a vote by two-thirds of both houses of Congress, or a constitutional convention (sometimes called a "convention of the states") on application of two-thirds of the states. Either way, the proposed amendments must be ratified by three-fourths of the states.

This process is deliberately difficult. The primary method of amending the Constitution requires two-thirds of *both* houses of Congress, *and* ratification by three-quarters of the states—today, that would be 38 states. A secondary method, floated several times but not yet actually used, is designed to work around a recalcitrant Congress: a constitutional convention convened on application of two-thirds of the states, which can then propose amendments, which must then be ratified by three-quarters of the states. So far, all 27 amendments have been enacted by Congress; we have not had a constitutional convention since 1787.[64]

The Article V amendment process is cumbersome—indeed, it was designed to be cumbersome—and it contains many points of failure. It needs to pass two-thirds of the House of Representatives' 435 members (i.e., 290 votes) and

[64] Several convention calls have come close, including as recently as the 1980s. *See generally* James Kenneth Rogers, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 Harv. J.L. & Pub. Pol'y 1005 (2007). A close call just short of the threshold was an important factor in Congress's eventual passage of the Seventeenth Amendment, and some have suggested that convention calls "may also have played a role in leading Congress to propose the Twenty-first, Twenty-second, and Twenty-fifth Amendments." *Id.* at 1008. Within the amendment movement, some support a convention call, arguing that Congress is part of the problem and too entrenched in the existing system. *See, e.g.*, Alison Hartson, *The Logical Path to End Corruption*, Medium (May 11, 2017), https://medium.com/wolf-pac/the-logical-path-to-end-corruption-a64c1d06394b. Most amendment supporters, however, oppose a constitutional convention, arguing that its unprecedented nature, combined with open questions about our ability to contain the scope of its the convention's proposals and a convention's authority to change the ratification requirements, make it dangerous under present political conditions. *See, e.g.*, *The Dangerous Path*, Common Cause, www.commoncause.org/issues/more-democracy-reforms/constitutional-convention/executive-summary.html; *Free Speech For People Statement Opposing Call for a Constitutional Convention*, Free Speech For People (May 18, 2017), https://freespeechforpeople.org/free-speech-people-statement-opposing-call-constitutional-convention/.

two-thirds of the Senate's 100 members (i.e., 67 votes), and then be ratified by three-fourths of the 50 states (i.e., 38 states).[65] That is not an easy process.

Some amendment skeptics cannot get past the fact that an amendment is hard to pass. But, as American history demonstrates, it is sometimes necessary and far from impossible.

The leading strategy of most constitutional amendment supporters today takes the best features from the convention call methodology—its bottom-up, state-by-state, grassroots-oriented approach—and applies them to the Congress-initiated formal mechanism. In other words, the plan is *not* to begin with Congress, lobby members of the House and Senate to pass an amendment, and *then* approach the states for ratification, but rather the other way around: *first* line up the states in support, *then* push for a Congressional vote.[66]

Toward this end, supporters have pressed for state-level resolutions—through direct popular vote where state laws allow, and through a legislative vote elsewhere—calling upon Congress to pass an amendment. As of this writing, 19 states (and over 700 cities and towns) have passed such resolutions, generally by overwhelming margins.[67]

To be clear, this strategy is *not* a call for a convention of the states. Rather, these state and local resolutions *call upon Congress* to pass an amendment and submit it to the states for ratification. While these resolutions vary from state to state, depending both on local circumstances and specific limits of state constitutions for such resolutions,[68] typically they do two things. First, they call upon Congress to pass an amendment to overturn *Citizens United*

[65] Under Article V of the Constitution, amendments must be "ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress." U.S. Const. art. V. In practice, most amendments have not specified a particular method of ratification; of those that have, only the Twenty-First Amendment (repealing Prohibition) specified that it must be ratified by convention. *See* U.S. Const. amend. XXI, § 3. All states but one (Nebraska) have bicameral legislatures, and generally speaking, state ratification of a constitutional amendment requires *both* state houses to ratify an amendment. Therefore, ratification by 38 states likely requires 76 different bodies to vote for ratification.

[66] In 2014, the Senate leadership decided to hold a preview test vote on the DFAA. This was a fortuitous opportunity, but ahead of schedule under this strategy.

[67] The states on record in support are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Montana, New Jersey, New Mexico, Nevada, New York, Oregon, Rhode Island, Vermont, Washington, and West Virginia. For a detailed list of the precise votes taken, see *State and Local Support by the Numbers*, United For The People, http://united4thepeople.org/state-and-local-support-2/.

[68] These differences between state resolutions are not significant because each state is stating its own call to Congress and the state legislature. Obviously, when an amendment is submitted for ratification, all the states will be voting on whether to ratify the same amendment.

and allow the people to set limits on money in politics from wealthy donors, corporations, and labor unions. Second, they call upon the state legislature to ratify such an amendment once it is submitted to the states by Congress. In some cases, these resolutions express a sense of the legislature; in others, they may even qualify as voter "instructions."[69]

For example, Colorado's voters in 2012 voted for the following question:[70]

> Shall there be amendments to the Colorado constitution and the Colorado revised statutes concerning support by Colorado's legislative representatives for a federal constitutional amendment to limit campaign contributions and spending, and, in connection therewith, *instructing Colorado's congressional delegation to propose and support, and the members of Colorado's state legislature to ratify, an amendment to the United States constitution that allows congress and the states to limit campaign contributions and spending?*

This resolution is not a call for a constitutional convention of the states. Rather, it is a nonbinding resolution *calling upon Congress to pass a constitutional amendment*, and Colorado's legislature to then ratify it. This strategy has been used since 1793, when the Massachusetts and Virginia legislatures passed resolutions calling on their representatives in Congress for a constitutional amendment to overturn *Chisholm v. Georgia*, thus starting the process that led to the Eleventh Amendment.[71]

When members of Congress know that the people of their states have affirmatively and clearly expressed their desire for an amendment, then their political calculations will reflect that change. This does not mean that it will be easy; it will still be difficult, and members of Congress could still choose to defy popular will in their state or district. But the goal of the movement is to change the political conditions under which they make these decisions. And when Congress passes an amendment bill, states that have already expressed their views on this topic are likely to ratify it quickly.

[69] In many states, voters have an explicit constitutional right to "instruct" their representatives, and this has often been used in the context of ratifying federal constitutional amendments. *See, e.g.*, Cal. Const. art. I, § 3; Howard Jarvis Taxpayers Ass'n v. Padilla, 62 Cal. 4th 486, 517–18, 363 P.3d 628, 647–48 (Cal. 2016), *reh'g denied* (Feb. 24, 2016); Kris W. Kobach, *May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. Davis L. Rev. 1 (1999).

[70] *Ballot Language for 2012 Amendments and Propositions*, Colo. Sec'y of State, www.sos.state.co.us/pubs/elections/Results/Abstract/2012/general/ballotLanguage.html (Amendment 65) (emphasis added).

[71] *See Howard Jarvis Taxpayers Ass'n*, 62 Cal. 4th at 501–2, 363 P.3d at 636 (discussing this history).

Of course, some argue that the amendment process will get harder as it goes on—that the initial batch of states are, almost by definition, the easiest. That is not totally wrong; some states will pose more obstacles than others. But it is important to remember how broad and bipartisan the support for this amendment is. On this issue, conventional divisions between "red" and "blue" are irrelevant—at least among voters, if not pundits. This distinguishes it from many other ideas for constitutional amendments that have strong partisan resonances among the grassroots.

Furthermore, as compared to other methods of reform, this last argument proves too much. A Twenty-Eighth Amendment to overturn *Citizens United* and *Buckley* is overwhelmingly popular among voters of both parties. If amendment skeptics want to argue that it is politically impossible to pass a pro-amendment resolution in certain states, then they may be forced to concede that more modest reforms will also be politically impossible to pass in those states. Indeed, as amendment advocate Derek Cressman notes, it is often easier to organize people to do something big (like pass an amendment) than something small (like update disclosure laws).[72] More people will call their legislators, march in the streets, or take other action in support of an amendment to overturn *Citizens United* than will do so for low-profile reforms. Furthermore, many of the various modest but worthy reforms that can be passed under the current constitutional jurisprudence face their own political obstacles; for example, some people oppose public funding of elections as taxpayer subsidies for politicians and their consultants. To argue that an amendment resolution cannot pass in a given state is probably to concede that modest reforms cannot pass in that state either. In fact, experience suggests that a constitutional amendment has broader support than any specific policy measure.[73]

Finally, it is important to understand that the amendment process may experience stops and starts. The Nineteenth Amendment (granting women the right to vote) was first introduced in 1878. Its first Senate floor vote was taken in 1887, but it failed to pass. It also failed to pass the Senate in 1914, 1918, and 1919. Three months later, it was brought back to Congress in a

[72] *See* Derek Cressman, When Money Talks: The High Price of "Free" Speech and the Selling of Democracy (2014).

[73] For example, in the November 2016 election, Washington state voters simultaneously voted *for* a resolution calling for a constitutional amendment and *against* a public funding proposal. *See Election 2016 Results for national, statewide races*, Seattle Times (Nov. 22, 2016), https://projects.seattletimes.com/2016/election-results/ (noting that Initiative 735, support for a constitutional amendment, passed 63-37, while, Initiative 1464, providing for publicly funded campaigns, failed 46–54).

special session, and this time (May 1919) the amendment passed the Senate. In 1920, four decades after it was first introduced, the Nineteenth Amendment was finally ratified. (Amendment advocates plan and hope for a much faster passage than the Nineteenth Amendment, of course!)

Will passing a constitutional amendment be easy? Of course not—the process was *intended* to be hard. But in these turbulent times, with widespread public unhappiness with the influence of big money in politics and broad grassroots support, and with a President Trump-appointed Supreme Court unlikely to reverse *Citizens United* (let alone *Buckley*) any time soon, the pieces are coming together. With a determined "citizen uprising," the Twenty-Eighth Amendment could become part of our Constitution before *Buckley* turns 50.