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# The Threat of Independent Political Spending to Democratic Life -- and a Plan to Stop It

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# THE THREAT OF INDEPENDENT POLITICAL SPENDING TO DEMOCRATIC LIFE—AND A PLAN TO STOP IT

BRUCE LEDEWITZ\*

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*The Kochs, who operate through their own aptly named Americans for Prosperity, a dark money group their network of super-rich allies also contribute to, have said that they plan to spend a humongous \$889 million in the 2016 campaign—all of it dark money, so the public won’t know who made the contributions. This makes the Kochs virtually a political party of their own.*<sup>1</sup>

## INTRODUCTION

Professor Lawrence Lessig has made a great contribution to American public life by drawing attention to the influence of money in politics through his writing,

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\* Professor of Law, Duquesne University School of Law. This Article is an expansion and developments of remarks given on a symposium panel sponsored by the Cleveland State Law Review on Friday, April 17, 2015, entitled “Power of the Purse: The Influence of Money in Today’s Political Regime.” That symposium preceded a keynote address by Professor Lawrence Lessig on the topic, “How Money (in politics) Matters.” This Article also in part responds to Professor Lessig’s talk. The Article was prepared with the support of the Duquesne Law School Summer Research Writing Program.

<sup>1</sup> Elizabeth Drew, *How Money Runs Our Politics*, N.Y. REV. BOOKS (June 4, 2015), <http://www.nybooks.com/articles/archives/2015/jun/04/how-money-runs-our-politics>.

speaking, and organizing. His best-selling book, *Republic Lost*,<sup>2</sup> has galvanized a movement demanding serious campaign finance reform. I agree with the broad outline of his concern about the dependence of Congress on wealthy individuals and entities and the political corruption that this pecuniary dependence entails.

So, it is with hesitation that I set out in this Article my reservations concerning Professor Lessig's analysis of the problem of money. Money does not play quite the dominant role in our politics that he suggests. Money by itself does not select nominees or elect candidates or enact policy.

Moreover, Professor Lessig's analysis overlooks the unique threat that independent political spending poses to American democracy. It is independent spending, rather than money in general, that threatens to undermine the nature of elections. Independent spending takes away debates and decisions from candidates and voters and empowers organizations that are, because of non-coordination requirements, independent and politically irresponsible. To deal with this immediate threat, I propose the elimination of all contribution limits to candidates for office, which would greatly inhibit independent spending. The Article opens in Part I with the legal history and current status of independent political spending. Then, in Part II, the Article shows how independent spending threatens democracy more fundamentally than does the influence of money in general. Part III outlines my plan to limit independent spending, which consists of the simple expedient of eliminating campaign contribution limits and addresses some of the concerns that arise from the resulting regime of unlimited direct campaign contributions. Finally, in Part IV, I return to Professor Lessig's program of campaign finance reform and suggest that eliminating contribution limits would actually advance that program.

I consider this Article to be a mostly friendly amendment to the Lessig reform agenda. Nevertheless, that reform agenda is too diffuse. Without immediate attention to the specific threat of independent political spending, American democracy will continue to erode, whatever other reforms are enacted.

#### I. THE HISTORY AND CURRENT STATUS OF INDEPENDENT POLITICAL SPENDING

The term independent political spending refers to money spent in support of the election of a candidate for political office that, by law, cannot be coordinated with the campaign activities organized by that candidate.<sup>3</sup> Such spending can be positive—that is, touting the attributes of a candidate or getting out the vote on her

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<sup>2</sup> LAWRENCE LESSIG, *REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011).

<sup>3</sup> I use the terms independent political spending and independent spending interchangeably. There are currently two major forms of independent spending: Super PACs, a new type of PAC created after *Speechnow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), was decided, technically independent expenditure-only committees, and 501(c)(4) and 501(c)(6) organizations, called politically active nonprofit organizations. See *Political Nonprofits (Dark Money)*, OPENSECRETS.ORG., [https://www.opensecrets.org/outsidespending/nonprof\\_summ.php](https://www.opensecrets.org/outsidespending/nonprof_summ.php) (last visited Jan. 25, 2016); *Super PACs*, OPENSECRETS.ORG., <https://www.opensecrets.org/pacs/superpacs.php> (last visited Jan. 25, 2016). Money spent on behalf of ballot questions and other forms of political decision-making is beyond the scope of this Article, but is generally protected from government regulation. See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298-99 (1981) (striking down contribution limits to a referendum campaign as far removed from the potential for candidate corruption).

behalf—but is often negative, attacking a favored candidate’s opponents. Disclosing the sources of independent spending may or may not be required.<sup>4</sup> When the sources of independent spending are not disclosed, the spending is often called “dark money.”<sup>5</sup> While individuals can engage in independent spending on their own, the vast majority of such spending is undertaken by nonprofit organizations, often created to further the electoral prospects of a single candidate, usually in one election cycle. Organizations engaged in independent spending can receive unlimited donations from corporations, individuals, and unions.<sup>6</sup>

Independent political spending did not exist in any important sense before 1976. Prior to that, candidates and political parties controlled spending in American political campaigns.<sup>7</sup> Independent political spending arose because of the particular holdings of the United States Supreme Court in *Buckley v. Valeo*.<sup>8</sup>

#### A. The Supreme Court’s Role in Independent Political Spending

*Buckley* held that, under the First Amendment, the only government interest that could justify restrictions on political contributions or political spending was preventing corruption or the appearance of corruption.<sup>9</sup> The Court held that there was no compelling government interest in reducing the influence of wealth by leveling the playing field to equalize the influence of individuals and groups.<sup>10</sup> In practical terms, these holdings meant that government could, to an extent, regulate contributions *to* candidates, but could not regulate spending *on behalf of* candidates, whether from a candidate’s personal funds or by individuals independent of a campaign.

The *Buckley* framework of limiting contributions but failing to limit independent spending, survives to this day. The only significant change in defining permissible campaign finance regulation since *Buckley* was the holding in *Citizens United v. FEC* that corporations enjoy First Amendment protections similar to those of

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<sup>4</sup> See Bradley A. Smith, *Disclosure in a Post-Citizens United Real World*, 6 U. ST. THOMAS J. L. & PUB. POL’Y 257, 268 (2012). For example, Super PACs must report their donors to the Federal Election Commission on a monthly or quarterly basis, while politically active nonprofits do not have to disclose the sources of their funding. Of course, there are loopholes to disclosure, such as nonprofit contributions to Super PACs that can effectively shield the real sources of funds. *Id.*

<sup>5</sup> See *Political Nonprofits (Dark Money)*, *supra* note 3. The Supreme Court held in *Citizens United v. FEC*, 558 U.S. 310, 370-71 (2010), that corporations could be required to disclose their independent political spending, but it is not clear that the law has kept up with the evolving phenomenon of independent spending.

<sup>6</sup> *Political Nonprofits (Dark Money)*, *supra* note 3.

<sup>7</sup> In fact, independent spending did not really take off until the twenty-first century. See Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683, 683 (2012).

<sup>8</sup> 424 U.S. 1 (per curiam).

<sup>9</sup> *Id.* at 25-28.

<sup>10</sup> *Id.* at 48-49.

individuals, and thus are protected in using general treasury funds to engage in independent spending on behalf of candidates.<sup>11</sup>

The modern phenomenon of independent political spending was born at the point of this juxtaposition of contribution limits without spending limits. A person who supports the election of a candidate can only contribute a certain amount of money directly to that candidate.<sup>12</sup> Therefore, if that person wants to spend more money supporting a candidate than contribution limits permit, the only way to do so is to spend money directly, by, for example, creating advertising supporting the candidate's election. Non-coordination regulations, which prohibit coordination between independent political spending and campaign spending, ensures that independent spending is not a disguised, prohibited campaign contribution.<sup>13</sup>

The continuity of the *Buckley* framework masked a disagreement among the Justices over the meaning of the corruption that the government might permissibly seek to prevent. In 2003, in *McConnell v. FEC*, the Court interpreted the government interest in preventing corruption to include not just the quid pro quo corruption of vote buying, but "the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder."<sup>14</sup> This expansive understanding of corruption, which is the understanding of corruption ardently supported by Professor Lessig,<sup>15</sup> could support not only limits on campaign contributions, but limits on independent spending as well.

In light of the possibility of restricting independent spending, the real significance of Justice Kennedy's majority opinion in *Citizens United* was not its holding regarding corporations, but his quotation from his dissent in *McConnell*, rejecting any approach to corruption broader than the prevention of quid pro quo vote buying.<sup>16</sup> Justice Kennedy held expressly for the Court in *Citizens United* that quid pro quo vote buying corruption could not justify a restriction on independent spending because such spending is not coordinated with a candidate's campaign, and, therefore, could not yield quid pro quo corruption.<sup>17</sup> This narrow conception of corruption now seems fully entrenched on the Court.<sup>18</sup>

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<sup>11</sup> See *Citizens United v. FEC*, 558 U.S. 310, 318-19, 370-71 (2010).

<sup>12</sup> See FED. ELEC. COMM'N, CONTRIBUTION LIMITS FOR 2015-2015 FEDERAL ELECTIONS, <http://www.fec.gov/info/contriblimitschart1516.pdf> (last visited Jan. 17, 2016).

<sup>13</sup> The Court in *Buckley* upheld treating coordinated expenditures as if they were contributions to a candidate – and thus permitting restrictions on the amount of coordinated spending – but struck down similar treatment for expenditures "made totally independently of the candidate and his campaign." *Buckley*, 424 U.S. at 46-47.

<sup>14</sup> *McConnell v. FEC*, 540 U.S. 93, 153 (2003).

<sup>15</sup> See LESSIG, *supra* note 2, at 226-47.

<sup>16</sup> See *Citizens United*, 558 U.S. at 359 (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in part and dissenting in part)).

<sup>17</sup> *Id.* at 360.

<sup>18</sup> See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441-42 (2014). At the *Cleveland State Law Review* 2015 Symposium, Professor Lessig expressed confidence that Justice Kagan would lead the Supreme Court toward a new conception of corruption that would permit government regulation of independent political spending. Professor Lawrence Lessig, Keynote Address at

*B. The Effect of Constitutionally-Protected Independent Spending on American Politics*

Before the current election cycle, one could point to three effects of independent spending on American politics: independent spending could (1) mask the sources of monetary support for a candidate, (2) increase the overall amount of spending on behalf of that candidate and (3) allow campaign activities, such as negative advertising, to go forward without the candidate's accountability. Of these effects, this Article is mainly concerned with the political irresponsibility that corresponds with the third effect. It is the *independence* of independent spending that threatens democracy in America.

The other two effects have not been significant by themselves. In terms of masking the sources of independent spending, the media has sometimes ferreted out such sources, even when attempts have been made at hiding them.<sup>19</sup> The real problem has been getting the public to care. The independence of this spending shields candidates from paying a political price for their dependence on unpopular funders.

In terms of the amount of money that independent spending provides, it is not clear how much of that money would be donated anyway—in the form of contributions to candidates—if independent spending were ended. There is a lot of independent spending. For example, in the 2014 Alaska Senate race, the candidates together spent less than \$20 million,<sup>20</sup> while outside groups spent around \$40 million.<sup>21</sup> If, however, the sheer amount of money spent is a concern, that concern is unrelated to the independence of the spending. Someone worried about the expense of politics is presumably concerned about the amount, not the form, of the spending, as demonstrated by the fact that \$60 million was spent on the Alaska Senate race in 2014.

In contrast to transparency and overall expense, the ability of independent spending to shield candidates from responsibility for actions taken on their behalf has actually changed how political campaigns are run and perhaps even has affected

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the *Cleveland State Law Review* Symposium: Power of the Purse: The Influence of Money in Today's Political Regime (Apr. 17, 2015). At the moment, it appears that any such change will have to await a change in membership on the Court.

<sup>19</sup> See, e.g., Ciara Torres-Spelliscy, *Courts Shine Light on Dark Money*, BRENNAN CTR. FOR JUST. (May 26, 2015), <https://www.brennancenter.org/blog/courts-shine-light-dark-money>. Actually, for purposes of transparency, the specific sources might not even matter. For example, two important sources of dark money in the North Carolina 2014 legislative races were the Natural Resources Defense Council and the American Petroleum Institute. See Alex Kotch, *Outside Political Groups Spent \$10M in NC in 2014, Favored GOP*, INST. FOR SOUTHERN STUD. (Mar. 12, 2015, 11:29 AM), <http://www.southernstudies.org/2015/03/outside-political-groups-spent-10m-in-nc-in-2014-f.html>. What more could voters learn about the nature of these influences that their very names do not tell them?

<sup>20</sup> See *Alaska Senate Race*, OPENSECRETS.ORG, <http://www.opensecrets.org/races/summary.php?id=aks1&cycle=2014> (last visited Jan. 25, 2016).

<sup>21</sup> See *2014 Outside Spending, by Race*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2014&disp=R&pty=A&type=A> (last visited Dec 9, 2015).

candidates' chances for victory. Two celebrated examples illustrate the point. In the 2004 presidential election campaign, a group called Swift Boat Veterans for Truth raised politically damaging questions about the Vietnam War service record of Democratic candidate John Kerry, who had been emphasizing his military record in contrast to that of President George Bush.<sup>22</sup> In the view of many observers, the campaign against Kerry was inaccurate, which has given rise to the phrase "swiftboating" to describe false political attacks on a candidate.<sup>23</sup> For purposes of this Article, the importance of this episode lies in the response to it and the requirement of non-coordination of independent spending.<sup>24</sup> When the swiftboat ads first appeared, Republican Senator John McCain, himself a veteran of the Vietnam War, called on the Bush campaign to condemn the ads.<sup>25</sup> Instead, the Bush campaign released a statement that pointed out it was not the Bush campaign that was challenging Kerry's military record.<sup>26</sup> Kerry was dismissive of this response, insisting that Bush wanted the Swift Boat group "to do his dirty work."<sup>27</sup> President Bush was pressed on the issue, but responded with a call for an end to all independent spending and urged Senator Kerry to do the same.<sup>28</sup> It is unclear what such an agreement about independent spending by the candidates could accomplish, given the non-coordination requirement.

Without addressing the issues of ties between the Bush campaign and the Swift Boat group, or the extent of actual, and thus illegal, coordination, it is clear that without independent spending, the legitimacy of Kerry's military record would either not have arisen—the Bush campaign was obviously loathe to raise the issue—or President Bush would have been forced to defend or condemn the attacks. It was the independence of the ad campaign that allowed President Bush to benefit from questionable political tactics on his behalf, for which he could then deny all responsibility.

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<sup>22</sup> See *Swift Boat Veterans for Truth, 2004 Election Cycle*, OPENSECRETS.ORG, <https://www.opensecrets.org/527s/527events.php?id=61> (last visited Dec 9, 2015).

<sup>23</sup> See MELISSA M. SMITH ET AL., *CAMPAIGN FINANCE REFORM: THE POLITICAL SHELL GAME* 105 (2010).

<sup>24</sup> The group Swift Boat Veterans for Truth was organized under section 527 of the Internal Revenue Code, which exempts from taxation "issue advocacy" nonprofit organizations that are also prohibited from coordination with candidates and campaigns. See Benjamin S. Feuer, Comment, *Between Political Speech and Cold, Hard Cash: Evaluating the FEC's New Regulations for 527 Groups*, 100 NW. U. L. REV. 925, 926 (2006).

<sup>25</sup> See *McCain Deplores Anti-Kerry Ads*, NBC NEWS (Aug. 5, 2004, 1:51 PM), <http://www.nbcnews.com/id/5612836/ns/politics/t/mccain-deplores-anti-kerry-ad/#.Vj0E7LSTr8F>.

<sup>26</sup> See *Bush Urges Immediate End to 'Soft Money' Ads*, WASH. TIMES (Aug. 5, 2004), <http://www.washingtontimes.com/news/2004/aug/5/20040805-115811-6900r/?page=all> ("We have not and we will not question Senator Kerry's service in Vietnam," White House spokesman Scott McClellan told reporters aboard Air Force One.").

<sup>27</sup> Jodi Wilgoren, *Fed Up, Kerry Says Bush Lets Group 'Do His Dirty Work'*, N.Y. TIMES (Aug. 20, 2004), <http://www.nytimes.com/2004/08/20/us/fed-up-kerry-says-bush-lets-group-do-his-dirty-work.html>.

<sup>28</sup> See *Larry King Live: Interview with George W. Bush, Laura Bush*, CNN (Aug. 12, 2004), <http://www.cnn.com/TRANSCRIPTS/0408/12/lk1.00.html>.

The swift boat lesson from 2004, that independent spending could insulate a candidate from responsibility for controversial attacks on an opponent, was dramatically reinforced in the 2012 Republican presidential primary campaign. As told by Paul Blumenthal at the Huffington Post, the main beneficiary of the irresponsibility of independent spending was the ultimate winner of the Republican nomination, Mitt Romney:

A similar notoriety has come to define Restore Our Future, the pro-Romney super PAC. The group has been nicknamed the "Death Star" by the media for its emulation of the "Star Wars" movie menace: Instead of planets, Restore Our Future zeros in on Romney's closest competitors and eviscerates them with negative ads.

"In state after state, whoever has popped up on the Republican side has been the recipient of very hard-hitting attacks," West<sup>29</sup> said. "It's not just the negativity, but a lot of the attacks have been misleading or take things out of context."

In December, when Gingrich surged to a huge lead in the national polls ahead of the Jan. 3 Iowa caucuses, Restore Our Future began an unprecedented assault. Its ads brought up Gingrich's climate change efforts with Democrats Nancy Pelosi and Al Gore, his work for Freddie Mac, the non-lobbying lobbying he did for health care companies and the \$300,000 penalty levied on him for congressional ethics rules violations. Gingrich collapsed in the polls as the Iowa contest approached.

After Gingrich bested Romney in the South Carolina primary on Jan. 21 and surged again into the national lead, Romney's super PAC ally spent \$10.9 million across Florida—the biggest negative campaign waged in one state by an independent group in primary history. Gingrich was swamped by the negative ads and lost badly in the Sunshine State.<sup>30</sup>

Although it was always clear that Romney was associated with these efforts, the ferocity and effectiveness of the negative campaign would not have been possible had Romney been forced to air these ads himself. It is important to remember that, given non-coordination requirements, Romney could not have legally stopped or modified these attack ads even if he had wished to do so.

By the 2012 campaign, independent spending had come to be a shield for a certain form of questionable attack ads. But the use of independent spending has been changing since that time. One change has been the entrance of independent spending into state and local elections, for judges, state legislators, governors and other state offices.<sup>31</sup>

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<sup>29</sup> Darrell West is the Vice President and Director of Governance Studies at the Brookings Institution.

<sup>30</sup> Paul Blumenthal, *Super PAC Ad Men Have Long History of Republican Attack Politics*, HUFFINGTON POST (Mar. 8, 2012, 12:44 PM), [http://www.huffingtonpost.com/2012/03/08/super-pac-ads-mitt-romney-rick-santorum\\_n\\_1314880.html](http://www.huffingtonpost.com/2012/03/08/super-pac-ads-mitt-romney-rick-santorum_n_1314880.html).

<sup>31</sup> See Kotch, *supra* note 19. In North Carolina, for example, independent spending by outside groups on legislative races grew from \$2.97 million in 2012 to \$8.23 million in 2014. *Id.*



The importance of this change is that, as opposed to the typically tight connections between presidential candidates and the groups that raise and spend independent money—so that the messages and themes of the independent groups likely mirror those of the candidate—national independent spending can crowd out the themes and issues that local candidates wish to emphasize and run on. For example, if the National Resources Defense Council and the American Petroleum Institute begin running ads in state legislative races, the pressure will grow on candidates in those races to address the reality and importance of global warming, even though the candidates in these races might have little interest in discussing that issue. If the same money were contributed to the candidates' campaigns instead, the election campaign itself would not be taken away from the candidates.

A second change in independent spending that is noticeable in the 2016 presidential campaign is the uses of independent spending are growing. No longer does such money only run ad campaigns. Democratic presidential candidate Hillary Clinton plans to use a Super PAC as a rapid response resource, even coordinating with the group under the so-called "Internet exemption."<sup>32</sup> The Associated Press reported in April that Republican presidential candidate Jeb Bush plans to turn over to a Super PAC, "many of the duties typically conducted by a campaign."<sup>33</sup> And, the *New York Times* reported in July 2015, that field operations preparing for the Iowa caucuses were being run by Super PACs rather than by certain campaigns.<sup>34</sup> It is not really known how all this can be done within the restrictions of non-coordination.

### III. THE UNIQUE THREAT THAT INDEPENDENT SPENDING POSES TO AMERICAN POLITICAL LIFE

We come now to the heart of the disagreement between Professor Lessig and me. From my perspective, the issue that must be addressed is independent political spending. For Professor Lessig, in contrast, the basic problem of American political life is that the dependence of candidates for office on campaign contributions from wealthy donors leads to a system that caters to donors' interests. Professor Lessig asserts that this would remain the basic problem even if independent spending were replaced by direct campaign contributions. According to Professor Lessig, wealthy individuals and corporations decide who gets to be taken seriously as a candidate and what issues ultimately get addressed in government decision-making.

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<sup>32</sup> Matea Gold, *How a Super PAC Plans to Coordinate Directly with Hillary Clinton's Campaign*, WASH. POST (May 12, 2015), <http://www.washingtonpost.com/blogs/post-politics/wp/2015/05/12/how-a-super-pac-plans-to-coordinate-directly-with-hillary-clintons-campaign>. The Internet exemption refers to "a 2006 Federal Election Commission regulation that declared that content posted online for free, such as blogs, is off limits from regulation." *Id.*

<sup>33</sup> Thomas Beaumont, *Jeb Bush Prepares to Give Traditional Campaign a Makeover*, ASSOCIATED PRESS (Apr. 21, 2015, 6:19 PM), <http://bigstory.ap.org/article/409837aa09ee405493ad64a94b8c2c3d/bush-preparing-delegate-many-campaign-tasks-super-pac>.

<sup>34</sup> See Trip Gabriel, *'Super PACs' Take on New Role, Organizing Voters*, N.Y. TIMES (July 7, 2015), [http://www.nytimes.com/2015/07/08/us/politics/super-pacs-take-on-new-role-organizing-voters.html?\\_r=0](http://www.nytimes.com/2015/07/08/us/politics/super-pacs-take-on-new-role-organizing-voters.html?_r=0). The campaigns listed were those of Senator Rand Paul of Kentucky and Governor Bobby Jindal of Louisiana. *Id.*

Despite our differences, I do not deny that politics in America favors the rich, whether overall, or in terms of the sorts of particular issues that Professor Lessig sets forth in his book.<sup>35</sup> One need only consider the matter of the Reagan cut in marginal federal income tax rates in 1986. Much of the problem of income inequality in America could be addressed by simply reversing that tax cut and returning to the tax rates of the 1950s, which was a golden era for economic growth and for a stable and widespread American middle class.<sup>36</sup> Despite the fact that most people would benefit from this change, it can be predicted with certainty that reversing the Reagan tax cut will not be raised as an issue in the coming presidential campaign. Professor Lessig would no doubt view this as self-evident proof of his position.

The important question to ask, however, is why most political candidates do not discuss the fundamental issue of income inequality? Professor Lessig would assert that the reason is structural: in a privatized campaign system, candidates for office need contributions and those contributions can only come, as a practical matter, from the tiny portion of the electorate that disproportionately benefit from low tax rates.

While this is so, Professor Lessig's answer does not tell the whole story. In fact, the need for wealthy donors is a relatively minor part of the reason that low tax rates are not generally challenged on the campaign trail. In America, low tax rates are genuinely popular, and candidates who run on the platform of raising taxes usually enjoy little electoral support. Whether one treats this phenomenon as a function of Marxist false consciousness, or prejudice against the poor and people of color, or as a function of something else—a phenomenon encapsulated in the book *What's the Matter with Kansas*,<sup>37</sup> which highlighted the failure of Americans to vote their apparent material interests—is a political, not a structural, matter. In other words, in America, candidates for office favor the interests of the wealthy not to get money, or not only to get money, but to get votes.<sup>38</sup> Thus, it is not structure, but politics, that favors the rich.

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<sup>35</sup> See LESSIG, *supra* note 2. Professor Lessig calls these particular issues, such as why we do not have free markets, “tells.” *Id.* at 41.

<sup>36</sup> This point is made about reversing the parallel tax cuts by Margaret Thatcher in Anthony B. Atkinson's recent book, *INEQUALITY: WHAT CAN BE DONE?* (2015). Thomas Piketty's review of Atkinson's book alerted me to this one simple action. See Thomas Piketty, *A Practical Vision of a More Equal Society*, N.Y. REV. BOOKS (June 25, 2015), <http://www.nybooks.com/articles/archives/2015/jun/25/practical-vision-more-equal-society>. It was Piketty who made the point that the same analysis applies to the Tax Reform Act of 1986, which cut the upper tax rate in the United States to twenty-eight percent. *Id.* President Reagan had previously overseen a reduction in the top marginal tax rate from seventy percent to fifty percent. See ANTHONY B. ATKINSON, *INEQUALITY: WHAT CAN BE DONE?* 180-83 (2015). Atkinson has a much more radical and innovative plan for change than just raising tax rates. See *id.* at 237-39.

<sup>37</sup> THOMAS FRANK, *WHAT'S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA* (2004).

<sup>38</sup> On more specialized issues, like banking regulation, which are the sorts of issues that Professor Lessig highlights in his book, there may be more substance to Professor Lessig's analysis. See LESSIG, *supra* note 2, at 80-81. But, those particular issues pale in significance compared to the real power of money to govern the overall shape of political life. And that real power is genuinely popular.

Even considering just the money itself, as Professor Lessig wants to do, does not remove the money from the politics. While candidates and office holders feel dependent on money and do respond to its donors, a lot of that money, maybe most of it, also represents the political commitments of ordinary people, even if the money is actually donated by rich people. This is certainly true of anti-gun control money, environmental money, and pro-Israel money. Serving those interests is not just catering to the source of the funds, but also to the millions of people who agree with the contributors. This is also true of pro-market, global warming skepticism money, even if the source of that money is the oil and gas industry. The influence of money does not trump politics. Money is a part of politics.<sup>39</sup>

The political aspect of money, which is always present, increases when the money is contributed to candidates directly, as opposed to being spent independently. When this money goes to candidates in the form of contributions, the money remains within traditional political considerations. Its impact there must at least compete with a candidate's larger political goals and commitments.<sup>40</sup>

The interrelationship between money and political influence is basically overlooked in Professor Lessig's analysis, which claims that the problem is always money, plain and simple. A dramatic example of Professor Lessig's one-sidedness in this regard, is what he refers to as "Tweedism." Our system is not democratic, Professor Lessig argues. Yes, voters cast votes, but money interests decide who gets to run, in a fashion similar to the Chinese government's proposal to have a hand-picked committee select the candidates for political office in Hong Kong, and afterwards allow a popular vote to select the office holders. The citizens of Hong Kong rightly protested against this proposal, but it is in effect our system, claims Professor Lessig.<sup>41</sup>

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<sup>39</sup> I saw the truth of this claim of the interconnection of money and politics illustrated dramatically in my hometown newspaper, the Pittsburgh Post-Gazette, on Monday, July 27, 2015. Reporter Rich Lord carefully traced the campaign contributions to Governor Tom Corbett that helped the natural gas industry stave off a severance tax during the Corbett administration. Rich Lord, *How Pennsylvania Gas Industry Gained Corbett Influence*, PITT. POST-GAZETTE (July 27, 2015, 12:00 AM), <http://powersource.post-gazette.com/news/state/2015/07/27/How-gas-industry-gained-Corbett-influence/stories/201507270009>. But, on that same day, an op-ed by Jim Kunz, a business manager for a union employed in the natural gas industry, appeared in the paper arguing that a proposed severance tax would cost Pennsylvania jobs. Jim Kuntz, *Don't Kill Our Pennsylvania Shale Jobs*, PITT. POST-GAZETTE (July 27, 2015, 12:00 AM), <http://www.post-gazette.com/opinion/2015/07/27/Don-t-kill-our-Pennsylvania-shale-jobs/stories/201507270019>. Obviously, Mr. Kunz was not planning to give money to the readers of the op-ed, but was trying to convince them of a preferred policy outcome.

<sup>40</sup> See J. Robert Abraham, Note, *Saving Buckley: Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1120-21 (2010) (finding that in a system of direct contributions, "political money would be channeled to political actors who would still be constrained in their campaign practices as a result of public disclosure requirements and ultimate accountability at the ballot box").

<sup>41</sup> See Lawrence Lessig, *We Should Be Protesting, Too*, HUFFINGTON POST (Dec. 1, 2014, 5:59 AM), [http://www.huffingtonpost.com/lawrence-lessig/we-should-be-protesting-too\\_b\\_5917486.html](http://www.huffingtonpost.com/lawrence-lessig/we-should-be-protesting-too_b_5917486.html) (explaining the Tweedism analogy as deriving from Boss Tweed in New York City).

Again, as is the case with the influence of money generally, there is some truth to Professor Lessig's claim about candidate selection. Former United States Senator Jim Webb, who announced his candidacy for the Democratic nomination for President on Friday July 2, 2015, decried his inability to raise the huge sums of money necessary to be taken seriously.<sup>42</sup> To the same effect, the ability to raise enormous sums is certainly a key component to Jeb Bush's campaign strategy.<sup>43</sup>

But, one can point conversely to the example of Wisconsin Governor Scott Walker to show that money is secondary to politics. Walker did not begin the presidential campaign with notable access to big money. It was his grass roots performance in Iowa that gave him national standing and the access to money that he later enjoyed.<sup>44</sup> Of course, Governor Walker's anti-union message is congenial to big money. So, money is not irrelevant. But, that anti-union message is also congenial to the Republican voters of Iowa, as well as doubtlessly representing Governor Walker's own sincere beliefs.<sup>45</sup>

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<sup>42</sup> Maggie Haberman & Alan Rappeport, *Jim Webb Announces Democratic Bid for Presidency*, N.Y. TIMES (July 2, 2015), <http://www.nytimes.com/2015/07/03/us/politics/jim-webb-presidential-campaign.html>. Webb wrote in his announcement on his website, "I understand the odds, particularly in today's political climate, where fair debate is so often drowned out by huge sums of money." JIM WEBB '16, <http://www.webb2016.com/jim-webb-announces-candidacy-for-president> (last visited Nov. 6, 2015).

<sup>43</sup> See Anna Palmer & Tarini Parti, *Jeb's Smooth Money Machine*, POLITICO (June 15, 2015, 5:11 AM), <http://www.politico.com/story/2015/06/jeb-bush-2016-fundraising-money-campaign-118950.html#ixzz3g4wOpcYf>. ("The full-court press is a key component of his campaign strategy to shut out potential rivals from megadonors, cement himself as the Republican establishment candidate and create the most ambitious presidential fundraising operation in history—all before even announcing his White House bid.")

<sup>44</sup> See Maggie Haberman & Jonathan Martin, *Scott Walker's Hard Right Turn in Iowa May Hurt Him Elsewhere*, N.Y. TIMES (July 2, 2015), <http://www.nytimes.com/2015/07/03/us/politics/scott-walkers-hard-right-turn-in-iowa-may-hurt-him-elsewhere.html?ref=todayspaper>. For example, the *New York Times* described his rise in July 2015: "Breakout performances on the stump in Iowa early this year vaulted Mr. Walker, who is expected to officially enter the presidential race this month, into the lead in polls in the state with the nation's first nominating contest, and cemented him among the top three Republican contenders in most national surveys." *Id.*

<sup>45</sup> See Robert Samuels, *Walker's Anti-Union Law Has Labor Reeling in Wisconsin*, WASH. POST (Feb. 22, 2015), [https://www.washingtonpost.com/politics/in-wisconsin-walkers-anti-union-law-has-crippled-labor-movement/2015/02/22/1eb3ef82-b6f1-11e4-aa05-1ce812b3fdd2\\_story.html](https://www.washingtonpost.com/politics/in-wisconsin-walkers-anti-union-law-has-crippled-labor-movement/2015/02/22/1eb3ef82-b6f1-11e4-aa05-1ce812b3fdd2_story.html). Governor Walker's abrupt exit from the presidential race on September 21, 2015, also shows that money is not the deciding factor in the ongoing Republican presidential campaign. Governor Walker was undone by the preference of Republican voters for an outsider. See Steve Peoples & Julie Pace, *Ranks Thinning, Traditional GOP Candidates Try to Adapt*, ASSOCIATED PRESS (Sept. 22, 2015, 2:22 PM), <http://bigstory.ap.org/article/433ce669798c4aec9bc7dce88c5a1ced/ranks-thinning-traditional-gop-candidates-try-adapt>. Governor Walker was also undone by his own mistakes. See James Downie, *The One Thing We Know After Scott Walker's Early Exit*, WASH. POST (Sept. 21, 2015), <http://www.washingtonpost.com/blogs/post-partisan/wp/2015/09/22/the-one-thing-we-know-after-scott-walkers-early-exit>. His campaign ran out of money only after his political support began to disappear. In fact, at the time of his withdrawal, the Super PAC supporting him still "was relatively flush with cash." Nicholas Confessore, *Demise of Scott Walker's 2016 Bid Shows Limits of 'Super PACs'*, N.Y. TIMES (Sept. 22, 2015),

The same dominance of politics over money is true of Jim Webb's problem overcoming Hillary Clinton's lead in the race for the Democratic nomination for President, or that of other Democratic candidates, such as Vermont Senator Bernie Sanders. Certainly, Clinton has more money, and access to even more money in the future, than does any other Democrat. But, Clinton's overwhelming lead has much more to do with her standing with African-Americans, women, and other key portions of the Democratic Party coalition, than it does with her lead in fundraising.<sup>46</sup>

If we go further back in time, the nomination of Barack Obama over Hillary Clinton in 2008 is another example of political attraction overcoming a lead in fundraising. Eventually, candidate Obama became a potent fundraiser. His fundraising success, however, came after he created political support for his nomination.<sup>47</sup> The foregoing demonstrates that Professor Lessig's Hong Kong analogy is exaggerated. The rich do not select our candidates. They do have an outsized influence, but they do not select.

If the influence of money is part of the give and take of the political process, rather than a structural weakness, then great attention must be paid to the political responsiveness of our system to that disproportionate influence. In other words, if issues are addressed in politics primarily because of their popularity, rather than just because of the influence of money, and if candidates are selected to run because of their political attractiveness, rather than solely because of their lead in fundraising, then the influence of money must be addressed in a political, rather than a structural way.

Again, I do not deny that the wealthy have far too much influence for America to maintain a healthy democracy. In addition, I do not deny that in detailed decision-making, in contexts in which the public has trouble discerning what is going on—as in bank regulation, for example—public opinion is often ignored in favor of the interests of wealth. But the way to deal with this phenomenon is to engage the public in the issue of banking reform, rather than emphasizing public financing of campaigns.

Independent spending now threatens the political responsiveness of our system and will do so much more in the future. Historically, the threat of independent spending has been to remove responsibility from a candidate for actions undertaken

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<http://www.nytimes.com/2015/09/23/us/politics/scott-walkers-demise-shows-limits-of-super-pac-money-model.html>.

<sup>46</sup> See Steve Kornacki, *How African-American Votes Could Tip the Scale for Clinton*, MSNBC (Oct. 16, 2015, 3:05 PM), <http://www.msnbc.com/msnbc/how-african-american-votes-could-tip-the-scale-clinton>; Jeffrey M. Jones, *Hillary Clinton Retains Strong Appeal to American Women*, GALLUP (Mar. 20, 2015), <http://www.gallup.com/poll/182081/hillary-clinton-retains-strong-appeal-american-women.aspx>; see also Shane Goldmacher, *Cash Rich Clinton Towers Over the GOP Field*, POLITICO (Oct. 16, 2015, 12:15 AM), <http://www.politico.com/story/2015/10/hillary-clinton-2016-money-race-214868>.

<sup>47</sup> John Solomon, *Obama Takes Lead in Money Raised*, WASH. POST (July 2, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/01/AR2007070100381.html>. Clinton outraised Obama during the first quarter of 2007, but Obama surged into the money raising lead in the second quarter. An indication that this was politics producing money and not the other way around, is that in that second quarter, “[t]he vast majority of Obama’s donors gave in relatively small amounts . . . . The average donation was \$202 . . . .” *Id.*

for the candidate or against an opponent, as independent spending shielded George Bush and Mitt Romney in the above examples. This makes it difficult for the voters to judge the character of the candidate, who can plausibly deny that he is acting improperly, or the record of an opponent, who is being savaged by misleading attack ads. Even if nothing else were at stake, this effect of political irresponsibility makes it imperative that we try to eliminate independent spending.

Although independent spending in judicial campaigns is beyond the scope of this Article, it should also be noted that the Supreme Court opinion that most strongly suggests, and criticizes, the relationship between spending and improper influence on judges—and thus the case that might be thought most directly to support Professor Lessig's thesis that money per se is the problem—was in fact a case about independent spending on unfair attack ads to change a judicial election result. In *Caperton v. Massey Coal Co.*, a party who would later seek to overturn a large judgment against his company, spent \$3 million, not on contributions to the judicial candidate who would eventually cast the deciding vote in his favor, but in creating ads that helped defeat a sitting justice on the West Virginia Supreme Court of Appeals.<sup>48</sup> Without independent spending, those unfair ads either would never have run or the ultimately successful judicial candidate would have had to take responsibility for them, which might have cost him the election. *Caperton* thus illustrates not the influence of money in general, but the disastrous effect of irresponsible independent spending.

But there is more to the threat from independent spending than just political irresponsibility. Independent spending is now poised to take over whole campaigns from the candidates in those elections. Independent spending now threatens the autonomy of political campaigns. This is an even more fundamental threat to American political life than irresponsibility.

To see this threat, consider the role an American election plays in public life. Because of the American emphasis on the two-party system, American elections have represented an opportunity for voters to make a choice between two visions of the future, either in terms of a particular issue or in more general terms. The iconic model for this understanding of American politics is the series of debates in 1858 between Abraham Lincoln and Stephen Douglas, the two Senate candidates from Illinois, over the future of slavery (although at the time the Illinois state legislature voted on and selected the state's senators).<sup>49</sup>

Despite all the problems of American political life today—its outlandish hatreds and partisan deadlocks—this model of decision between two visions of the future has given our system a great deal of dynamism. It has allowed an actual public decision to be made in an election, at least in general terms.<sup>50</sup>

As independent spending evolves into political parties of its own,<sup>51</sup> election campaigns could become merely occasions for ongoing debates over issues deemed

<sup>48</sup> 556 U.S. 868, 873 (2009).

<sup>49</sup> THE LINCOLN-DOUGLAS DEBATES (Rodney O' Davis & Douglas L. Wilson, eds., 2008).

<sup>50</sup> Clearly, the American political system does not always—and never completely—live up to this ideal of the two party system, but pretty dramatic popular turns have occurred with some regularity—for example, the elections of FDR, Ronald Reagan and, for a time, Barack Obama. For a contrast between the ideal and the actual, see Joel Rogers, *Two Party System: Pull the Plug*, 52 ADMIN. L. REV. 743 (2000).

<sup>51</sup> See Drew, *supra* note 1.

important by organized interests, on the left and right. Candidates themselves could become a sideshow to the main event of special interest campaigning. In this way, independent spending could sever the bond between candidate and voter.

This is not a theoretical concern. The *New York Times* reported in July 2015 that field operations preparing for the Iowa caucuses were being run by Super PACs rather than by the presidential candidates.<sup>52</sup> Since these PACs are closely identified with the candidates, this is undoubtedly not an instance of genuinely independent operations, but probably one in which non-coordination rules are being flouted. Nevertheless, there can be no obvious coordination between the Super PAC and the campaign. This led the *New York Times* reporter to make this ominous observation: “[T]here are risks to outsourcing a field campaign. Candidates, who are legally forbidden to coordinate with super PACs, are in danger of being cut off from their most ardent supporters as they head into caucus and primary elections.”<sup>53</sup> What kind of democracy can there be when candidates are legally prohibited from direct contact with supporters? This already is the strange new world of independent spending.

America has not yet experienced a national campaign truly based on independent spending—one in which, for example, the National Resources Defense Council and the American Petroleum Institute begin running ads about the reality of global warming in state legislative races when the candidates themselves have little interest in discussing the issue. The Super PACs in Iowa are close to the campaigns they are serving as proxies. But as the interests that spend independently become better organized, more sophisticated, and begin to maintain continuing, institutional spending structures, it seems that a kind of parallel campaign is likely to evolve.

One could argue that this kind of private outsourcing of the themes of a political campaign would improve democracy by forcing candidates to address important issues that both major party candidates would prefer to push under the rug. But, for better or worse, American political life has left the selection of issues largely to candidates in individual races. America does not even practice the political party selection of issues that parliamentary systems favor. Independent spending threatens to change the American approach to political elections and we should certainly think hard before continuing policies that favor the independent spending that is bringing this about.

As the above discussion shows, there are two different types of independent spending. The first, which is what independent spending has been up until this time, is the spending in which non-coordination is a fiction. These are, for example, the Super PACs organized by candidates themselves. In effect, this money substitutes for direct contributions that would violate contribution limits, and allows that money to fund questionable campaign activities or even, as in Iowa, to more easily fund genuine campaign activities. This kind of “independent” activity is harmful, but perhaps not fatal, to democracy.

But, once the Koch brothers organized Americans for Prosperity as an ongoing political force to defend capitalism against misconceptions,<sup>54</sup> another form of

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<sup>52</sup> See Gabriel, *supra* note 34.

<sup>53</sup> *Id.*

<sup>54</sup> See Kenneth P. Vogel, *Koch Brothers Plan \$125 Million Spending Spree*, POLITICO (May 9, 2014), <http://www.politico.com/story/2014/05/koch-brothers-americans-for-prosperity-2014-elections-106520.html>. Defending capitalism against misconceptions is how the group described its intentions in a memo about the upcoming campaign season. *Id.*

independent spending began to emerge—one in which the independence of the spending is real and there is little or no coordination between the spending and the campaigns that are being supported. When other groups begin to set up their own permanent structures that also mimic campaigns and political parties, the emphasis in elections may begin to drift away from candidates to a parallel campaign among interest groups.

Even if this section has convinced the reader that independent spending represents a unique threat to American political life, the question remains as to what can be done about it, since the Supreme Court has held that such spending is constitutionally protected. I turn to that issue in the next section.

#### IV. THE PLAN TO STOP INDEPENDENT POLITICAL SPENDING BY ELIMINATING CAMPAIGN CONTRIBUTION LIMITS

The Supreme Court has held that the First Amendment protects spending by individuals and groups to support the election of favored candidates.<sup>55</sup> Despite the arguments in the previous section that independent spending threatens American democracy, the general thrust of these decisions is legally sound. Indeed, if free speech does not guarantee that a citizen is free to rent a billboard at any time, with the message, for example, “Don’t Vote for Clinton,” without having to get permission from a government official or filing an official form, then it is hard to imagine what free speech does mean. The Court is also correct to reason that a citizen should be free to remain anonymous in independent electoral activity,<sup>56</sup> especially given the current atmosphere, in which the identities of petition circulators are posted online, thus exposing people to retaliation.<sup>57</sup> Although scale matters, that same constitutional protection must also be extended to groups organized to raise funds to do the spending.

But if all this spending is constitutionally protected, how can there be a plan to stop it? While even constitutional protections can be overcome by sufficiently compelling government interests, the Court has, until now, rejected corruption as a sufficient interest in the context of independent spending.<sup>58</sup> Despite Professor Lessig’s attempts at proposing a redefinition of corruption, and despite his

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<sup>55</sup> This is the key holding in *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam), and *Citizens United v. FEC*, 558 U.S. 310, 318-19, 370-71 (2010).

<sup>56</sup> See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (holding the state prohibition against the distribution of anonymous political literature as unconstitutional). In *McIntyre*, the Court distinguished the disclosure requirements upheld in *Buckley*. *Id.* at 353-57.

<sup>57</sup> See Sean McMahon, Note, *Deregulate But Still Disclose? Disclosure Requirements for Ballot Question Advocacy After Citizens United v. FEC and Doe v. Reed*, 113 COLUM. L. REV. 733, 734 (2013) (“Prop 8 Maps, a website that takes the publicly disclosed names and addresses of financial supporters of California’s Proposition 8 against gay marriage and overlays them on an accessible Google map, has been blamed for facilitating death threats and other harassment against Proposition 8 backers.”). This is the sort of concern that led Justice Alito to concur in *Doe v. Reed*, 561 U.S. 186 (2010), arguing that even if disclosure requirements in referendums are facially constitutional, individuals may bring as applied challenges alleging that disclosure in a particular instance will expose them to retaliation. *Id.* at 203 (Alito, J., concurring).

<sup>58</sup> See *supra* Parts I and II.



confidence in Justice Kagan's powers of persuasion in moving the Court toward recognition of new forms of corruption as justifying government regulation of political spending, there is no indication that there will be a change in this case law any time soon.<sup>59</sup> Therefore, for now, any effort to regulate independent spending by restricting it in amount or timing, and perhaps even in requiring non-corporate transparency in financial sources,<sup>60</sup> is likely to be found unconstitutional.

However, there is a way other than government regulation to eliminate independent spending, or at least reduce its size and impact. That way is simply to end campaign contribution limits. While calls for the end of contribution limits have been made from time to time, those proposals have usually been grounded in First Amendment considerations.<sup>61</sup> But now, the threat from independent spending has become so serious that the elimination of contribution limits needs to be reconsidered as a means to protect democracy, whatever view one takes of the First Amendment status of contributions limits.<sup>62</sup> The rest of this section argues that contribution limits, whatever their merits, are not worth their effect in creating and sustaining independent spending.

In considering the elimination of contribution limits, three questions must be considered. First, would eliminating contribution limits actually stop independent spending? Second, would the tradeoff be worth it—that is, even if eliminating contribution limits would end independent spending, would the resulting regime of unlimited direct campaign contributions be worse than the current campaign finance system? Third, is the elimination of contribution limits politically feasible?

#### A. *Eliminating Contribution Limits Will Stop Independent Spending*

As to the first question, there are some anecdotal indications that eliminating campaign contributions would end independent spending. After all, independent spending as an organized phenomenon did not exist before contribution limits and non-coordination requirements were introduced in the 1970s. In one large, unintended experiment, California's adoption of state and local contribution limits in 2001 does seem to have stimulated the growth of independent spending to its current massive levels in that state.<sup>63</sup>

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<sup>59</sup> The per curiam decision in *American Tradition Partnership v. Bullock*, 132 S. Ct. 2490, 2491 (2012), striking down Montana's regulation of independent corporate political spending and the decision in *McCutcheon v. FEC*, 134 S. Ct. 1434, 1434-37 (2014), striking down aggregate contribution limits, suggest that the Court has not moved any since *Citizens United* was decided.

<sup>60</sup> Justice Kennedy's majority opinion in *Citizens United* upheld disclosure requirements in the context of corporate speech, but held open the possibility of as applied challenges when the potential for retaliation that would chill speech can be shown. *Citizens United*, 558 U.S. at 368-71.

<sup>61</sup> See, e.g., Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 664 (1997); Wayne Batchis, *Reconciling Campaign Finance Reform with the First Amendment: Looking Both Inside and Outside America's Borders*, 25 QUINNIPIAC L. REV. 27, 49 (2006) ("free speech purists call for the overturning of *Buckley* . . .").

<sup>62</sup> There have been proposals to eliminate contribution limits along the lines set forth here, as well. See Abraham, *supra* note 40.

<sup>63</sup> Jim Miller, *Independent Spending in California's Statewide, Legislative Races the Highest in Years*, SACRAMENTO BEE (June 1, 2014), <http://www.sacbee.com/news/politics->

Aside from empirical indications, reasonable speculation about what would happen were contribution limits ended suggests why independent spending would end or decline. First, without contribution limits, the legal structure of non-coordination would have to be rescinded. Non-coordination only exists as a way to prevent contributions to campaigns that exceed contribution limits. Without that justification, non-coordination is a pointless restriction on core political speech.<sup>64</sup> So, once contribution limits are eliminated, non-coordination will necessarily be repealed or struck down.

In the absence of non-coordination requirements, voters could demand that candidates rein in the excesses of their supporters, for example, the airing of irresponsible attack ads. Unlike the current structure of legally enforced irresponsibility, a candidate's refusal or failure to assert control over all attack ads launched for his or her benefit in a regime without non-coordination would lead to the loss of electoral support. The inability or unwillingness of the candidate to control supporters would be regarded as a failure of leadership.

Furthermore, once the advantage of irresponsibility was lost, candidates would demand that contributions to independent Super PACs simply be contributed instead to the candidate's own campaign. The current trend to fund campaign activities through independent spending referred to above is mostly just a way of avoiding existing contribution limits. Without those limits, the complex structure currently evolving would be unnecessary. Thus, independent groups, like Americans for Prosperity, would quickly be forced to contribute directly to campaigns rather than undertake independent activities<sup>65</sup> for fear of alienating the very candidates they purport to support. Eventually, candidates would just obtain the original contributions themselves and would not need independent groups at all.

Even the problem of dark money would disappear without campaign contribution limits. Without non-coordination requirements, the media and voters could ask candidates to fully identify financial sources when they receive campaign contributions from groups. Of course, a candidate could make a principled First Amendment argument that anonymity should be respected, but the voters might not be impressed by that position. Even if the candidate were to return dark money contributions, any resulting independent spending of that money would still be regarded as the candidate's responsibility.

While there cannot be certainty that eliminating contribution limits will diminish independent spending, a natural experiment that Pennsylvania conducted during the 2015 campaign season may help determine whether there would be such an effect. Because of retirement, resignation under fire, and criminal conviction, Pennsylvania,

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government/election/article2600258.html#storylink=cpy ("Such spending has been a fixture of California races since 2001, following voters' approval of contribution limits for candidates. The independent groups can accept unlimited amounts from deep-pocketed donors but cannot legally coordinate with the campaigns of candidates they support.").

<sup>64</sup> See Justin B. Uhlemann, Comment, *Constitutional Law: The Not So Narrow Tailoring of State Limits on Campaign Contributions*, 53 FLA. L. REV. 183, 185 (2001) (stating that the *Buckley* Court regarded contribution limits as infringing on fundamental right of political association and only upheld them under exacting scrutiny).

<sup>65</sup> Current restrictions on Super PACs' contributions to campaigns would also be relaxed or eliminated once contribution limits are ended. Without contribution limits, they also would serve no purpose.

which holds partisan judicial elections, elected three justices to its seven-member Supreme Court.<sup>66</sup> That large number means that partisan and ideological control of the court is at stake. Perhaps because Pennsylvania does not have contribution limits in judicial elections, independent spending has not been an issue in previous judicial campaigns. But, such an extraordinary potential prize raised fears that organized interests—business, union, environmental—might flood the airwaves with judicial attack ads during this particular judicial election.

In an attempt to forestall this possibility in the general election, I wrote an op-ed the day of the primary election that appeared in the *Philadelphia Inquirer* and online, calling on the six winners to forego any independent spending on their behalf by formally asking their supporters to make direct campaign contributions instead.<sup>67</sup> So far, this effort has not worked, as the candidates have stated that they do not intend to interfere with how people wish to spend their money. But this evasion of responsibility by the judicial candidates may not last once the voters begin to pay attention to the matter in the fall. In any event, even having to respond demonstrates that the absence of contribution limits can have an effect on independent spending.

I doubt that the speculations above will be particularly controversial. When I put the question of the effect of eliminating contribution limits to noted campaign finance expert Joseph Fishkin, at the Association of American Law Schools program on campaign finance reform in January 2015,<sup>68</sup> he did not deny that such a change would transfer independent spending to campaign spending.<sup>69</sup> In fact, Professor Fishkin was skeptical of proposals to eliminate contribution limits combined with disclosure requirements, because, he said, it would simply transfer the current excesses of independent fundraising and spending—its responsiveness to only a few large donors—to candidates and political parties.<sup>70</sup> In contrast, campaigns now are at least partly still volunteer affairs and politically responsive, which would end once candidates became, in effect, Super PACs. Professor Fishkin did not doubt that eliminating contribution limits would transform independent spending into campaign spending, which raises the second question regarding whether there would be any gain from eliminating contribution limits.<sup>71</sup>

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<sup>66</sup> See Chris Potter, *Three Open Seats on PA Supreme Court Make for Pivotal Races*, PITT. POST-GAZETTE (May 3, 2015, 12:00 AM), <http://www.post-gazette.com/news/politics-state/2015/05/03/Three-open-seats-on-PA-Supreme-Court-make-for-pivotal-races/stories/201505310002>; see also Eric Holmberg, *What You Need to Know About the PA Supreme Court Race*, PUBLICSOURCE.ORG (Oct. 13, 2015), <http://publicsource.org/from-the-source/what-you-need-know-about-pa-supreme-court-race#.Vj-zirSTr8E>.

<sup>67</sup> See Bruce Ledewitz, *Court Candidates, Pledge to Limit Campaign Donations*, PHILA. INQUIRER (May 18, 2015, 10:47 AM), <http://www.philly.com/philly/blogs/thinktank/Court-candidates-pledge-to-limit-campaign-donations.html>.

<sup>68</sup> Professor Joseph Fishkin, *Citizens Invited: Scholars and Professors in the Campaign Finance Wars*, ASS'N OF AM. LAW SCHS. (Jan. 4, 2015), <https://soundcloud.com/aals-2/hot-topic-bridge-citizens-invited/s-pMWR3>.

<sup>69</sup> *Id.* My question was put at around 4:34 PM and Professor Fishkin responds around thirty-six minutes into the program.

<sup>70</sup> *Id.*

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

*B. Eliminating Contribution Limits Will Prevent Campaign Corruption by Allowing Candidates to Once Again Control the Campaign*

Assuming that eliminating contribution limits were to greatly restrict independent spending, would such a change just corrupt candidates as much, or even more, than the current system? One way to think about answering this question is to consider whether independent spending is more harmful to democracy than spending by candidates. Of course, the prior section attempted to show that it is. If that is the case, then the tradeoff of substituting campaign contributions for independent spending would be worth it even if nothing else were to change. In a world without contribution limits, and without a ban on coordination, candidates and political parties would receive and spend most of the money raised and spent on political campaigns. This would result in more politically responsible campaigns, with fewer blatantly unfair attack ads, and would focus voter attention away from the interests favored by economically powerful interest groups and toward issues that candidates determined should be the focus of the campaign.

But the benefits of ending contribution limits might go beyond just shifting the same amount of money from independent spending to direct campaign contributions. In a world without contribution limits, candidates and voters would likely insist that money go to the candidates themselves, who would then be responsible for how the money was spent. In this world, the egos of rich individuals, who now receive attention and satisfaction from changing the course of a campaign through their independent activities, would be relegated to mere contributors among many other contributors. Perhaps in this new world, there would be less incentive to contribute at all. It is possible, then, that less money, or at least fewer large donations, would be spent on campaigns overall after contribution limits were eliminated.

What, then, about the effect on candidates that Professor Fishkin predicts? Would this not be worse than the current system? The answer to that question is plainly, no. The new system would be an improvement. For one thing, this fear of the effect of campaign contributions on candidates ignores the fact that candidates raise money now. Even candidates who benefit the most from independent spending cannot entirely rely on it. Candidates are already money machines even without taking into account the new phenomenon of non-declared candidates raising Super PAC money—without contribution limits—and only then formally declaring.<sup>72</sup>

In addition, candidates are inefficient money machines. Part of the reason that candidates spend so much time on fundraising is contribution limits.<sup>73</sup> Super PACs do not have to constantly fundraise because they can accept large contributions. So, if a candidate is willing to absorb the political heat from receiving a couple of million dollar checks that will fund an entire campaign, they should be permitted to do so. Undoubtedly, in response, the opponents of such candidates will then pledge to limit contributions to a relatively small amount. The voters can then choose which approach they prefer.

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<sup>72</sup> This was the tactic utilized by Jeb Bush in the spring of 2015. See Andrew Prokop, *Jeb Bush is Stretching the Limits of Campaign Finance Law*, VOX (Apr. 6, 2015, 3:40 PM), <http://www.vox.com/2015/4/6/8354331/jeb-bush-fundraising>.

<sup>73</sup> See Vincent Blasi, *Spending Limits and the Squandering of Candidates' Time*, 6 J.L. & POL'Y 123, 124 (1997).

In addition, eliminating contribution limits would eliminate the noxious role of the bundler. These are individuals who get around contribution limits by bringing a bunch of individual contributions to a candidate in one fell swoop, thus skirting even existing campaign finance regulations.<sup>74</sup> At least the influence of these individuals would be lessened in the world of unrestricted contributions.

There are other potential advantages from the elimination of contribution limits. In terms of grass roots campaigns, the law of contribution limits is part of the complexity of election law that helps keep outsiders from running. If people could give any amount of money, record-keeping requirements could be simplified. In addition, while independent spending can be uniquely valuable to a candidate—for the reasons explained above—all contributions are of the same value per dollar contributed. So, candidates will be less obligated to special interests if support takes the form of contributions rather than independent spending. It may even be that opposing interests will be encouraged to make contributions to the same candidates, thus offsetting the influence of one side in a controversy. This is harder to do when independent spending takes place.

Granted, Americans assume that personal solicitation of contributions by a candidate creates a unique context for influence on that candidate. It was in part just such a concern that led the Supreme Court to permit restrictions on personal solicitations by judicial candidates even when independent spending on behalf of judicial candidates was not restricted in any way.<sup>75</sup> But whatever validity there may be in this intuition with regard to the problem of quid pro quo corruption—or, in the case of a judge, the loss of faith in an impartial judiciary—there is no reason to assume that office holders are generally more responsive to the issue orientation of contributors to them than they are to independent spending on their behalf.

Furthermore, responsiveness by a non-judicial office holder to the issue concerns of contributors is quite different from the fear that judges will be influenced by contributions in their decision-making. For example, if a candidate for legislative office is elected with the monetary and electoral support of pro-life or pro-choice voters, it is not any form of democratic deformation for that office holder to respond to the concerns of those voters and contributors when voting on abortion related issues. Indeed, that is exactly what we expect an office holder to do. It is only in the case of a judge that we would regard any form of responsiveness in decision-making to a contributor to be threatening to the value of the rule of law. Even in the case of a judge, however, there is reason to doubt that personal solicitation is more threatening than independent spending. The reader should remember that in the only case in

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<sup>74</sup> See Michael Gentithes, *An Aggregated Threat: Campaign Contribution "Bundling" and the Future of Reform*, 30 QUINNIPIAC L. REV. 587, 589-90 (2012). "The rapidly-growing modern practice of campaign finance 'bundling' allows a single powerful donor to stockpile innumerable individual contributions and deliver them in one package to a candidate for use entirely at that candidate's discretion. Often, such bundled contributions are a farcical front for the donor's personal effort to fund a candidate well beyond existing contribution ceilings, earning the bundler special notoriety and inside access during an ongoing campaign." *Id.*

<sup>75</sup> See *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1672 (2015). The failure of the government to attempt to limit independent spending on behalf of judicial candidates was one ground for Justice Scalia's dissent in the case. See *id.* at 1679-80 (Scalia, J., dissenting).

which political activity led the Supreme Court to order recusal, the activity was not campaign contributions but independent spending.<sup>76</sup>

*C. Eliminating Contribution Limits is a Feasible and Constitutional Solution*

The political reason that contribution limits could so easily be abolished is that many Republicans and conservatives are already of the view that contribution limits at least threaten, if not violate, First Amendment values. This was the point of the Chief Justice Burger's partial dissent in *Buckley*.<sup>77</sup> For this reason, any general attempt to eliminate contribution limits, whether at a state or national level, would receive overwhelming Republican support.<sup>78</sup> This leaves Democrats and liberals, many of whom, like Professor Lessig, do not believe that contribution limits violate the First Amendment. So, contribution limits would be repealed tomorrow if even a portion of this latter group became convinced that there were reasons other than the First Amendment for repeal of contribution limits.

The purpose of this Article is, in large part, to change the view of eliminating contribution limits by some of those in the liberal camp. Until now, any argument about contribution limits has centered around the meaning of free speech. I have purposely avoided such constitutional considerations here. My goal is to raise the issue of independent political spending as a serious problem aside from general considerations of the influence of money in politics. Then, hopefully, people will consider the elimination of contribution limits not just as a constitutional issue, but also as a way of curbing the power of independent spending.

We are not helpless to do something while the Koch brothers on the right and all sorts of individuals and groups on the left create shadow campaigns and parallel campaigns that engage in harmful activities and eclipse genuine democracy. We can break the current deadlock around this problem. In fact, if Professor Lessig endorsed the change, given his influence among Americans who are worried about the political influence of money, contribution limits would very likely be quickly eliminated.

However, treating contribution limits and independent spending as separate from all other efforts of campaign finance reform is not a realistic way of framing the issue. Professor Lessig has been promoting a much larger effort toward campaign finance reconceptualization. Before asking him and his supporters to join an effort to eliminate contribution limits, the effect of such a repeal on that larger project must be addressed. At first glance, one would think that repeal of contribution limits would have a negative effect on Professor Lessig's larger effort. In the next section, I hope to show, instead, that eliminating contribution limits is actually a necessary first step toward enacting any more general campaign finance reform.

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<sup>76</sup> See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 873, 879-90 (2009).

<sup>77</sup> See *Buckley v. Valeo*, 424 U.S. 1, 241-46 (1976) (Burger, C.J., concurring in part and dissenting in part).

<sup>78</sup> This is not pure speculation. Actual attempts to eliminate contribution limits at the state level have generated patterns of support and opposition very much along party lines. See, for example, the experience in West Virginia, Joel Ebert, *Bill to Remove Political Contribution Limits Sent to Subcommittee*, CHARLESTON DAILY MAIL (Feb. 25, 2015), <http://www.charlestondaily.com/article/20150225/DM01/150229574>.

V. THE RELATIONSHIP OF ELIMINATING CONTRIBUTION LIMITS TO PROFESSOR  
LESSIG'S REFORM PLAN

Independent spending is a major impediment to the enactment of Professor Lessig's campaign finance reform program. To see this, consider Professor Lessig's major proposal: public financing of elections, either by a voucher system or by direct public financing, to reduce the influence of private money in political affairs, in favor of what he calls dependence on the people.<sup>79</sup>

Independent spending is already reducing the impact of one form of public financing currently in place—public financing of the election campaign for President.<sup>80</sup> Imagine a Republican candidate for President who proposed, after the party nominating convention, that both major party candidates for President forswear private campaign contributions in favor of public financing in the general election. This would be a reasonable proposal since each candidate would have the same amount of money to spend<sup>81</sup>—in 2012, each major party general election candidate for President was eligible to receive \$91.2 million in public funds<sup>82</sup>—and for all the reasons Professor Lessig has highlighted in his writings and speaking, the public would be in favor of this proposal.

Yet, as things now stand, no Democratic candidate for President could responsibly agree to this proposal. With the independent spending structures now in place, the Democratic Party presidential candidate would be overwhelmed by independently funded attack ads and non-coordination rules would prevent the Republican candidate from stopping these independent efforts, even if the will to do so were present. While groups would raise independent money on behalf of the Democratic nominee as well, this would not change the negative calculation. Democrats have never been able to match independent spending by Republican Party supporters. Regardless, no presidential candidate would hand over the future of her campaign to outsiders.

At the moment, the First Amendment would prevent any restriction on the amount of money independently raised and spent on behalf of the Republican candidate in my scenario. Even if this constitutional interpretation were to change

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<sup>79</sup> See LESSIG, *supra* note 2, at 265-72

<sup>80</sup> In 2008, Democrat Barack Obama was the first major party candidate to reject public financing for the general election. Independent spending is one of the factors that has led presidential candidates to abandon the public financing system. See Tarini Parti, *Will 2012 Be the End of the Presidential Public Financing System?*, OPENSECRETS.ORG (Aug. 5, 2011), <http://www.opensecrets.org/news/2011/08/the-end-of-presidential-public-financing>. According to the Congressional Research Service, "No major candidate accepted public funds in 2012." R. Sam Garrett, *Proposals to Eliminate Public Financing of Presidential Campaigns*, CONG. RES. SERV. (Mar. 4, 2015), <https://www.fas.org/sgp/crs/misc/R41604.pdf>.

<sup>81</sup> See *Public Funding of Presidential Elections*, FED. ELECTION COMM'N (Apr. 2015), [http://www.fec.gov/pages/brochures/pubfund.shtml#Expenditure\\_Limits](http://www.fec.gov/pages/brochures/pubfund.shtml#Expenditure_Limits). Public financing requires that the candidate forswear additional fundraising and spending during the general election: "A major party nominee who has accepted public funding for the general election may not accept any contributions to further his election." *Id.* Campaign spending limits apply to acceptance of matching public funds during the primary campaign. *Id.*

<sup>82</sup> *Quick Answers to Public Funding Questions*, FED. ELECTION COMM'N, [http://www.fec.gov/ans/answers\\_public\\_funding.shtml#howmuchmoneydotheyget](http://www.fec.gov/ans/answers_public_funding.shtml#howmuchmoneydotheyget) (last visited Jan. 17, 2016). The amounts are adjusted for cost of living.

that would just cause the negative attack ads to become negative issue ads. The Democratic nominee would have to respond to ads such as “The Iranian deal will give Iran the bomb” or “Obamacare has been a failure.” No conceivable interpretation of the First Amendment could prevent negative discussion of the issues during an election campaign. So, no Democratic nominee for President could agree to public financing. Thus, independent spending has already been an important factor in the nonuse of public funding by presidential candidates.

Similar scenarios can be imagined in local government campaigns. Today, local governments, under the influence of Professor Lessig’s reform program, are considering public election funding.<sup>83</sup> But, as independent groups discover the power of independent spending at the local level, these public funding efforts may also be overwhelmed and thus abandoned. One can easily imagine restaurant and retail groups running independent attack ads against incumbent city council members in every city in which the minimum wage has been raised. Under most public financing rules, these incumbents would not be able to raise concomitant amounts of money to respond to such attacks.

Imagine now a world without contribution limits. In this world, independent spending has gradually dried up as candidates and political parties have insisted that they control the planning and spending in campaigns. The abolition of non-coordination restrictions has also enabled candidates to discourage spending by outside groups. Super PACs have disappeared as candidates have developed their own capacities to solicit large scale contributions. Voters have gotten used to campaigns totally controlled by candidates.

In this world, an offer by one presidential candidate to the other that they both accept public financing could at least be considered. It would not be political suicide to accept such an offer. This is one way that eliminating contribution limits can serve the accomplishment of Professor Lessig’s overall goals. Yes, in the short run, ending contribution limits just further emphasizes private fundraising by candidates. But as the above thought experiment shows, eventually, the end of contribution limits could serve to strengthen the potential for public financing of elections.

But all this, of course, is speculation. However, there is one way that ending contribution limits immediately serves Professor Lessig’s goals by breaking the partisan logjam on political finance reform.

Many conservatives reject Professor Lessig’s basic analysis of the role of money in American political life. For them, given the size of the United States economy, relatively little is spent on politics, perhaps not enough.<sup>84</sup> In addition, many conservatives see the First Amendment as strongly supportive of campaign finance that is free of government regulation. For someone who shares Professor Lessig’s commitments, there is not very much common ground with such conservatives around these questions. Yet, Professor Lessig has also favored nonpartisan

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<sup>83</sup> Lessig adverted to these efforts in his presentation during the Symposium. See Lessig, *supra* note 18.

<sup>84</sup> See Peter Roff, *There’s Not Enough Money in Political Campaigns*, U.S. NEWS REPS. (Nov. 16, 2010), <http://www.usnews.com/opinion/blogs/peter-roff/2010/11/16/theres-not-enough-money-in-political-campaigns>.



approaches to campaign finance reform and has emphasized the need to find elusive common ground.<sup>85</sup>

The goal of eliminating contribution limits can serve as just the kind of joint first step that Professor Lessig has advocated. Probably both conservatives and liberals share the commitment that political campaigns are best run by candidates rather than by independent groups, as long as the right of independent groups to participate is respected. While conservatives and liberals would not agree on any coercive regulations to discourage independent spending, they might be able to agree on a non-coercive approach, such as ending contribution limits as a way to curb independent spending. If so, ending contribution limits could be the beginning of a renewed nonpartisan dialogue about money and politics.

#### CONCLUSION

In the past few years, Professor Lawrence Lessig has convinced millions of Americans of the need for campaign finance reform through his persuasive analysis of the influence of money in American elections and policy-making. If there is a chance that these matters will be addressed, it is largely because of his efforts.

Nevertheless, the failure of Professor Lessig to address independent political spending as a separate issue has hindered his appreciation of the unique harm that independent spending poses to democratic life. Independent spending must be curbed now, before its corrosive effects undermine American democracy beyond repair. Independent spending is worse than the problem of money in politics generally.

Fortunately, independent spending can be curbed without constitutional amendment, constitutional convention, or shifting First Amendment analysis. Independent political spending is the creation of campaign contribution limits and can be curtailed by simply eliminating those restrictions.

The resulting world of unlimited, large contributions by a small number of donors giving directly to candidates may seem very far away from the concerns and hopes of Professor Lessig. That impression is misleading. Direct contributions to candidates are much more subject to democratic discipline and filtering than is independent spending. Because of that, even a dollar-for-dollar shift from independent spending to campaign contribution would reduce the influence of money in politics. In addition, the plaything of a few wealthy individuals that independent spending has made of American politics may be lessened when those same individuals contribute money rather than run their own, parallel campaigns.

Finally, restricting independent spending is one way to reach the ultimate goal of robust public financing. It will be far easier to move to public financing in a context in which candidates and campaign contributions represent the workings of money in our system, as opposed to our current context of independent groups and spending, which undermines any hope of a public financing system. Though Professor Lessig may not yet agree, the elimination of contribution limits should be high on his agenda of campaign finance reform.

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<sup>85</sup> See LESSIG, *supra* note 2, at 335 (“[T]here is critical work to be done now to build understanding across the insane political divide that defines politics in America today.”).