[Dear Schmooze participants,

This is a condensed version of a longer piece that I'm currently working on. The longer piece is intended for an audience of political theorists and political scientists, and as such discusses the legal doctrine of campaign finance in much more extensive detail than is necessary for a legal audience. I thus hope that you will excuse the superfluity in some of what follows. I eagerly look forward to meeting all of you this weekend, and equally eagerly anticipate your thoughts and comments.

Best,
Prithvi]

Why Campaign Finance Matters

Prithviraj Datta

Due to the combination of a host of factors – not least among them being the Supreme Court decision in the case of *Citizens United v FEC*, the not-entirely-unrelated explosion of Super PACs as a political force in electoral politics, and the tremendous increase in the amounts that candidates and parties have been spending in their campaign efforts – the issue of campaign finance has, once again, rise to prominence in scholarly and public debate. Unsurprisingly, given the highly polarized and divisive political environment in which we live, the debate over campaign finance is characterized by a sharp cleavage of opinion regarding the normative desirability of the legal regime that governs campaign spending in the United States currently. Yet, in spite of this renewal of interest, the debate is shaped almost entirely by two conceptions of the normative significance of campaign finance which are themselves quite old, having been developed in the course of prior eruptions of concern over the manner in which American campaigns were funded and run. In the course of the account which follows, I will endeavor to demonstrate that these conceptions of the salience of campaign spending – which I term the "informational" and the "influence-based" conceptions respectively – suffer from serious empirical and conceptual infirmities. To the extent that participants in the debate over the desirability of the current campaign spending regime rely on these conceptions, therefore, the arguments that they put forth rest on an unsound and unstable footing. A more empirically valid and conceptually nuanced discussion of the merits of the contemporary campaign finance regime is possible, however, if one regards campaign finance as being important not by virtue of the role it plays in informing citizens, or enabling them to exercise greater political influence, but rather, for the manner in which it permits those who engage in it to obtain *affirmation* for their political preferences. The primary aim of this account, therefore, is to provide an outline of this affirmational case for the democratic importance of campaign finance. Before commencing with the provision of this outline, however, it is first necessary to take up the informational conception of campaign finance for critique and analysis.

The Informational Conception of Campaign Finance

The most succinct – and perhaps best known – articulation of the informational conception may be in found in Justice Anthony Kennedy's opinion for the United States Supreme Court in the decision of *Citizens United v Federal Election Commission. Citizens*

United involved a challenge to the constitutionality of restrictions on the broadcast of "electioneering communications" funded by corporations or labor unions in the run-up to a primary, or general election, for federal office. An "electioneering communication," as defined by the Bipartisan Campaign Reform Act of 2002, referred to any broadcast communication which was made 30 days before a contested primary or 60 days prior to a federal election, referred to a candidate by name, and was targeted at the public. Citizens United was a non-profit corporation which sought to broadcast a feature critical of Hillary Clinton, then a candidate for the Democratic Presidential nomination, within the 30-day window prior to the first Democratic primaries for the 2008 election. As such, the broadcast fell squarely within BCRA's restriction on electioneering communications. Aggrieved by the possibility of sanction for broadcasting the documentary it produced, Citizens United moved the courts for relief, arguing, among other grounds, that BCRA's restrictions on electioneering communications violated its constitutional right to the freedom of speech. In its final decision, following an unusual second round of arguments, a narrow majority of the Supreme Court agreed with Citizens United. In his opinion for the majority, Justice Kennedy reasoned that the restrictions were problematic because they deprived

"the electorate…of information, knowledge and opinion vital to its function. By suppressing the speech of manifold corporations, both profit and non-profit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons and entities are hostile to their interests."[1]

Since the protection of the "the ability of the citizenry to make informed choices among candidates for office" was one of the foremost tasks of the United States Constitution's protection for the freedom of speech, Kennedy further concluded, these restrictions were also unconstitutional, as were any forms of campaign finance limitations other than those aimed at overcoming *quid pro quo* corruption, and enhancing the disclosure of the identities of those engaged in campaign spending.[2]

Justice Kennedy's treatment of campaign finance follows in a long line of judicial decisions which treat such spending as a form of speech, and which regard the electoral sphere as a "marketplace of ideas" entitled to heightened protection from governmental regulation.[3] On this view, campaign spending, in the first instance, enables individuals to engage in the dissemination of their beliefs to the public at large at a period when the public's attention to issues of political significance is at its highest. Campaign spending, in this regard, enables individuals to engage in the process of *persuading* their fellow citizens of the merits of the positions, candidates, and parties whom they support. The importance of such efforts aimed at persuasion, however, emerges from the impact that they have upon those who are exposed to them, rather than from the benefits which accrue to those engaging in them. Where the members of the public are confronted by a diversity of political arguments, each urging them to take a different course of action on the day of the elections, this account further proceeds, they are encouraged to *reflect* upon the competing arguments before them, and to follow the one which

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[1] *Citizens United v Federal Election Commission*, 130 S. Ct. 876, 899 (2010).
[2] Ibid., 898.
[3] See, for e.g., *Buckley v Valeo,* 424 U.S. 1 (1976); and *First National Bank v Bellotti,* 435 U.S. 765 (1978).

they find most convincing on its merits. The true democratic value of campaign finance, it thus follows, emerges from the manner in which it enables citizens to engage in the *reasoned evaluation* of the candidates and parties before them, thereby enhancing the quality of their electoral decisions, and, by implication, of their government as well.[4]

There are thus two assumptions which underpin the informational conception of the importance of campaign finance. The first is that campaigns *matter*; that is to say, that citizens pay attention to the views and positions to which they are exposed in the period immediately preceding elections, and that campaign messages play a role in the electoral decisions that they make. Secondly, it must also be the case, as a matter of fact, that campaign spending prompts reasoned evaluation for the informational conception to be an accurate description of the importance of campaigns. The veracity of the informational conception hinges, in other words, on its being true that the electoral messages that campaign spending funds either be intended as a means of encouraging those exposed to it to engage in scrutinizing the positions of the candidates and parties running for office on matters of collective political importance and relying upon the results of their investigations to make their voting decisions, or that it have the effect of doing so. Regrettably, however, all that we know about the realities of the modern American electoral campaign indicates that there is very little warrant for believing that these assumptions are true.

There are two sets of findings, in this regard, which are pertinent to highlight. Thus, in the first instance, several political scientists have argued that voters largely decide whom to vote for on the basis of pre-determined partisan affiliations, and that the information that they receive during campaigns which run counter to these affiliations are often ignored.[5] Furthermore, while a large – and increasing – number of citizens declare themselves to be "independent," and eschew formal affiliation with any particular political party, partisan affiliations have been found to dictate the voting behavior of a majority of these formally unattached citizens as well.[6] If these accounts are correct, we have good reason to believe that campaigns play a role in determining the political views of a very small minority of citizens. Secondly, and more prominently, there is an overwhelming amount of evidence that political scientists have adduced to support their contention that fundamental issues over which campaigns have little to no control, and indeed which are often determined *prior* to the process of campaigning, play perhaps the most decisive role in determining electoral outcomes.[7] Thus, political scientists who study American politics have had a considerable degree of success in predicting electoral outcomes well before the campaign process gets fully underway, chiefly by focusing on public perceptions of the health of

[4] For a more detailed, and critical, overview of this "deliberative ideal" of campaigns, see James Gardner, *What Are Campaigns For? The Role of Persuasion in Electoral Law and Politics* (New York: Oxford University Press, 2009), 1-7, 38-43, 70-81.

[5] See, for e.g., Angus Campbell et al., *The American Voter* (New York: John Wiley, 1960).

[6] See generally, Bruce Keith et al., *The Myth of the Independent Voter* (Berkeley: University of California Press, 1992); and David Magleby et al., "The Myth of the Independent Voter Revisited," in Paul Sniderman and Benjamin Highton eds., *Facing the Challenge of Democracy: Explorations in the Analysis of Public Opinion and Participation* (Princeton, NJ: Princeton University Press, 2011), 243–249.

[7] See, for e.g., Larry Bartels, "Messages Received: The Political Impact of Media Exposure," *American Political Science Review* 87 (1993): 267-285; and Andrew Gelman and Gary King, "Why Are American Presidential Elections so Variable when Votes Are so Predictable?", *British Journal of Political Science* 23 (1993): 409-451.

the economy, and the state of the nation's security.[8] Taken cumulatively, therefore, these sets of findings have led many political scientists to assert that electoral campaigns have limited effects on determining political outcomes, and usually play only a small role in transforming the political views that citizens hold. If this account is correct, it thus follows, efforts to defend campaigns for the role that they play in informing citizens and enabling them to better identify their political interests have no foundations in political reality.

The "minimal effects" school of thought has, it is important to concede, come in for serious challenge in recent times, with several political scientists arguing that campaigns do, in fact, have an impact on the decisions that voters make during elections. There is little in the findings of these revisionist accounts, however, which supports Kennedy's endorsement of campaign finance as a means by which citizens may be prompted to reason about their political interests, and help them attain a "consensus" on political issues as a result. Rather, to the extent that campaigns *do* appear to have an effect on individuals, their impact may be attributed to the prompting of spontaneous and irrational responses from those who are exposed to them. Thus, while proponents of the "campaign effects" approach have found that exposure to campaigns, and their messaging, can prompt citizens to change their minds, these persuasive effects are usually felt by a small section of voters – those "persuadable partisans" who have traditionally voted for a particular party or platform, and since become dissatisfied with them. For these citizens, therefore, campaigns only provide the final push that convinces them to change their vote, and do not themselves occasion the sort of deep reflection that precedes a switch in partisan political affiliation.[9] Furthermore, the role that campaigns play in persuading voters to change their minds largely occurs through the priming of *affective* and *emotional* responses from these citizens. When exposure to campaign messaging convinces voters, in other words, to change their voting behavior, they do so not by prompting a reasoned re-evaluation of their political preferences, but, rather, by playing on their sentiments to provoke feelings of enthusiasm for certain candidates, or of fear and resentment towards others.[10] As one account succinctly puts it, campaigns serve as vehicles by which to disseminate "propaganda that are successful in causing citizens to shift their expressed preferences toward the sponsoring candidate," and not by causing them to bring their enlightened interests in line with their voting decisions.[11] There is thus also little empirical evidence to support the contention that campaign spending is intended as, or has the effect of, prompting reasoned evaluation on the part of those targeted by the messages that it funds.

Indeed, it is difficult to imagine any set of conditions under which campaigns *could* perform the function of occasioning reasoning about political preferences of the sort Kennedy

[8] See, for e.g., James Campbell, *The American Campaign: U.S. Presidential Campaigns and the National Vote* (College Station: Texas A&M University Press, 2000); and Gregory Markus, "The Impact of Personal and National Economic Conditions on the Presidential Vote: A Pooled Cross-Sectional Analysis," *American Journal of Political Science* 32 (1988): 137-154.

[9] See Sunshine Hillygus and Todd Shields, *The Persuadable Voter: Wedge Issues in Presidential Campaigns* (Princeton: Princeton University Press, 2008), 49-106.

[10] See Ted Brader, "Striking a Responsive Chord: How Political Ads Motivate and Persuade Voters by Appealing to Emotions," *American Journal of Political Science* 49 (2005): 388-405.

[11] Gregory Huber and Kevin Arceneaux, "Identifying the Persuasive Effects of Presidential Advertising," *American Journal of Political Science* 51 (2007): 978.

envisages in his opinion for the majority in *Citizens United.* The purpose of campaigns, after all, is to secure electoral victory for certain key political entities – parties, candidates, or electoral platforms – and to do little else. The obsessive focus on electoral success turns campaigning into what Amy Gutmann and Dennis Thompson have termed a "competitive, zero-sum activity" in which "[d]efeating your adversary is the dominant and legitimate motive."[12] Under these sorts of constraints and incentive structures, it is difficult to imagine campaign finance ever supporting the forms of expression which provoke citizens to carefully reconsider and reevaluate the beliefs and preferences that they subscribe to in the light of alternate, reasoned viewpoints. Rather, the imperatives of ensuring electoral victory are almost always likely to compel the organizers of campaigns to fund messaging and activities which provoke emotional responses in citizens, since emotional appeals have a greater likelihood of occasioning a change in voting behavior than the reasoned and rational interchange of ideas in the electoral arena would.

Campaign Finance as Political Influence

The most prominent competitor to the informational conception of the normative salience of campaign finance treats it as a form of *political influence*. On influence-based accounts, campaign spending is an important means by which citizens can gain the attention of their elected officials and political leaders, thereby enabling them to secure political outcomes which they favor. The logic of this argument is not difficult to understand. Money may, without much exaggeration, be regarded as the life-blood of competitive electoral campaigns, especially in in countries as large and as heavily populated as the United States where voter outreach and mobilization can only be effectively undertaken at considerable expense. When citizens donate to competitive campaigns, therefore, they satisfy a voracious need that candidates and parties have. Spending which helps to meet this insatiable demand for money can thus inspire feelings of gratitude on the part of those who benefit from it, and one may reasonably expect such gratitude, in turn, to be repaid through the enactment or promulgation of favorable policy outcomes when their beneficiaries win their electoral contests and assume office.[13] On the influence-based conception, campaign spending, in this sense, thus serves as an important – if not *the* most important – input into what the campaign finance scholar Larry Lessig has called "the economy of influence" which determines the direction of government and shapes its policy outcomes.[14]

Proponents of the influence-based conception, however, also encounter serious obstacles to their arguments. The first of these emerges from the lack of any compelling empirical

[12] Amy Gutmann and Dennis Thompson, "The Mindsets of Political Compromise," *Perspectives on Politics* 8 (2010): 1136.

[13] While the informational view of campaign spending currently dominates American campaign finance jurisprudence, the influence-based view has played a significant role in resolving disputes concerning the constitutionality of restrictions upon campaign spending as well – see, for e.g., *McConnell v FEC*, 540 U.S. 93, 153 (2003)(upholding BCRA's ban on "soft-money" contributions to parties on the grounds that it restricted the ability of those who made them to exercise "undue influence" over political outcomes by encouraging "officeholders [to] 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.")

[14] Lawrence Lessig, *Republic Lost: How Money Corrupts Congress – and a Plan to Stop It* (New York/Boston: Twelve Books, 2012), 16-17.

evidence that demonstrates that campaign spending has an impact on political outcomes. Thus, in a seminal article titled "Why is There So Little Money in Politics?", the political economists Stephen Ansolabehere, James de Figueiredo and James Snyder offer a bevy of reasons to doubt that campaign giving is motivated by the desire to exercise influence, and to believe that any giving which is so motivated would in fact be a wasted investment. The authors of this article begin their account by noting a peculiar feature of campaign spending in the United States: while the sums that are spent on funding candidates and parties during federal elections are large in absolute dollar terms, they form an infinitesimally small fraction of the total amount that is spent by the federal government. Additionally, they observe that a large number of wealthy organizations which have an interest in securing favorable political outcomes – corporations and labor unions, for instance – do not spent on campaigns at all, or spend very little, nowhere near the limits which electoral law imposes on campaign contributions and expenditures.[15] The relative indifference that these organized political actors display towards campaign spending thus provides us with one preliminary reason to doubt whether spending of this nature does, in fact, have an impact on political outcomes. Ansolabehere, de Figueiredo and Snyder also sought to provide an explanation for why this unwillingness on the part of well-funded interests was not merely a form of over-cautious or otherwise irrational behavior. They did this by undertaking a meta-analysis of over 40 studies which were aimed at determining whether campaign contributions could effectively predict roll-call votes cast by members of Congress, as a means of further determining if contributions had an influence on legislative outcomes. Based on this meta-analysis, these scholars concluded that there was almost *no* evidence to suggest that campaign contributions had any independent impact upon legislative outcomes. "Legislators' votes," they noted, "depend almost entirely upon their beliefs and the preferences of their voters and their party."[16] The relative lack of interest that the wealthy and the well-mobilized displayed in campaign spending is thus, in light of its minimal effects, entirely rational on their account.

In the years since its publication, several doubts have been raised about the accuracy of the conclusions in "Why is There So Little Money in Politics?" None of these doubts, however, have tested the fundamental assertion at the core of the article – that campaign finance is a poor means of exerting influence over political outcomes. Thus, while some scholars have questioned the accuracy of the meta-analysis undertaken by the authors of the article in the years following its publication,[17] most political economists tend to agree with its finding that legislative outcomes are not directly dictated by campaign spending.[18] Most recent influence-based accounts, however, have moved away from arguing that campaign contributions make an impact upon the *votes* of legislators to arguing, instead, that they play a crucial role in determining who gains *access* to legislators, policy-makers, and other actors in positions of political authority.

[15] Stephen Ansolabehere, John Figueiredo, and James Snyder, "Why is There So Little Money in Politics?", *Journal of Economic Perspectives* 17 (2003): 105-130.

[16] Ibid., 116.

[17] See, for e.g., Thomas Stratmann,"Some Talk: Money in Politics. A (Partial) Review of the Literature," *Public Choice* 124 (2005): 143-146.

[18] It is pertinent to note, in this regard, that recent efforts undertaken by political scientists to analyze the considerable influence that the wealthy exert over the American political process are notably ambivalent on the role that campaign finance has played in bringing about this outcome, see, for e.g., Larry Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* (Princeton: Princeton University Press, 2008), 279-282.

Campaign contributions, it is commonly asserted on this access-oriented version of the influence-based conception, serve as important vehicles by means of which lobbyists are able to win political concessions for the interests that back them, most prominently by enabling them to engage in a strategy of "buying time" of legislators.[19] When lobbyists marshal campaign contributions towards legislators, in other words, they provide incentives to these officials to grant them an audience where they can present the concerns and views of those whom they represent. Since the time and attention of legislators is finite, it is feared that campaign contributions purchase access for the wealthy at the expense of those who lack the resources to engage in campaign spending and to hire lobbyists. In this way, the argument goes, unrestricted campaign spending greatly restricts the range of views and voices that legislators are exposed to in the course of discharging their functions of legislative agenda-setting and policy-making, thereby conferring the wealthy and the well-connected a disproportionate amount of influence over political outcomes.[20] Campaign spending, in other words, enables lobbyists to undertake what is termed an "exchange" strategy, where contributions are granted (or channeled) either as a bid for the granting of legislative time and attention, or as a reward for the same.[21]

The trouble with these access-based arguments for treating campaign finance as a form of political influence, however, is that they are contradicted by the funding practices of contemporary lobbyists. To put this point somewhat differently, if the exchange strategy for purchasing access – and hence, exercising influence – were prevalent, one would expect lobbyists to direct most of their resources towards legislators who either took positions that were opposed to their interests, or at least towards those who were ambivalent "fence-sitters" on issues of significance to the interests that they represented. Surprisingly, however, the facts that we have at our disposal about the habits of lobbyists indicate exactly the opposite: lobbyists tend to concentrate the majority of their spending upon officials who are *already* ideologically allied with them, and with whom they enjoy *pre-existing* relationships.[22] The problem that this feature of the practice of lobbying poses for the exchange strategy is obvious: it seems to indicate that lobbyists expend huge sums of money – in the billions of dollars annually – to gain access to, and hence to attempt to influence, those legislators whose interests and commitments are similar to theirs, and who have a considerable degree of sympathy for the positions that they espouse. It is difficult to regard such a strategy as being rational in any sense, and to understand why lobbyists would be supported in such an endeavor by those who hire them.

These facts about the funding practices of lobbyists have prompted contemporary political scientists to, for the most part, abandon access-based analyses of lobbying. Instead of treating lobbyists as putative purchasers of access, scholars of politics now prefer to regard

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[19] Richard Hall and Frank Wayman, "Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees," *American Political Science Review* 84 (1990): 797-820.

[20] See, for e.g., Dan Clawson, Alan Neustadtl, and Mark Weller, *Dollars and Votes: How Business Campaign Contributions Subvert Democracy* (Philadelphia: Temple University Press, 1998).

[21] For a critical overview of different formulations of this strategy, see Richard Hall and Alan Deardorff, "Lobbying as Legislative Subsidy," *American Political Science Review* 100 (2006): 70-71.

[22] See, for e.g., Marie Hojnacki and David Kimball, "Organized Interests and the Decision of Whom to Lobby in Congress," *American Political Science Review* 92 (1998): 775-790; Stephen Bronars and John Lott, "Do Campaign Donations Alter How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things That They Do?", *Journal of Law and Economics* 40 (1997): 317-350.

lobbyists as "information service bureaus,"[23] or as providing a "legislative subsidy."[24] On this view, the primary role that lobbyists perform is of providing legislators with *information* that is relevant to the performance of their jobs. There are three kinds of information, in particular, which legislators look to lobbyists to obtain. The first is information of a technical or complex nature which legislators do not have the skills or resources to obtain and understand on their own.[25] Secondly, lobbyists can also make information about legislative strategy accessible to legislators, leveraging their political connections to provide elected officials with details about the policy preferences of other legislators, as well as of the procedural obstacles that lie in the way of achieving political outcomes that they favor. Lobbyists, in the words of the political economists Richard Hall and Alan Deardorff, thus provide crucial "political intelligence" to those whom they support and engage with.[26] Finally, lobbyists can also provide legislators with information about the views and preferences of their constituents. The importance of lobbyists, in this regard, emerges from the manner in which they can assist legislators to align their policy interests with their electoral interests.[27] It is pertinent to point out, in this regard, that legislators are more likely to trust, and hence to rely upon, information provided to them by lobbyists with whom they are closely affiliated and share common political ground.

It is important to note that while political scientists focus on the informational role that lobbyists play in contemporary politics, they also take great care to emphasize that the information that is provided to legislators is far from innocuous, and often – if not always – filtered through the strategic preferences and biases that these lobbyists hold. By controlling what information is made available to legislators, and how it is conveyed, therefore, lobbyists are able to determine legislative outcomes in a manner that benefits the interests of those whom they represent – usually the wealthy or the well-connected – at the expense of the less well-off and the poorly mobilized.[28] For the purpose of the present account, however, it is important to note that *campaign finance* only plays a limited role in determining political outcomes through the provision of political information in this form. Thus, engaging in campaign spending can allow new entrants into the lobbying field to establish their credentials and signal their political affiliations by establishing patterns of political giving along ideological and partisan lines. Additionally, where lobbyists continue to raise and spend large sums of money for those with whom they are already aligned, they also continue to signal their commitment and interest to those politicians who benefit from such giving. Campaign contributions, it thus follows, may smooth the way for lobbyists to access legislators, but they are not, in and of themselves, the chief source through which lobbyists impact political outcomes. Such impact emerges from the informational services that lobbyists provide to these legislators – services in which, it bears reiterating, campaign spending plays no role. To the extent that campaign spending does provide

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[23] Raymond Bauer, Ithiel de Sola Pool, and Lewis Anthony Dexter, *American Business and Public Policy: The Politics of Foreign Trade* (New York: Atherton Press, 1963), 353.
[24] Hall and Deardorff, "Lobbying."
[25] See, for e.g., Kevin Esterling, *The Political Economy of Expertise* (Ann Arbor: University of Michigan Press, 2004).
[26] Hall and Deardorff, "Lobbying," 74.
[27] See, for e.g., John Mark Hansen, *Gaining Access: Congress and the Farm Lobby, 1919-1981* (Chicago: University of Chicago Press, 1991), 1-25, 101-111, 215-230.
[28] See, for e.g., David Austen-Smith, "Information and Influence: Lobbying for Agendas and Votes," *American Journal of Political Science* 37 (1993): 799-833; and Hall and Deardorff, "Lobbying," 81.

access to legislators, therefore, it does so in a manner that does not necessarily confer *influence* in way that proponents of the exchange model allege it does.

It is relevant to note, furthermore, that contributions form only *one* way – and a marginal one, at that – in which relationships can be established and maintained between lobbyists and elected officials. Indeed, political observers often argue that employing individuals who are close to legislators, or those with considerable policy expertise, is a more effective way of building political ties with legislators than engaging in campaign spending.[29] From an informational standpoint, this makes a good deal of sense: lobbyists who hire their former staffers are more successfully able to establish their reliability, ideological affinity and trustworthiness by leveraging the sort of personal connections that the mere making of campaign contributions is unable to nurture. Contributions thus appear to matter only at the periphery even in providing access, casting further doubt on the belief that the exchange strategy is widely resorted to by lobbyists as means of securing political outcomes that favor those whom they represent. It follows, from the foregoing discussion, that the imposition of strict limits on campaign spending is unlikely to bring about a reduction in the asymmetric nature in which political influence is currently distributed in the United States. Those concerned with mitigating the stranglehold that the wealthy and the well-connected exercise over the political process – a grip that is all too real and well-documented – would thus do better if they turned their attention to reforming means of political participation other than campaign finance. For those seeking to understand how campaign finance works, and what the source of its political importance is, however, the search for a conceptually sound and empirically plausible theory of campaign spending still continues. It is time, therefore, to turn to providing the outlines of exactly one such account of campaign finance, which treats it as an important means by which citizens may obtain *affirmation* for their political preferences.

Campaign Finance and the Affirmation of Political Preferences

Before proceeding with discussing how campaign finance enables those who engage in it to obtain the affirmation of their political preferences, it is necessary, as a preliminary matter, to spend a little time on understanding the role that elections play in conferring *legitimacy* upon the political positions taken by those who win them, as well as of their supporters, endorsers, and funders. Electoral outcomes hold a particularly exalted status in the democratic imagination. Where an electoral platform gains victory, the candidates and parties running on it, as well as their supporters, are able to plausibly assert a *mandate* for the issues and policy positions which comprise that platform, even though the supposed public consent for such a mandate is usually hypothetical and constructed, rather than being an actual sociological fact.[30] The claiming of such a mandate serves two purposes: one which is primarily administrative in nature, and the other being chiefly moral in its emphasis. In the first instance, electoral victory creates a presumption – albeit a rebuttable one – in favor of the validity and desirability of political decision-making which furthers the campaign promises that were made by those parties,

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[29] See, for e.g., Jordi Blanes i Vidal, Mirko Draca, and Christian Fons-Rosen, "Revolving Door Lobbyists," *American Economic Review* 102 (2012): 3731-3748.

[30] See, for e.g., Lawrence Grossback, David Peterson, and James Stimson, *Mandate Politics* (Cambridge: Cambridge University Press, 2006).

candidates, and coalitions who form the government upon the completion of elections. We see this, for instance, in some the arguments that Barack Obama and Congressional Democrats offered for prioritizing the comprehensive reform of the American healthcare system in the face of concerted opposition from Republicans, and the demands that the prolonged economic recession was making on legislative time and attention. Since healthcare reform, the argument went, was a core component of the Democratic Party's platform, as well as a major issue on the campaign agenda in the Presidential election of 2008, efforts to overhaul the American health care system were to be regarded as *presumptively* valid, as electoral victories for the President, and for the Democrats who formed a majority in Congress, could reasonably be interpreted as conferring a popular mandate for such an outcome.

The second, and for our purposes, more important, role that electoral victory serves is to allow the *supporters* of winning platforms to claim legitimacy for those political positions and beliefs to which they attach salience. The chief impact of electoral success, in this context, is not the momentum that it generates for particular legislative outcomes, but rather, the enhancement in moral valence that accrues to issues that form part of the agenda on the basis of which campaigns are fought. The legitimating effect of electoral victory was captured most evocatively by Tocqueville, when he discussed the reactions that impending Presidential elections had upon political parties in Jacksonian America. Ordinarily content to remain aloof from the public, Tocqueville observed, parties felt a great need, during the run-up to elections,

"to rally around an individual in order to communicate more effectively with the masses. Thus they generally use the name of the Presidential candidate as a symbol: they make him the personification of their theories. Hence the parties have a great interest in winning Presidential elections, not so much in order to aid in achieving the triumph of their doctrines as to demonstrate by electing him that those doctrines enjoy the support of the majority."[31]

While Tocqueville does not explicitly articulate what it is about majority support for a party's "doctrines" which make electoral victory so vital, the reasons are fairly obvious. Electoral victory allows winning parties to claim that their views and positions are more democratically legitimate than – and hence, *normatively superior* to – parties on the losing side. This claim is, of course, a rebuttable one, since electoral victory is not the only factor determinative of democratic legitimacy. As the political theorist Russell Muirhead validly notes, the fact "that the numerous have some claim is not to say that its claim is absolute, or trumps every other claim. It is rather *one ingredient* in the mix of democratic legitimacy."[32] Nevertheless, in the absence of compelling moral flaws pervading the positions which parties in government take on the campaign trail, or of reasons which call the fairness of the electoral process into question, electoral victory adds significant rhetorical force to claims of greater moral worth when they are made by winning parties. While the fundamental issues at stake in contemporary elections rarely pack the same sort of moral punch that those in antebellum America did, the legitimacy-conferring role that elections play upon the political preferences of those who ally themselves

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[31] Alexis de Tocqueville, *Democracy in America* (Arthur Goldhammer trans., New York: Library of America, 2004), 152.

[32] Russell Muirhead, "A Defense of Party Spirit," *Perspectives on Politics* 4 (2006): 719 (emphasis added).

with particular candidates nevertheless continues to serve as an important motor of electoral mobilization and participation in our time as well.

While Tocqueville's discussion is limited to parties, it does not take much imagination to see how electoral success can also have a similarly legitimating effect upon the preferences to which *individuals* attach salience. Where citizens ally themselves closely with a particular party or candidate – in other words, act in a partisan manner – and where that party or candidate secures electoral victory, these citizens too may rely on this outcome to claim greater democratic legitimacy for the preferences which they share with it. Campaign contributions, in particular, can play an extremely prominent role in conferring legitimacy upon the political views that partisans adhere to. They can serve the instrumental purpose of enabling their beneficiaries to secure electoral victory, by underwriting the expenses necessary to motivate the public to take a sympathetic view of their proposals, and to mobilize them to turn out in their support during the elections. Contributions, in this way, allow those making them to take ownership of the electoral victories of the candidates and parties whom they support. Secondly, and perhaps more importantly, where citizens donate funds to candidates or parties, they make it possible for these entities to disseminate their ideas – and, by extension, the ideas of their partisan supporters – to the public at large. Where the beneficiaries of such partisan spending gain electoral victory, they allow their donors to claim that their views, and not those of partisans on the losing side, have been heard by their fellow citizens, and found to be convincing by them. These claims may, as I have noted above, be adduced in support of arguments which seek to establish the *pro tanto* validity of legislation favored exclusively by partisans of those in the winning coalition, but they may also be presented to underpin the *normative desirability* of the positions that these partisans take. In so doing, one may argue, campaign contributions can have the effect of affirming the political preferences that partisans hold, where the beneficiaries of such contributions are able to secure electoral victory.

It is important to note, at this point, that while the obtaining of electoral success is perhaps the most effective way by means of which campaign spenders are able to gain legitimacy (and hence, affirmation) for their political preferences, the *pursuit* of electoral victory through such spending can also have similar effects. Thus, where citizens engage in campaign spending, they may be able to obtain the same sort of affirmation of their political preferences as arises when individuals are able to secure a public hearing for their views. Where citizens are allowed and encouraged to support political causes and entities in furtherance of their beliefs without fearing reprisal or coercion, they may come to internalize the belief that these viewpoints are important. The display of toleration and restraint on the part of the legal system, and of those exposed to the views that campaign spending funds, in other words, can engender respect and regard for these views among those who hold them.[33] Secondly, campaign spending may also result in the affirmation of political preferences by generating relationships of *solidarity* among funders. Here campaign spending is conducted in a transparent and open manner, citizens who contribute to a favored party, candidate, or cause are able to see that their views are not held in

[33] For a similar argument concerning the importance of tolerance for speech regarded as offensive by those to whom it is addressed, see Lee Bollinger, *The Tolerant Society* (Oxford: Oxford University Press, 1986). For an argument which focuses on exactly this respect-enhancing aspect of tolerance as a grounds for restricting hate speech, see Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012).

isolation, and that a portion of their fellow-citizens are also committed to the same views and preferences that animate them. The recognition that political beliefs are shared by others can also serve as a powerful source of affirmation of those beliefs. It demonstrates to those individuals holding these views that they are not mistaken or misled in the degree of significance which they attach to their political preferences, since many of their peers feel as strongly about the relevant political issues as they do.[34] Finally, campaign spending can also lead to the affirmation of political preferences by occasioning *contestation* among citizens who are exposed to campaign messaging which they disagree with, or otherwise find objectionable. Where citizens are able to respond to these messages by engaging in messaging of their own, thereby engaging in a robust defense of their own preferences and beliefs, they may find themselves taking their own political views more seriously, and according a higher level of regard to them as a result.[35]

The argument that campaign spending secures the affirmation of political preferences avoids many of the pitfalls identified with the influence-based conception of campaign finance. For starters, attributing an affirmational role to such spending offers us a convincing explanation for why donors continue to spend large sums of money to support candidates and make independent expenditures despite the limited influence that such expenditures exercise upon political outcomes which they favor. Campaign spending, for these individuals, can be regarded as a means of standing with parties and candidates whom they identify with, or of ensuring the dissemination of the political views that they favor, in an attempt to gain affirmation for one's beliefs. The large sums that they spend on candidates and outcomes which they favor, therefore, ought not to be regarded as an irrational pursuit of influence, but, rather, as a means of engaging in *self-expression*. It is important to note, however, that there is little in the way of incontrovertible evidence available to us (yet) to demonstrate that most campaign spending is, in fact, driven by the desire to obtain the affirmation of political preferences in the manner highlighted above. Unfortunately, scholars who study campaign participation have only paid limited attention to understanding the motivations that underpin spending on the part of campaign donors. It is possible, however, to produce some indirect support for the foregoing argument by noting the manner in which it can satisfactorily explain a peculiar feature of the American campaign finance system: the widespread and increasing levels of engagement in campaign spending on the part of *ordinary donors*; that is, of individuals who give less than $1,000 to candidates and as independent expenditures in any election cycle.[36] As recent surveys show, cumulative donations in the amount of $1,000 or less have been increasing at an extremely

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[34] In this regard, campaign spending can be taken to further these affirmational ends in the same way as social movements have been documented as doing, see, for e.g., Elizabeth Pincel and William Swann, "Finding the Self Through Others: Self-Verification and Social Movement Participation," in Sheldon Stryker, Timothy Owens, and Robert White, eds., *Self, Identity, and Social Movements* (Minneapolis: University of Minnesota Press, 2000), 132-152; and Aldon Morris and Naomi Braine, "Social Movements and Oppositional Consciousness," in Jane Mansbridge, ed., *Oppositional Consciousness: The Subjective Roots of Social Protest* (Chicago: University of Chicago Press, 2001), 20-37.

[35] This argument tracks one of the many defenses that John Stuart Mill offered for a robust protection for liberty – that where an individual is allowed the full freedom to act as he pleases short of causing harm to others, he is likely to become "more valuable to himself" and to manifest "a great fullness of life about his own existence," Mill, *On Liberty* (John Gray, ed., Oxford: Oxford University Press, 1991), 70.

[36] Ordinary donors may thus be distinguished from *small* donors, who are defined, in the literature studying campaign funding patterns, as individuals who give $250 or less in a single election cycle.

fast pace in recent federal elections.[37] The informational model, focused as it is on the effects of spending rather than upon its causes, is unable to provide a satisfactory explanation for why such spending occurs. Indeed, given the extremely high costs associated with purchasing airtime and engaging in other forms of campaign mobilization, it is unlikely that donors who give in small amounts believe that their contributions will have an impact on the nature and amount of information available to the public on the eve of the elections. This is especially unlikely to be the case in light of the (well-known) fact that parties, candidates, and independent expenditure committees raise most of their funds from large donors and entrenched interest groups, rather than from ordinary donors. Nor can the influence-based conception offer a full explanation for the increasing presence of ordinary donors in American campaigns. Given the huge sums that large donors and special interests make available to parties and candidates during elections, it would be entirely unreasonable for an individual who spends $1,000 or thereabouts, and who has no other means of obtaining access to elected officials, to expect to influence political decision-making by means of her contribution.

The affirming effects argument put forth in this account offers us a better explanation for why small donors – despite the widespread cynicism that Americans display towards electoral politics in general, and campaign finance in particular – are resorting to campaign spending in ever-increasing numbers. Campaign donations allow these individuals to purse legitimacy for their political preferences by contributing, however modestly, to the electoral success of the parties and candidates whom they identify with politically, or who take congruent positions on political issues to which they attach salience; campaign spending, for them, is thus akin to volunteering time for political canvassing and other forms of mobilization efforts. Such spending, in other words, serves as a means by which partisans and issue advocates can dedicate the resources at their disposal to ensuring that their "side," or the political positions which they support, obtains popular approval at the hustings. It is this desire to obtain electoral legitimacy for their preferences which explains why ordinary donors respond with alacrity to fundraising messages that specifically target them. As scholars of political spending have noted, ordinary donor involvement in campaign funding is strongly correlated with efforts on the part of candidates and parties, and to a lesser extent, of issue and advocacy groups, to *solicit* funds from such individuals.[38] These fundraising messages signal financial need on the part of those who issue them, and are often couched in terms which predict detrimental political consequences which are likely to arise if they are not heeded. In this way, fundraising solicitation motivates partisan supporters and issue advocates to step up their spending efforts, in a bid secure electoral legitimacy for the political positions that they share with those sending them these messages, or, as is often the case, to prevent those politically opposed to them from obtaining electoral approval for *their* views and preferences.

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[37] See, for e.g., Anthony Corrado et al., *Reform in an Age of Networked Campaigns* (2011), Joint Report of the Campaign Finance Institute, American Enterprise Institute, and the Brookings Institutions, http://www.brookings.edu/~/media/research/files/reports/2010/1/14%20campaign%20finance%20reform/0114_campaign_finance_reform.pdf.

[38] See, for e.g., Corrado et al., *Networked Campaigns*, 12-14; and Michael Malbin, "Small Donors: Incentives, Economies of Scale, and Effects," *The Forum* 11 (October 2013): 385-411.

The ancillary affirming effects of campaign spending – its impact on developing greater regard for the preferences that campaign donors hold by conferring recognition, engendering solidarity, or occasioning contestation – helps us understand another peculiar feature of campaign spending in the American context: the disproportionate role that donors who hold strong and politically intense views which are located outside the political mainstream play in the making of small contributions.[39] The importance of campaign spending for these ideological "extremists" cannot be attributed to the role that electoral success plays in affirming their political preferences. Those ordinary donors who give their hard-earned money to the Libertarian Party, or in support of Dennis Kucinich's efforts to win the Democratic Presidential primary, after all, are fully aware of the futility of such spending as a means of helping their beneficiaries secure office. For these individuals, then, campaign spending is best understood as a means by which to obtain affirmation for their political preferences in the three distinct ways that I have identified above. In the first instance, by enabling the dissemination of views that they regard as important to the public at large, those citizens who adhere to preferences that lie outside the political mainstream are able to gain a greater regard for their beliefs. Additionally, by allowing these individuals to join in common cause with other citizens who share their preferences, and who are committed enough to them to spend their precious money on candidates and platforms furthering them, campaign spending may heighten the respect that they accord to their political positions by engendering solidarity. Finally, spending which supports "extremist" candidates and platforms can also help those who incur it to stand in opposition to the positions taken by more mainstream political actors. In so doing, it may serve to enhance the attachment and regard which they have towards their own political preferences, by allowing them to contest and challenge those views which they regard as problematic.

It is not too difficult to appreciate the appeal of campaign spending, when understood as furthering the affirmation of political preferences, in light of the foregoing examples. While campaign finance may not contribute to the creation of a more enlightened citizenry, and may not occasion greater responsiveness on the part of political leaders towards the concerns of those who spend to get them elected, it nevertheless continues to have considerable democratic importance and valence. Thus, in the first instance, by enabling individuals to obtain democratic legitimacy for their political preferences along the lines described above, campaign spending can create a deeper appreciation and regard for democratic politics among those who resort to it. Increasing participation in campaign spending may thus serve as one important means – though by no means the exclusive one – by which to counteract the widespread prevalence of apathy and disenchantment which political scientists identify as the defining features of the attitudes that citizens of contemporary advanced industrial democracies manifest towards their elected officials.[40] Secondly, and no less crucially, campaign spending may also appeal to those citizens who hold unpopular or under-represented political views, by enabling them to obtain a fair and respectful hearing for their beliefs and positions in public. In so doing, the sort of affirmation for

[39] See, for e.g., Kyle Saunders and Alan Abramowitz, "Ideological Realignment and Active Partisans in the American Electorate," *American Politics Research* 32 (2004): 285-309; and Clyde Wilcox, "Contributing as Political Participation," in Gerald Lubenow ed., *A User's Guide to Campaign Finance Reform* (Lanham: Rowman and Littlefield, 2001), 109-127.

[40] For a more detailed discussion of these phenomena, see Pierre Rosanvallon, *Counter-democracy: Politics in an Age of Distrust* (Cambridge: Cambridge University Press, 2008).

political preferences that recourse to campaign spending facilitates can serve to enhance the political standing of citizens with preferences that are in the minority of mainstream opinion, thereby contributing considerably to the enhancement of the legitimacy of democratic government – understood both in normative and sociological senses of the term.[41]

The appeal of the informational and influence-based conceptions is not limited exclusively to the manner in which they help to organize views on the importance of campaign spending. Rather, the dominance that these conceptions have exerted over scholarly as well as public debates concerning campaign spending can be attributed, in large part, to the easily comprehensible *policy proposals* that they support. Thus, those who subscribe to the informational account of campaign finance often (though not always) tend to be leery of regulations which impose restrictions upon the amounts that citizens – acting independently or in concert – can spend on campaigns.[42] Restrictions of this sort, proponents of the informational conception fear, may undermine the educative and empowering potential inherent in electoral campaigns by reducing the quantum of information that voters are exposed to. For their part, adherents of the influence-based conception are far more accepting of spending limits upon campaign expenditures. For these adherents, spending restrictions are critical means by which the ability of the wealthy and the politically well-connected to monopolize the attention of elected representatives may be curtailed. Restrictions of this sort can achieve this end either by undermining the capacity of spenders for engendering gratitude on the part of their beneficiaries, or by limiting the extent to which they can "dominate" campaign discourse and hence "drown out" the voices of citizens of more ordinary means.[43] Restrictions upon the amounts that may be spent on campaigns are thus, for proponents of the influence-based view, essential to safeguarding the ability of ordinary citizens to ensure that governmental decision-making remains responsive to their interests and concerns.

The foregoing account, by providing grounds for treating the informational and influence-based conceptions of the importance of campaign spending with skepticism, undermines the respective regulatory approaches that their adherents endorse as well. Happily, for our present purposes, the affirmational account of campaign finance is entirely consistent with a third form of regulatory approach – one which privileges the building of floors which enhance the ability of citizens of ordinary means to engage in campaign spending instead of emphasizing the importance of placing ceilings on the amounts that the wealthy and the well-connected may spend on elections.[44] There are two inter-connected reasons for why this strategy

[41] For a discussion of the role that the representation of minority views can play in enhancing the normative legitimacy of democratic government, see, for e.g., Amy Gutmann and Dennis Thompson. *Why Deliberative Democracy?* (Princeton University Press, 2009), 95-124. For a discussion of the role that it plays in enhancing legitimacy in a sociological sense, see, for e.g. Robert Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (Cambridge, MA: Harvard University Press, 2014)(forthcoming).

[42] See, for e.g., *Citizens United*, 130 S. Ct. at 899. For an account which relies on the informational conception to argue for the imposition of restrictions upon campaign spending, see Ronald Dworkin, "The Curse of American Politics," *New York Review of Books*, October 17, 1996, 19-24.

[43] For an account which blends both these arguments in calling for strict spending limits on campaign contributions and independent expenditures alike, see J. Skelly Wright, "Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?", *Columbia Law Review* 82 (1982): 609-645.

[44] For detailed formulations of this third approach, see, for e.g., Richard Hasen, "Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers," *California Law Review* 84 (1996): 1-59;

of building floors is congenial to the affirmational argument for the importance of campaign finance. In the first instance, the affirmational value identified above can be realized only partially by an unregulated market in campaign spending of the sort that proponents of the informational conception support. The huge disparities in income which characterize the American polity, combined with the high costs associated with purchasing airtime and engaging in mass mobilization, ensure that only a tiny proportion of Americans can obtain the affirmational benefits of campaign spending in the absence of *any* regulation of the campaign finance regime. Imposing strict restrictions upon the amounts that citizens may spend in support of electoral activity along the lines proposed by those who rely on the influence-based conception, however, does not help overcome this problem. Rather, the adoption of low campaign contribution and independent expenditure limits may in fact diminish the affirmational potential inherent in such spending by reducing the ability of all Americans – regardless of income, political interest, and partisan commitment – to strive to attain democratic legitimacy for the candidates, causes, or parties which they favor. It follows, therefore, that a regulatory regime which focuses its attention on enhancing the ability of ordinary citizens to participate in campaign spending *alone* can enable these citizens to obtain affirmation for their political preferences in a meaningful manner. Regrettably, the question of how a regime of this sort may be designed is one which must, in the interests of time and space, be left to be answered at a later moment.

Dennis Thompson, *Political Ethics and Public Office* (Cambridge, MA: Harvard University Press, 1987), 114-117; and Joel Fleishmen and Pope McCorkle, "Level-Up Rather Than Level-Down: Towards a New Theory of Campaign Finance Reform," *Journal of Law and Politics* 1 (1983): 211-285.