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ESSAY

THE FEDERALISM IMPLICATIONS OF CAMPAIGN FINANCE REGULATION

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INTRODUCTION

Recent controversies in campaign finance have generated concerns that wealthy donors will dominate the political landscape, with *Citizens United v. Federal Election Commission*¹ and *McCutcheon v. Federal Election Commission*² standing as the high-water marks in the U.S. Supreme Court’s jurisprudential turn towards deregulation. This short Essay puts this case law in perspective by briefly explaining how our system of federalism gives the states more authority than Congress to restrict campaign spending.

Unlike the federal government, with its system of checks, balances, and “veto gates” that make it difficult to enact legislation, states have a more compelling interest in countering the appearance of corruption and accounting for the distorting influence that money can have in skewing public debate over policies. Because of direct democracy, in particular, these policies are easier to enact than federal law and therefore are more susceptible to being co-opted by special interests.³ While this Essay takes no position on the

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¹ 558 U.S. 310 (2010).

² 134 S. Ct. 1434 (2014).

³ See, e.g., Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1549 (1990) (arguing that direct democracy can be harmful to the interests of racial minority groups because it lacks the “internal safeguards designed to filter out or negate factionalism, prejudice, tyranny, and self-interest”). The proliferation of anonymous money would further undermine the ability of direct democracy to represent the interests of a fair cross-section of the community. See Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. REV. 1141, 1183 (2003) (arguing that effective campaign finance regulation in the context of direct democracy has to “encourage those interested groups to speak directly to the public and make identifiable their position on the ballot measure”).

wisdom of direct democracy, it argues that the Court can help ensure that the states' constitutionally sanctioned choice of direct democracy actually effectuates the preferences of the majority of the electorate by broadening the case law's current conception of anticorruption and resuscitating the recently deceased antidistortion rationale. In limiting the states' ability to defend their campaign finance regimes, the Court has not considered that these justifications safeguard the political equality that is vital to the success of direct democracy systems. Thus, defenders of state campaign finance regulations may find greater success by arguing that states have an additional and powerful compelling interest in regulating campaign spending because of its impact on direct democracy.

I. CAMPAIGN FINANCE IN A PERIOD OF DEREGULATION: RECENT CASE LAW

In the area of campaign finance, the Supreme Court employs a pluralist view of democracy, routinely restricting government power in order to encourage its own version of "broad" and "diverse" political participation. The Court's focus on speaker diversity belies its singular focus on encouraging speech from two particular constituencies: corporations and wealthy individuals.⁴ For example, *Citizens United* invalidated a federal law prohibiting corporations from making independent expenditures in campaigns for public office.⁵ The Court argued that the ban limited voter information and undermined corporate speech rights.⁶ Similarly, *McCutcheon* invalidated aggregate contribution limits to national party and federal candidate committees, reasoning that Congress could not regulate contributions "to reduce the amount of money in politics" or "to restrict the political participation of some in order to enhance the influence of others."⁷ As a practical matter, however, both decisions undermined government efforts to prevent the wealthy from having a louder voice in the political system than ordinary voters.⁸

⁴ As Justice Scalia pointed out in his opinion in *McConnell v. FEC*, "We are governed by Congress, and this legislation [BCRA] prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice: national political parties and corporations, both of the commercial and the not-for-profit sort." 540 U.S. 93, 248 (2003) (Scalia, J., concurring in part and dissenting in part), *overruled in part by Citizens United*, 558 U.S. 310.

⁵ 558 U.S. at 372.

⁶ *See, e.g., id.* at 349 ("Political speech is indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.").

⁷ 134 S. Ct. at 1441.

⁸ *See Citizens United*, 558 U.S. at 341 (noting that "[t]he First Amendment protects speech and speaker"); *see also* Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 165-66 (2015) (describing the expansion of protections for commercial speech against regulation).

The answer to our campaign finance woes might lie in using the constitutional amendment process of Article V to overturn these decisions, or employing Article II to appoint judges sympathetic to campaign finance regulation, but there is a much more practical answer to this problem. Focusing on how federalism influences the constitutionality of campaign finance reform helps to create a jurisprudence that is grounded in both theory and reality. Unlike the federal government, which the Framers wanted to insulate from the excesses of democracy,⁹ the Guarantee Clause and the Tenth Amendment give states the discretion to govern and run their elections in any manner they choose, so long as their political system exceeds the floor of republicanism.¹⁰ Consequently, most states have opted for political systems that are closer to pure democracy,¹¹ which has significant implications for the constitutionality of state campaign finance laws.

II. THE STATES AS “LABORATORIES OF DEMOCRACY”: CAMPAIGN FINANCE AND DIRECT DEMOCRACY

In many states, voters have significant control over the election of state officials and the direction of state policy.¹² In *Gregory v. Ashcroft*, the Supreme Court touted this as one of the benefits of our federalist system.¹³ In so doing, the Court held that a popularly-enacted Missouri law instituting mandatory retirement for state court judges did not violate the federal Age Discrimination in Employment Act.¹⁴ The Court stressed the respect owed to decisions made by states in areas traditionally left to their discretion, even if their decisions departed from federal law.¹⁵

⁹ See generally THE FEDERALIST NO. 10 (James Madison); THE FEDERALIST NO. 52 (James Madison or Alexander Hamilton).

¹⁰ Under the Guarantee Clause, Congress must guarantee to each state “a republican form of government.” U.S. CONST. art. IV, § 4. Under the Tenth Amendment, states retain control over their own elections. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (“[T]he Framers of the Constitution intended the States to keep for themselves . . . the power to regulate elections.”); see also THE FEDERALIST NO. 21 (Alexander Hamilton) (arguing that the Guarantee Clause “could be no impediment to reforms of the State constitutions by a majority of the people in a legal and peaceable mode”).

¹¹ See SANFORD LEVINSON, FRAMED: AMERICA’S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 120 (2012) (noting that all states “incorporate the possibility of direct democracy into their constitutional orders”).

¹² See JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 3 (2006) (“[S]tate constitution makers have adopted a number of mechanisms that allow citizens to participate directly in the lawmaking process.”).

¹³ 501 U.S. 452, 458 (1991) (noting that states offer an increased “opportunity for citizen involvement in democratic processes” and “more innovation and experimentation in government”).

¹⁴ *Id.* at 473.

¹⁵ See *id.* at 461 (“States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.”).

Like the Missouri law at issue in *Gregory*, ballot initiatives and referendums illustrate how states have experimented with democratic forms of governance over the past two centuries to address what they viewed as defects in representative government. Throughout the nineteenth century, many states had mandatory referenda on issues such as voting rights and apportionment, and they adopted popular initiative procedures in order to counteract the power that corporations and railroads had in the legislative sphere.¹⁶

In modern times, ballot initiatives have played a powerful role in mitigating the effects of partisanship on government. For example, in 2010, Florida voters used direct democracy to prohibit the legislature from taking partisanship into account in the drawing of legislative district lines.¹⁷ Similarly, Arizona voters passed a ballot initiative delegating the state legislature's redistricting authority to an independent commission.¹⁸ Because states rely on direct democracy to enact policy and resolve important political issues, immense amounts of money can skew public debate and be especially harmful to the political power of ordinary voters.¹⁹

III. PROMOTING CITIZEN INVOLVEMENT: FEDERALISM AS A CONSTRAINT ON THE FIRST AMENDMENT

In *American Tradition Partnership, Inc. v. Bullock*, the Supreme Court relied on *Citizens United* to overturn Montana's one-hundred-year-old ban on corporate spending on First Amendment grounds.²⁰ The Court failed to consider whether principles of federalism might require a different outcome, despite routinely employing federalism arguments to protect the states' governing authority in other areas.²¹ The Court failed to apply a more lenient standard of review to Montana's ban on corporate independent expenditures,

¹⁶ DINAN, *supra* note 12, at 67-73.

¹⁷ See FLA. CONST. art. III, § 21 ("No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent . . .").

¹⁸ For a brief discussion of this initiative, see *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2661-63 (2015).

¹⁹ See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 809 (1978) (White, J., dissenting) (arguing that "the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process").

²⁰ 132 S. Ct. 2490, 2491 (2012) (per curiam).

²¹ See, e.g., *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (upholding a state law that allowed individuals to exercise free speech on private property on the grounds that a state may "adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution"); see also *New York v. United States*, 505 U.S. 144, 162 (1992) (holding that Congress cannot commandeer state officials to implement federal law); *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (requiring a plain statement that Congress intended to subject states to federal law in an area traditionally left to the states).

which was a legitimate means of protecting its democratic government from wealthy oligarchs.

Notably, Montana voters enacted the ban at a time when there was extensive evidence of electoral corruption in the state as a result of disputes between mining and industrial enterprises—both of which were controlled by wealthy individuals and corporations.²² As the Montana Supreme Court observed, these disputes had “profound long-term impacts on the entire State, including issues regarding the judiciary, the location of the state capitol, the procedure for election of U.S. Senators, and the ownership and control of virtually all media outlets in the State.”²³

The Court has not always ignored the corrupting and potentially distorting impact of money on the political process. In *Austin v. Michigan State Chamber of Commerce*, the Court sustained restrictions on independent expenditures by corporations and unions, reasoning that the First Amendment could not supplant the overwhelming interest that the government has in preventing well-financed special interests from distorting an issue’s level of support among the general electorate (also known as the “antidistortion” rationale).²⁴ Similarly, *Nixon v. Shrink Missouri Government PAC* upheld contribution limits for state elections, despite scant evidence of actual corruption, because the appearance of corruption could undermine the people’s faith in the political system.²⁵

Although the Court has either rejected outright or severely circumscribed these rationales in recent cases, these justifications are implicated when states, like Montana, delegate significant governing authority to their citizens via direct democracy. While the federal legislative process has a series of “veto gates” that make it difficult for special interests to enact their preferred legislation despite the proliferation of money in federal elections, the filter of representative government is not present to mitigate the outsized influence of the wealthy in systems of direct democracy.²⁶ Thus, the Court’s approach in its recent cases—let everyone in, let everyone spend—stands in tension with the truly pluralistic and inclusive systems that states are seeking to implement through direct democracy.

²² See *Bullock*, 132 S. Ct. at 2491-92 (Breyer, J., dissenting) (arguing that the case at bar presented stronger evidence of corruption than *Citizens United*).

²³ *W. Tradition P’ship v. Attorney Gen.*, 2011 MT 328, ¶ 22, 363 Mont. 220, 271 P.3d 1, 8.

²⁴ 494 U.S. 652, 659-60 (1990), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010).

²⁵ 528 U.S. 377, 390-95 (2000).

²⁶ See Maxwell L. Stearns, *Direct (Anti-)Democracy*, 80 GEO. WASH. L. REV. 311, 336 (2012) (describing veto gates as “junctures [that] make it easier to block than to pass legislation because success at every focal point is required for passage”).

CONCLUSION

States have the freedom to embrace democracy, reject democracy in favor of representative government, or choose any form of government that comports with the Guarantee Clause and the Tenth Amendment. The Court must therefore allow states to regulate campaign finance in a manner that is consistent with—and protective of—their chosen form of government by allowing states to advance an antidistortion rationale or a broader anticorruption justification in defending their campaign finance laws. For those states that rely on direct democracy as part of their preferred governing model, the Constitution permits limitations on the influence of the wealthy in order to further the democratic nature of state political systems.

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