

QUASI CAMPAIGN FINANCE

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ABSTRACT

Say you're wealthy and want to influence American politics. How would you do it? Conventional campaign finance—giving or spending money to sway elections—is one option. Lobbying is another. This Article identifies and explores a third possibility: quasi campaign finance, or spending money on nonelectoral communications with voters that nevertheless rely on an electoral mechanism to be effective. Little is currently known about quasi campaign finance because no law requires its disclosure. But its use by America's richest and politically savviest individuals—the Koch brothers, Michael Bloomberg, and the like—appears to be rising. It also seems to skew policy outcomes in the spenders' preferred direction.

After introducing quasi campaign finance, the Article considers its legal status. Is it like ordinary campaign finance, in which case it could be regulated fairly extensively? Or is it like garden-variety political speech, rendering it presumptively unregulable? One argument for pairing quasi and regular campaign finance is that they share several features—who bankrolls them, the tactics they pay for, the reasons they work—and so may serve as substitutes. Another rationale for conflation is that they may both cause the same democratic injuries: corruption, the distortion of public opinion, and the misalignment of public policy. Pitted against these points is the slippery-slope objection: If quasi campaign finance may constitutionally be curbed, what political speech may not be?

Lastly, the Article suggests how quasi campaign finance should (assuming it actually may) be regulated. Limits on contributions and expenditures are unwise and probably unadministrable. Disclosure, though, is a necessity. The public should know who is trying to

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persuade it (and how). Even more promising is the public subsidization of quasi campaign finance. If every voter received a voucher for this purpose, then public funds might crowd out private capital, thus alleviating its harmful effects.

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INTRODUCTION

On any given day—whether an election is imminent or not—hundreds of Americans for Prosperity (“AFP”) activists knock on thousands of voters’ doors. Each encounter follows much the same script. The AFP activist pitches a message of small-government conservatism: lower taxes, less spending, less regulation, fewer entitlements, and so on. The AFP activist also asks for the voter’s views on a variety of topics and collects the voter’s contact information. This

data will be used in the future to encourage the voter to act in some way: to write to her representative, to attend a protest, to donate money, or to support a certain candidate.¹

AFP does more than proselytize on behalf of libertarianism. The organization also mobilizes the electorate around particular issues. When the Obama administration proposed a cap-and-trade policy to combat climate change, for example, AFP “sent ‘Carbon Cops,’ who pranced into Tea Party rallies pretending to be overreaching emissaries from the EPA.”² AFP also “launched what it called the Cost of Hot Air Tour,” featuring “a seventy-foot-tall bright red hotair balloon on whose side was emblazoned a [derogatory] slogan.”³ Likewise, whenever a state considers expanding Medicaid eligibility, the local AFP chapter springs into action. It runs “expensive ads decrying Medicaid expansion,” “organize[s] rallies and demonstrations,” and “canvass[e] the districts of [legislators] who tried to compromise.”⁴

These AFP efforts—as well as similar ones by many other groups—are notable in several respects. First, they are not explicitly electoral. They usually do not refer to candidates and may take place even when the next election is still far off. Second, the communications *do* have overt policy goals. They promote either a general ideology or a stance on a specific issue. And third, the mechanism through which the communications hope to achieve their policy goals *is* electoral. The idea is that politicians may be induced to behave in certain ways by voters’ nonelectoral mobilization because that nonelectoral energy could easily become electoral when the next campaign comes around.

American law does not know what to make of this activity. Though it has an electoral connection, it is beyond the scope of campaign finance statutes. Those statutes apply only to communications that mention candidates in certain periods or that

1. See, e.g., Matea Gold, *Americans for Prosperity Plows Millions into Building Conservative Ground Force*, WASH. POST (Oct. 11, 2014), https://www.washingtonpost.com/politics/americans-for-prosperity-plows-millions-into-building-conservative-ground-force/2014/10/06/692469b6-4b35-11e4-b72e-d60a9229cc10_story.html [<https://perma.cc/H9XJ-P642>]; Michael J. Mishak & Philip Elliott, *Americans for Prosperity Builds Political Machine*, LEDGER (Oct. 11, 2014, 10:46 PM), <https://www.theledger.com/news/20141011/americans-for-prosperity-builds-political-machine-for-2016-races/1> [<https://perma.cc/NG6N-DP6R>].

2. JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 265–66 (2017).

3. *Id.* at 266.

4. Alexander Hertel-Fernandez, Theda Skocpol & Daniel Lynch, *Business Associations, Conservative Networks, and the Ongoing Republican War over Medicaid Expansion*, 41 J. HEALTH POL., POL’Y & L. 239, 266 (2016) (describing the tactics of AFP-Virginia).

advocate their election or defeat.⁵ Nor do lobbying regulations extend to the activity, though it often involves requests that voters contact their representatives. Grassroots interactions with politicians, unlike direct lobbying, do not have to be disclosed.⁶ Tax law, too, fails to shed much light on the activity, though much of it is conducted by nonprofit groups that are required to file detailed returns.⁷ A series of loopholes render these returns only mildly informative.⁸

My initial objective in this Article, then, is to introduce the concept of *quasi campaign finance* and to describe the little that is known about it. Quasi campaign finance, like conventional campaign finance, pays for political communications with voters. But with quasi campaign finance, unlike with ordinary campaign finance, these communications are nonelectoral yet rely on an electoral link to be effective. Little is known about quasi campaign finance because no law demands its disclosure. Individuals, corporations, unions, and nonprofits may thus fund quasi campaign finance without informing any authority of their disbursements. If “dark money” is electoral spending whose amount is known but whose source is not,⁹ then quasi campaign finance is even more opaque—*black* money whose sums and origins are mostly a mystery.

Only mostly, though. Thanks to the dogged efforts of political scientists, we know a bit about the volume, drivers, and effects of quasi campaign finance. Its annual amount has been conservatively estimated at three quarters of a billion dollars; the true figure is likely somewhat higher.¹⁰ Quasi campaign finance is therefore in the same spending league as regular campaign finance and lobbying, which each total about \$3 billion annually, but have commanded far more regulatory and scholarly attention. The biggest spenders on quasi campaign finance are wealthy and ideologically extreme individuals. AFP’s annual outlays of over \$100 million, for instance, are funded by

5. See 52 U.S.C. § 30104(f)(3) (2018); *Buckley v. Valeo*, 424 U.S. 1, 43–44 (1976) (per curiam).

6. See 2 U.S.C. § 1604 (2018).

7. See I.R.S. Schedule C (Form 990 or 990-EZ), Political Campaign and Lobbying Activities (OMB No. 1545-0047) (2019) [hereinafter Form 990 Schedule C], <https://www.irs.gov/pub/irs-pdf/f990sc.pdf> [<https://perma.cc/HQ9S-EAML>].

8. See *infra* notes 50–54 and accompanying text.

9. See *Political Nonprofits (Dark Money)*, CTR. FOR RESPONSIVE POL. (Oct. 1, 2020), http://www.opensecrets.org/outsidespending/nonprof_summ.php [<https://perma.cc/3SD9-FVBH>].

10. See, e.g., Drew Dimmery & Andrew Peterson, *Shining the Light on Dark Money: Political Spending by Nonprofits*, 2 RUSSELL SAGE FOUND. J. SOC. SCI. 51, 64–65 (2016) [hereinafter Dimmery & Peterson, *Shining the Light*].

the Koch brothers and their affiliated right-wing network.¹¹ And these spenders appear to see quasi campaign finance as a partial substitute for conventional campaign finance. When the latter is more heavily restricted, more money flows to the former, and vice versa.¹²

Interestingly, quasi campaign finance does not seem to move public opinion significantly.¹³ This may be because its usual aim is to raise an issue's salience, not to change voters' minds. Or it may be because it typically targets a narrow slice of the electorate: older, better educated, and more affluent voters.¹⁴ However, quasi campaign finance evidently *does* influence the behavior of elected officials.¹⁵ They may (wrongly) think that it is shifting voters' views—and then alter their own positions to be more congruent with (what they believe to be) the electorate's. Or politicians may (rightly) worry that any group that can mobilize the public around a nonelectoral issue can also do so come election time. After all, the same techniques characterize quasi and ordinary campaign finance; the main difference is the message.¹⁶

The complex relationship between quasi and regular campaign finance motivates my second inquiry in this Article: probing whether, legally, quasi campaign finance is more like regular campaign finance or the vast domain of public discourse. A great deal hinges on the answer to this question. Conventional campaign finance may be regulated through disclosure requirements, contribution limits, and formerly—but maybe again if the Supreme Court's composition changes—expenditure caps. This is because ordinary campaign finance is arguably part of the bounded institution of elections: a delimited area where the state may regulate speech to promote the institution's ends. In contrast, public discourse is generally deemed unregulable under the First Amendment tradition. As Professor Robert Post has written,

11. See, e.g., Gold, *supra* note 1.

12. See, e.g., Robert E. Hogan, *State Campaign Finance Laws and Interest Group Electioneering Activities*, 67 J. POL. 887, 901 (2005).

13. See *infra* notes 144–53 and accompanying text.

14. See, e.g., KENNETH M. GOLDSTEIN, *INTEREST GROUPS, LOBBYING, AND PARTICIPATION IN AMERICA* 115–16 (1999).

15. See, e.g., Daniel E. Bergan, *Does Grassroots Lobbying Work? A Field Experiment Measuring the Effects of an e-Mail Lobbying Campaign on Legislative Behavior*, 37 AM. POL. RSCH. 327, 340 (2009) (“The models show that the e-mail lobbying campaign influenced legislative voting behavior on the two pivotal roll calls.”).

16. See, e.g., *id.* at 329 (discussing the reasons why quasi campaign finance may influence legislators).

“[W]ithin public discourse, speech must be kept free in order democratically to determine what [society’s] goals should be.”¹⁷

The contemporary Court would no doubt assign quasi campaign finance to the realm of public discourse. Indeed, the contemporary Court has edged ever closer to classifying *regular* campaign finance as public discourse—and thus obliterating any legal distinction between elections writ small and politics writ large.¹⁸ Consistent with other scholarship,¹⁹ though, my premise here is that elections and politics do meaningfully differ: that the former may be structured and administered in ways that would be impermissible for the latter. If this premise is granted, then the legal status of quasi campaign finance becomes a difficult and fascinating issue. The law must then decide whether it fits better in the electoral domain (despite its nonelectoral content) or in public discourse (despite its reliance on future campaigns for its impact).

From a functional perspective, this is not actually a dilemma. As no less an authority than Charles Koch has explained, quasi and conventional campaign finance serve the same ultimate purpose. “Education,” “grassroots organizations,” “lobbying,” and “political action” all aim “[t]o bring about social change,” and so constitute “a strategy that is vertically and horizontally integrated.”²⁰ Yet the claim that quasi campaign finance is legally like ordinary campaign finance because a funder may substitute one activity for the other surely proves too much. For example, Charles Koch also advances his agenda through think tanks, university centers, and media organs.²¹ But no one would consider these entities to be part of the electoral domain. If they

17. ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 81 (2014).

18. See, e.g., *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 516 (2007) (Souter, J., dissenting) (“What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day.” (quoting *McConnell v. FEC*, 540 U.S. 93, 126 n.16 (2003), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010))).

19. See generally, e.g., C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1 (1998) (distinguishing between elections specifically and politics generally); Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751 (1999) [hereinafter Briffault, *Issue Advocacy*] (same); Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789 (1998) (same); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999) (same).

20. MAYER, *supra* note 2, at 173.

21. See generally MAYER, *supra* note 2 (discussing Koch’s multipronged initiatives); Theda Skocpol & Alexander Hertel-Fernandez, *The Koch Network and Republican Party Extremism*, 14 PERSP. ON POL. 681 (2016) (same).

could be labeled electoral due to their interchangeability with campaign finance, then little would remain of public discourse.

Another argument for equating quasi and regular campaign finance is that they both may distort public opinion. For many years, the Court recognized “the corrosive and distorting effects of immense aggregations of wealth” on voters’ choices at the polls.²² If those decisions can be distorted by conventional campaign finance, it stands to reason that voters’ policy stances can be skewed by quasi campaign finance. As noted above, however, there is an empirical problem with this proposition. Quasi campaign finance does not greatly sway public opinion.²³ A deeper difficulty is that if quasi campaign finance may be regulated because of its effects on voters, then so may be any communications that are persuasive thanks to their heavy funding. The anti-distortion argument thus also imperils the special place of public discourse in First Amendment law.

A further reason to treat quasi and ordinary campaign finance symmetrically is their impact on politicians (as opposed to voters). In previous work, I have shown that legislators’ records mirror their donors’ preferences but diverge widely from what their constituents want.²⁴ Similarly, as observed earlier, quasi campaign finance exerts considerable influence on elected officials, inclining them toward the funders’ positions and away from the electorate’s.²⁵ But the Court has never accepted the misalignment of representatives’ and voters’ views as a justification for curbing protected speech. One might also worry again about slippery slopes. If quasi campaign finance earns the same legal status as regular campaign finance because of its misaligning potential, then so might other political messages that threaten, too, to drive a wedge between politicians and their constituents.

As this sketch illustrates, I am conflicted about the legal place of quasi campaign finance. For every analogy between it and conventional campaign finance, there is a counterpoint that, actually, it more closely resembles public discourse. Nevertheless, my final aim in this Article is to explore the regulatory implications if quasi and

22. *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 660 (1990), *overruled by Citizens United*, 558 U.S. at 319.

23. *See supra* notes 13–14 and accompanying text.

24. *See* Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1467–86 (2015) [hereinafter Stephanopoulos, *Aligning Campaign Finance*].

25. *See supra* notes 15–16 and accompanying text.

ordinary campaign finance were ultimately paired. In that case, how should quasi campaign finance be managed?

The default tools of regular campaign finance law—limits on contributions and expenditures—seem inapt. In the quasi campaign finance context, there are no donations to candidates to restrict. Ceilings on spending would also face formidable issues of administrability: where to set the caps, how to deal with proliferating groups, which disbursements to count, and so on. Disclosure, however, is a more plausible option. At present, little is known about who pays for quasi campaign finance, how much money is spent, or where this money goes. If this data were produced, as it is for conventional campaign finance, then voters would learn which actors are trying to mobilize them and with what resources. This information could be even more useful to rival groups, who could offset the disclosed activities with renewed efforts of their own.

But the most intriguing idea, in my view, is the public subsidization of quasi campaign finance. In particular, I envision a voucher program of the sort that scholars have long advocated,²⁶ and municipalities have begun to implement,²⁷ in the ordinary campaign finance arena. Under such a program, each voter would receive a small annual sum (say \$100), which the voter could then spend directly on quasi-electoral activities or contribute to a group engaged in these efforts. The policy's appeal is that it would significantly allay concerns about distortion and misalignment. If quasi campaign finance were largely paid for by the people themselves, it would push public opinion toward, not away from, a benchmark of free and equal participation. Likewise, it would motivate politicians to shift their positions in the direction of the electorate's, since their humble constituents would now be the source of most quasi-electoral funding.

The Article takes the following route. Part I is a descriptive account of quasi campaign finance. I define the term, provide more examples of it, and summarize what is known about its volume, drivers, and effects. Part II is then the Article's legal core. I carefully consider the arguments for treating quasi and regular campaign finance equivalently, and, conversely, for assigning quasi campaign finance to the realm of public discourse. I also discuss other classificatory options,

26. See generally, e.g., BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002) (advancing a voucher proposal).

27. See, e.g., *Democracy Voucher Program*, SEATTLE.GOV, <http://www.seattle.gov/democracy/voucher/about-the-program> [<https://perma.cc/SG5D-MHT2>].

like situating quasi campaign finance in a bounded domain of policymaking. Lastly, Part III returns from theory to practice. I propose and assess a series of regulations that could be applied to quasi campaign finance—assuming it is, in fact, regulable.

One more note before proceeding: because quasi campaign finance has not previously been studied in any depth, the approach of this Article is necessarily exploratory and contingent. I say as much as can fairly be said about the subject, given our current knowledge about it. But I hope that future research will expand and deepen what we know about nonelectoral, yet still political, messages to voters. And as our understanding shifts, so, I expect, will my descriptive and normative claims about quasi campaign finance. These claims are preliminary, at present, not set in stone.

I. THE CONTOURS OF QUASI CAMPAIGN FINANCE

Judge Richard Posner once referred to certain companies as “political hermaphrodites” because of their penchant for donating money to candidates from both major parties.²⁸ Quasi campaign finance is also politically hermaphroditic, albeit for a different reason. It straddles not the partisan line between Democrats and Republicans but rather the conceptual boundary between elections and politics. My goal in this Part, then, is to gain some theoretical and empirical purchase on this hybrid activity. I first define quasi campaign finance as *funding for communications with voters that are nonelectoral yet rely on an electoral mechanism to be effective*. After showing how this definition distinguishes quasi campaign finance from existing legal categories, I describe several more cases of it. AFP and other Koch-backed groups are today’s highest-profile funders of quasi-electoral communications, though wealthy liberal individuals and organizations are now also entering the fray.

In the balance of the Part, I scour the academic literature—of which surprisingly little is relevant—and present its findings about the scale, causes, and consequences of quasi campaign finance. As to its scale, it is comparable to, if somewhat less voluminous than, conventional campaign finance. As to its causes, more money flows into quasi campaign finance when ordinary electoral funding is limited, when issues are salient, and when groups seek to disrupt the status quo. And as to its consequences, quasi campaign finance appears to have a

28. *LaFalce v. Houston*, 712 F.2d 292, 294 (7th Cir. 1983).

greater impact on elected officials than on voters. It induces politicians to move in the funders' preferred direction, while it stimulates but seldom convinces the public.

A. *Definition*

Several pieces of my definition for quasi campaign finance require explication.²⁹ Start with the first word: *funding*. In the regular campaign finance context, the focus is on the money that is deployed in elections, not the messages the money is used to disseminate.³⁰ This is because it is the money that may give rise to corruption, distortion, misalignment, and other democratic harms. The messages, in contrast, are simply political speech, which legally may not³¹ (and normatively should not³²) be regulated on account of its viewpoint. So, too, in the arena of quasi campaign finance. If this activity is problematic, it is because of the resources that are dedicated to it, not the ideas that are propagated by those resources. The ideas, again, are political advocacy that any democracy should cherish. Accordingly, my definition emphasizes the funding of nonelectoral communications, as does my subsequent analysis.³³

29. The literature includes a few other definitional efforts, none of which are quite right, in my view. *See, e.g.*, KEN KOLLMAN, *OUTSIDE LOBBYING: PUBLIC OPINION & INTEREST GROUP STRATEGIES* 3 (1998) (defining “outside lobbying” as “attempts by interest group leaders to mobilize citizens outside the policymaking community to contact or pressure public officials inside the policymaking community” (emphasis omitted)); KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* 400 (2012) [hereinafter SCHLOZMAN ET AL., *UNHEAVENLY CHORUS*] (defining “grassroots lobbying” as “communicating with the public or with organization members and supporters in order to highlight issues, to shape opinions, or to generate communications to public officials in support of favored political positions”); Pam Fielding, *A Guide to Grassroots Advocacy for Lobbyists*, in *THE LOBBYING MANUAL* 769, 770 (William V. Luneburg, Thomas M. Susman & Rebecca H. Gordon eds., 4th ed. 2009) (“Grassroots lobbying is any formal or informal effort designed to influence policymakers or policymaking by mobilizing the general public (or a segment of the general public) to support or oppose a particular position on an issue.”).

30. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (per curiam) (analyzing “the giving and spending of money” rather than the “forms of communication made possible by [it]”).

31. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”).

32. I share Alexander Meiklejohn’s view that “no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept” from the people. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 89 (1948).

33. *See infra* Parts II–III.

These *communications with voters* may take the same forms as electoral messages. They may thus include television and online advertisements, fundraising solicitations, door-to-door canvassing, phone banking, speeches, rallies, and protests. The only requirement is that there be some provision of information from the payor of the quasi campaign finance to the electorate. That the electorate is the audience for the communications is important as well. My definition is only intended to capture efforts at *mass* mobilization and persuasion. It is not meant to extend to messages conveyed directly to elites, such as politicians, bureaucrats, journalists, and scholars.³⁴

This brings me to the first of the two distinguishing characteristics of quasi campaign finance: the *nonelectoral* nature of the communications with voters. They do not openly urge the election or defeat of any candidate. Indeed, they often do not even mention any candidate's name. The messages may also be sent at any time, whether an election is imminent or still years away. If anything, their schedule is more closely tied to ongoing policy debates than to the electoral calendar. Nevertheless, the communications *are* necessarily political. Their subject may be an overarching ideology like libertarianism, religious fundamentalism, environmentalism, or socialism. Or they may tackle a particular issue like taxes, abortion, climate change, or welfare. In either case, the messages provide the recipients with information, argue for certain positions, and sometimes request that the recipients take actions. These steps could be supplying contact details, writing to representatives, giving money, or volunteering for future activities.

The other essential attribute of quasi campaign finance is its *reliance on an electoral mechanism to be effective*. This mechanism is quite blunt for certain communications. Though their content is nonelectoral, their primary purpose is to elect or defeat specific candidates. The messages only take a nonelectoral form because their funders have decided, for legal or strategic reasons, that this approach is preferable to an overtly electoral effort. The mechanism is subtler, however, for other communications. Their aim truly is policy change (or preservation), not returning candidates to (or ousting them from) office. The broadcasters of these messages may even be agnostic as to who is elected as long as their policy priorities are achieved. Yet these activities, too, depend on an electoral connection for their efficacy.

34. I want to emphasize the word "directly" in this definition. Quasi campaign finance certainly intends to convey messages *indirectly* to elites through the activities of mobilized voters.

Actually, they depend on several related links. Perhaps the most obvious is the threat of future electoral mobilization. A group that is able to reach many voters with nonelectoral communications could likely do the same—only with electoral messages—during the next campaign. The group could use exactly the same tactics but switch their mode from nonelectoral to electoral advocacy. Knowing this, election-seeking politicians may be inclined to do what the group wants: to support (or oppose) the group’s preferred (or disfavored) policies. That way, the politicians may avoid a large-scale effort being launched against them close to the next election—or benefit from a major mobilization on their own behalf.³⁵

Another pathway hinges not on a group’s future electoral activities but rather on the cogency of its current nonelectoral communications. Suppose that a group’s quasi campaign finance convinces some voters to shift their positions on a given issue. These may be ordinary voters whose only resources are their ballots; or they may be more influential constituents thanks to their campaign contributions, political connections, and activism. This change in public opinion may induce politicians to adjust their own stances in the same direction. Some politicians may adhere to a delegate theory of representation, under which they ought to reflect faithfully their voters’ views. Less high-mindedly, other politicians may worry that if they are not responsive to their constituents’ preferences, they may face an electoral penalty. Ordinary voters who find that candidates do not share their positions may vote against them on election day. Even worse, more influential constituents who are at odds with candidates may offer their time, money, and networks to opposing politicians.³⁶

A final route through which quasi campaign finance may have an electoral impact is a variant of the previous one. Even if nonelectoral messages do not *persuade* voters, they may raise the salience of certain

35. For other scholars noting this mechanism, see GOLDSTEIN, *supra* note 14, at 39 (“[I]f [groups] can recruit citizens to write about an issue, they can recruit citizens to vote on an issue.”) and BERGAN, *supra* note 15, at 329 (“[T]his method can signal to legislators that groups are able to mobilize supporters, and may be able to do so in the next election, giving the legislator an incentive to support the groups’ preferred policies.”).

36. For other scholars noting this mechanism, see KOLLMAN, *supra* note 29, at 8 (explaining that “outside lobbying” may “influence public opinion by changing how selected constituents consider and respond to policy issues”) and ANTHONY J. NOWNES, TOTAL LOBBYING: WHAT LOBBYISTS WANT (AND HOW THEY TRY TO GET IT) 79 (2006) (“The influence of constituent opinion on the behavior of elected officials—especially legislators—cannot be overestimated.”). Note that if quasi campaign finance exerts its influence because elected officials think of themselves as delegates, that is a nonelectoral mechanism.

issues and educate voters as to how their representatives have addressed those issues. This is a more modest role for quasi campaign finance, requiring only that it not be ignored by its audience. Yet it could create much the same incentive for politicians to endorse the policies favored by the funders of the nonelectoral communications. If they fail to do so, after all, they could risk electoral retribution from voters newly attentive to a topic and newly aware of what candidates are saying (or not saying) about it.³⁷

B. Demarcation

So defined, quasi campaign finance is mostly exempt from (1) conventional campaign finance regulation; (2) lobbying law; and (3) the tax code. In the seminal case of *Buckley v. Valeo*, the Supreme Court held that the Federal Election Campaign Act (“FECA”)—the 1974 law that established the modern framework of campaign finance regulation—applies only to “communications that include explicit words of advocacy of election or defeat of a candidate.”³⁸ Quasi campaign finance is thus entirely uncovered by FECA since one of its hallmarks is that it does *not* pay for messages that overtly urge a candidate’s election or defeat. Consequently, under FECA, quasi campaign finance is not limited in any way, nor does it have to be disclosed to the Federal Election Commission (“FEC”).

The story is similar, if not quite identical, under the other key federal campaign finance statute: the Bipartisan Campaign Reform Act of 2002 (“BCRA”). BCRA created a new category of “electioneering communication” that includes “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate” and is made within thirty days of a primary or sixty days of a general election.³⁹ Most quasi campaign finance is not electioneering

37. For other scholars noting this mechanism, see GOLDSTEIN, *supra* note 14, at 34 (observing that “[g]rass roots lobbying” may “make policy effects more salient,” “make constituents aware of government actions,” and “link legislators to those policy effects and government actions”) and BERGAN, *supra* note 15, at 329 (“[G]rassroots lobbying campaigns simultaneously inform group members of the actions that a legislator is taking on an issue (such as legislative votes) and let legislators know that group members are informed and paying attention to legislative actions.”).

38. *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (per curiam). On its face, the statute extended to communications “relative to a clearly identified candidate,” *id.* at 39 (quoting 18 U.S.C. § 608(e)(1) (1790 ed., Supp. IV), but the Court adopted a narrowing construction in order to “preserve the provision against invalidation on vagueness grounds,” *id.* at 44.

39. 52 U.S.C. § 30104(f)(3)(A) (2018). BCRA’s prohibition of corporation and union electioneering communication was upheld in *McConnell v. FEC*, 540 U.S. 93, 203–09 (2003), but

communication. The messages it pays for typically are not television ads, or do not mention a candidate, or are not disseminated close enough to an election. A fraction of quasi campaign finance, however, is regulated by BCRA. Take a television ad, aired near an election, that mostly discusses a certain policy but closes by asking viewers to contact a candidate about that issue. Even though the ad is nonelectoral (otherwise it would not be quasi campaign finance), BCRA requires the disclosure of its content and funding to the FEC.⁴⁰

Beyond being subject to disclosure, the hypothetical ad is notable in another respect: not only is it not express advocacy, it is not “sham” issue advocacy either. Sham issue advocacy is a pejorative term for communications that avoid the “magic words” of overt electoral support or opposition—which would bring them within FECA’s scope—but that are obviously aimed at influencing voters’ choices at the polls.⁴¹ The ad does not resort to this sort of subterfuge. By assumption, it addresses a matter of policy, providing information to its audience and endorsing a particular stance. It refers to a candidate not to recommend her election or defeat, but rather to make clear whom voters may contact to express their views on the topic. The ad is thus *true* rather than sham issue advocacy: a genuinely policy-focused and nonelectoral communication. This is the case, moreover, for all quasi campaign finance. Indeed, the activity could equivalently be labeled as that portion of true issue advocacy that relies on an electoral mechanism to be effective.⁴²

invalidated in *Citizens United v. FEC*, 558 U.S. 310, 318–19, 366 (2010). However, *Citizens United* upheld BCRA’s disclosure requirement for electioneering communication. See *Citizens United*, 558 U.S. at 366–71.

40. See § 30104(f) (specifying BCRA’s disclosure requirements for electioneering communication).

41. See, e.g., *McConnell*, 540 U.S. at 185 (discussing the “proliferation of sham issue ads” in the late 1990s); see also Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence To Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 MINN. L. REV. 1773, 1795 (2001) (finding in an empirical study that the “vast majority” of electioneering communication that is *not* express advocacy *is* sham issue advocacy). A classic example of this sham issue advocacy was a commercial detailing domestic violence perpetrated by a candidate, his felony conviction, and his failure to pay child support, and concluding, “Call Bill Yellowtail. Tell him to support family values.” *McConnell*, 540 U.S. at 193 n.78.

42. As noted above, the primary subjective motivation of some quasi campaign finance may be electoral. See *supra* Part I.A. To qualify as quasi campaign finance (rather than as sham issue advocacy), however, its content must be nonelectoral. This obviously raises the question of how to distinguish between electoral and nonelectoral material. I do not provide an answer here (at least not beyond those supplied by FECA and BCRA) for two reasons. First, as discussed below, the heartland of quasi campaign finance is plainly nonelectoral and thus avoids this quandary. See *infra* Part I.C. Second, the distinction between electoral and nonelectoral content seems less

Another body of law that might be thought applicable to quasi campaign finance—but, in fact, is not—is lobbying regulation. The Lobbying Disclosure Act of 1995 (“LDA”) requires the quarterly reporting of “lobbying contacts,” which are “oral or written communication[s]” with executive or legislative branch officials about policy matters.⁴³ Since some quasi campaign finance encourages voters to make such communications, the resulting grassroots contacts may seem like they would be covered by the LDA. However, the statute exempts messages that are broadcast through a “medium of mass communication,” which is precisely how quasi campaign finance often reaches the electorate.⁴⁴ More importantly, the LDA’s legislative history makes clear that it does not mandate the disclosure of so-called “grassroots lobbying”: contacts between ordinary voters and elected officials. As the law’s sponsor stated on the Senate floor, “We struck any reference to grassroots lobbying from the lobbying reform bill . . . in order to make progress.”⁴⁵

Though it need not be reported under the LDA, grassroots lobbying has an interesting relationship with quasi campaign finance. A common goal of quasi campaign finance is to *stimulate* grassroots lobbying: to convince voters to contact their representatives about the issues that are the subject of the funders’ communications. This lobbying may be effective simply because some politicians are responsive to their constituents, irrespective of any electoral

important to me than the boundary between quasi campaign finance and public discourse. If the claim is correct that quasi campaign finance may be conflated for legal purposes with conventional campaign finance, then the line between them is largely immaterial. Communications may still be regulated no matter on which side of the line they fall. In contrast, the border between quasi campaign finance and public discourse then becomes a cliff. *That* becomes the frontier beyond which regulation is almost categorically impermissible. *See infra* Part II.

43. Lobbying Disclosure Act of 1995, 2 U.S.C. § 1602(8)(A) (2018). More specifically, lobbying contacts must be with certain “covered” officials and must pertain to federal legislation, federal regulation, the administration of a federal program, or the nomination of a federal official. *See id.* Registered lobbyists must file quarterly reports stating the clients and issues they lobbied for, as well as the income they received for these activities. *See id.* § 1604(b).

44. *Id.* § 1602(8)(B)(iii). Even without this exemption, communications paid for by quasi campaign finance would not have to be disclosed (even if they encourage grassroots contacts) because they are directed at *voters*, not officials covered by the LDA. *Id.* § 1602(3)–(4).

45. 141 CONG. REC. 29,015 (1995) (statement of Sen. Levin); *see also, e.g.*, Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 529–30, 529 n.75 (2007) (“Because of the vociferous opposition to such regulation, the final version of the LDA passed in 1995 contains no regulation of grassroots lobbying.”). However, “most *state* lobbying disclosure laws do cover some grassroots lobbying activity.” Richard Briffault, *The Anxiety of Influence: The Evolving Regulation of Lobbying*, 13 ELECTION L.J. 160, 187 (2014) [hereinafter Briffault, *Anxiety*] (emphasis added).

implications. Or the grassroots contacts may have an impact because other politicians realize that voters motivated enough to reach out to them about policy matters may easily organize for or against them during the next campaign. In the latter case, grassroots lobbying has an electoral valence, and indeed constitutes one of the electoral mechanisms through which quasi campaign finance achieves its aims.⁴⁶

Tax law is the final field that is potentially relevant to quasi campaign finance. A good deal of the activity is conducted by nonprofit groups that are registered under § 501(c) of the Internal Revenue Code: social welfare organizations (501(c)(4)s), labor unions (501(c)(5)s), and business leagues (501(c)(6)s).⁴⁷ All of these groups must file tax returns that are public and that detail their revenue, expenses, and assets.⁴⁸ The tax returns also include questions about “direct and indirect political campaign activities,” “lobbying expenditures to influence public opinion (grassroots lobbying),” and “lobbying expenditures to influence a legislative body (direct lobbying).”⁴⁹

But the tax returns do not ultimately provide the disclosure that conventional campaign finance law and lobbying law fail to require. The expenses that groups list are broken down by function: “compensation,” “occupancy,” “travel,” and the like.⁵⁰ There is no separate category for nonelectoral, yet still political, messages to voters. In addition, the tax returns’ reference to “direct and indirect political campaign activities” captures only *electoral* efforts—conventional rather than quasi campaign finance.⁵¹ And the questions about “grassroots lobbying” and “direct lobbying”⁵² have to be answered only by 501(c)(3) organizations that engage in lobbying.⁵³

46. Grassroots lobbying may also play a part in the other electoral mechanisms discussed above. See *supra* notes 35–37 and accompanying text. That is, it may suggest to politicians that voters’ preferences have changed, that the salience of certain issues has increased, or that politicians’ own positions are better known to the electorate.

47. See 26 U.S.C. § 501(c) (2018).

48. See I.R.S. Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2019) [hereinafter Form 990], <https://www.irs.gov/pub/irs-pdf/f990.pdf> [<https://perma.cc/EUP6-G8D8>].

49. Form 990 Schedule C, *supra* note 7, at pt. I-A, II-A.

50. Form 990, *supra* note 48, at pt. IX.

51. Form 990 Schedule C, *supra* note 7, at pt. I-A.

52. *Id.* at pt. II-A.

53. See Form 990, *supra* note 48, at pt. IV (“Section 501(c)(3) organizations. Did the organization engage in lobbying activities . . . ? If ‘Yes,’ complete Schedule C, Part II.” (first emphasis omitted)).

Other nonprofit groups may ignore these questions. In fact, as long as they do not receive membership dues, other groups need not supply any information at all about their nonelectoral activities—lobbying or otherwise.⁵⁴

C. Examples

Quasi campaign finance, then, is money that pays for communications with voters that are not about elections but that nevertheless depend on an electoral link for their effectiveness. Quasi campaign finance is also mostly unregulated by the bodies of law that apply to ordinary campaign finance, lobbying, and taxation. But moving beyond these initial points, what does quasi campaign finance actually look like? On the ground, which actors use which tactics to address which issues?

I cannot provide a full answer here, due to both space constraints and the lack of disclosure of most nonelectoral, yet still political, activities. I can, however, offer a number of examples of quasi campaign finance, gleaned from the work of many journalists and a few enterprising political scientists. These examples, of course, are not necessarily representative. They *may* be, but it is impossible to say for sure since the relevant universe is shrouded in uncertainty. Still, the examples suggest that quasi campaign finance is often paid for by wealthy individuals who are involved in electoral as well as nonelectoral politics; that its techniques closely resemble those of electoral campaigns; and that its topics tend to be controversial areas of ongoing public debate.

I began this Article with a synopsis of the nonelectoral efforts of Americans for Prosperity: canvassing voters to spread a libertarian message, organizing rallies to oppose the Obama administration's cap-and-trade proposal, running ads against politicians considering

54. *See id.* (“Is the organization a section 501(c)(4), 501(c)(5), or 501(c)(6) organization that receives membership dues . . . ? If ‘Yes,’ complete Schedule C, Part III.”). In its most recent publicly available tax return, for example, AFP reported total expenses of \$51.7 million as well as \$2.9 million of electoral spending. Ams. for Prosperity Found., Form 990, Return of Organization Exempt from Income Tax 1 (OMB No. 1545-0047) (2017), https://projects.propublica.org/nonprofits/display_990/521527294/02_2019_prefixes_47-52%2F521527294_201712_990_2019022716130818 [<https://perma.cc/8HJ8-ZJL9>]; Ams. for Prosperity Found., Form 990 Schedule C, Political Campaign and Lobbying Activities 1 (OMB No. 1545-0047) (2017), https://projects.propublica.org/Nonprofits/display_990/521527294/02_2019_prefixes_47-52%2F521527294_201712_990_2019022716130818 [<https://perma.cc/8HJ8-ZJL9>]. But because AFP is a nonmembership 501(c)(4) organization, it did not say a word about its lobbying or other nonelectoral activities.

Medicaid expansion, and so on.⁵⁵ I chose AFP as an introductory example because it appears to be the single biggest spender on quasi campaign finance in contemporary American politics. Surveying AFP tax returns and archived AFP web pages, political scientists Theda Skocpol and Alexander Hertel-Fernandez found that the group's annual budget increased from \$4 million in 2005 to \$150 million in 2015, its staff rose from nineteen to five hundred full-time employees, and its volunteer activists grew from two hundred thousand to 2.4 million.⁵⁶ AFP's funds are supplied by the Koch brothers and their affiliated network of conservative donors.⁵⁷ They are deployed for not only quasi campaign finance but also regular campaign finance and lobbying.⁵⁸ And in their sheer scale, they make AFP "a privatized political and policy advocacy operation like no other in American history," with capabilities that rival those of the Republican Party itself.⁵⁹

AFP uses these vast resources to advance a range of policies beyond the ones noted at the Article's outset.⁶⁰ At the federal level, for instance, AFP launched a "Porkulus" effort against the Obama administration's stimulus package,⁶¹ fought the passage and then the implementation of Obamacare,⁶² initiated the "Spending

55. See *supra* notes 1–4 and accompanying text.

56. See Skocpol & Hertel-Fernandez, *supra* note 21, at 687; see also, e.g., Henry Farrell, Alexander Hertel-Fernandez & Theda Skocpol, *Trump Will Win or Lose. Either Way, the Koch Network Will Still Shape the Republican Party*, WASH. POST (Feb. 29, 2016, 8:45 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/29/trump-may-win-or-lose-either-way-the-koch-network-will-still-shape-the-republican-party> [<https://perma.cc/LL5B-9YY3>] (reporting that "Koch donors gave close to \$400 million leading into 2012 and [had] pledged to spend between \$700 and \$900 million for the 2015–16 cycle").

57. See, e.g., Kenneth P. Vogel, *Inside the Vast Liberal Conspiracy*, POLITICO (June 23, 2014, 5:01 AM), <https://www.politico.com/story/2014/06/inside-the-vast-liberal-conspiracy-108171> [<https://perma.cc/S4SM-N5FD>] ("Koch network donors are expected to provide almost every penny of the Koch operation's . . . spending goal[s].").

58. See, e.g., Farrell, Hertel-Fernandez & Skocpol, *supra* note 56 ("[AFP] mov[es] seamlessly from helping to elect very conservative Republicans to lobbying them once in office to effectuate preferred policies.").

59. Kenneth P. Vogel, *How the Koch Network Rivals the GOP*, POLITICO (Dec. 30, 2015, 5:17 AM) [hereinafter Vogel, *Koch Network*], <https://www.politico.com/story/2015/12/koch-brothers-network-gop-david-charles-217124> [<https://perma.cc/E4CG-V2S5>]; see also, e.g., Skocpol & Hertel-Fernandez, *supra* note 21, at 689 (commenting that AFP "more closely resembles a European-style political party than any sort of specialized traditional U.S. advocacy group or election campaign organization").

60. See *supra* notes 1–4 and accompanying text.

61. See, e.g., MAYER, *supra* note 2, at 209.

62. See, e.g., *id.* at 237.

Accountability Project” in support of automatic spending reductions,⁶³ and backed the Trump administration’s tax cuts.⁶⁴ In the states, similarly, AFP “focus[es] relentlessly on promoting tax cuts, blocking and eliminating business regulations, opposing the landmark health-reform law passed in 2010, pushing for reductions in funding of (and, where possible, the privatization of) public education and social-welfare programs, and opposing state-level environmental initiatives.”⁶⁵ AFP pursues these aims through the same means as campaigns for elected office. It holds rallies, including more than three hundred against Obamacare.⁶⁶ It broadcasts ads, like its attacks on politicians contemplating Medicaid expansion.⁶⁷ And its hundreds of employees and thousands of volunteers represent “a permanent ground force” that never stops calling and canvassing voters, even outside the electoral season.⁶⁸ As one of AFP’s regional directors told his staff, “If you think you’re having fun now, just wait until after the election, because then you’ll start to see the fear in these legislators’ eyes — ‘Oh wait, AFP’s not leaving?’”⁶⁹

While AFP is the Koch brothers’ flagship organization, it is only a part of a broader constellation of Koch-backed groups that engage in significant nonelectoral activities. Unlike the generalist AFP, these other groups target specific constituencies with the Kochs’ small-government ideology. Generation Opportunity appeals to college-aged voters, the LIBRE Initiative is directed at Latinos, the 60 Plus Association reaches out to senior citizens, and so on.⁷⁰ Despite their

63. See, e.g., T.W. Farnam, *Americans for Prosperity Campaigns To Let the Sequester Take Effect in March*, WASH. POST (Feb. 15, 2013) https://www.washingtonpost.com/politics/americans-for-prosperity-campaigns-to-let-the-sequester-take-effect-in-march/2013/02/14/fa339670-76cf-11e2-95e4-6148e45d7adb_story.html [<https://perma.cc/LFD7-LY56>].

64. See, e.g., Jeremy W. Peters, *Conservative Groups Seeking Support for Tax Cuts Find it a Hard Sell*, N.Y. TIMES (Dec. 6, 2017), <https://nyti.ms/2AXyiOO> [<https://perma.cc/GA6C-U8QC>].

65. Skocpol & Hertel-Fernandez, *supra* note 21, at 690; see also, e.g., Farrell, Hertel-Fernandez & Skocpol, *supra* note 56 (describing AFP efforts “to block Medicaid expansion in the states, weaken public sector labor unions, stop environmental and climate change reforms, and limit government spending”).

66. See, e.g., MAYER, *supra* note 2, at 237.

67. See, e.g., Hertel-Fernandez, Skocpol & Lynch, *supra* note 4, at 274.

68. Gold, *supra* note 1.

69. *Id.*; see also, e.g., Skocpol & Hertel-Fernandez, *supra* note 21, at 689 (“In another distinctive combination, Americans for Prosperity conducts political activities between as well as during elections, maintaining a continuity of effort that its leaders proudly tout . . .”).

70. See, e.g., Vogel, *Koch Network*, *supra* note 59. Other Koch-backed groups targeting specific constituencies include the Concerned Women for America and the Concerned Veterans for America. *Id.* After years of separate existence, these groups were recently relocated within

narrower audiences, these groups push the same policies, and rely on the same tactics as AFP. Generation Opportunity thus runs ads against Obamacare (featuring a “creepy Uncle Sam”) and throws tailgate parties where attendees are urged not to purchase health insurance.⁷¹ The LIBRE Initiative provides services like English-language classes, resume-writing assistance, and free Thanksgiving turkeys; in return, beneficiaries have to provide their contact information and listen to LIBRE’s libertarian pitch.⁷² And the 60 Plus Association promotes the privatization of Social Security through bus tours, rallies, and commercials, especially in senior-rich Florida.⁷³

Of course, quasi campaign finance is not the exclusive province of the Koch network. On the left, hedge fund billionaire Tom Steyer has founded a pair of organizations, NextGen America and Need to Impeach, that are dedicated to combating climate change and impeaching President Trump, respectively.⁷⁴ Between them, these groups have close to a thousand employees and biannual outlays of over \$100 million (though most of these resources seem to be allocated to electoral activities).⁷⁵ The groups’ nonelectoral efforts include town halls, petition drives, door-to-door canvassing, and ad campaigns about

AFP itself. See James Hohmann, *The Daily 202: The Koch Network Is Reorganizing Under a New Name and with New Priorities*, WASH. POST (May 20, 2019, 10:19 AM), <https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2019/05/20/daily-202-the-koch-network-is-reorganizing-under-a-new-name-and-with-new-priorities/5ce1a94fa7a0a435cff8c0d3> [<https://perma.cc/WC6H-2PU7>].

71. See, e.g., Ashley Alman, *Creepy Uncle Sam Parties with College Students To Slam Obamacare*, HUFFPOST (Nov. 12, 2013, 11:19 AM), https://www.huffpost.com/entry/creepy-uncle-sam-obamacare_n_4260116 [<https://perma.cc/MAN5-2EB4>]; Garance Franke-Ruta, *Creepy Anti-Obamacare Ads Suggest Where Uncle Sam Wants To Stick It*, ATLANTIC (Sept. 19, 2013), <https://www.theatlantic.com/politics/archive/2013/09/creepy-anti-obamacare-ads-suggest-where-uncle-sam-wants-to-stick-it/279825> [<https://perma.cc/UG2P-ECRU>].

72. See, e.g., Ed O’Keefe, *As Influx of Puerto Ricans Continues, Koch-Based Group Starts Seeking Them Out in Florida*, WASH. POST (Jan. 8, 2018, 6:00 AM), <https://www.washingtonpost.com/news/powerpost/wp/2018/01/08/as-influx-of-puerto-ricans-continues-koch-backed-group-starts-seeking-them-out-in-florida> [<https://perma.cc/4VTR-XXJK>]; Ashley Parker, *Koch Brothers Woo Hispanic Voters with Turkeys and Questionnaires*, N.Y. TIMES (Nov. 25, 2015), <https://nyti.ms/1Yv8koC> [<https://perma.cc/8M8V-XNLQ>].

73. See, e.g., Jeremy Wallace, *AARP Rivals Launch Bus Tour in Sarasota*, SARASOTA HERALD TRIB. (June 20, 2012), <http://politics.heraldtribune.com/2012/06/20/aarp-rivals-launch-bus-tour-in-sarasota> [<https://perma.cc/Y3ZJ-NAFC>]; *Medicare Tall Tales*, TAMPA BAY TIMES (Dec. 7, 2009), <https://www.tampabay.com/archive/2009/12/07/medicare-tall-tales> [<https://perma.cc/DtE2-X2DS>].

74. See, e.g., Edward-Isaac Dove, *Tom Steyer’s \$110 Million Plan To Redefine the Democrats*, POLITICO (July 31, 2018, 5:05 AM), <https://www.politico.com/story/2018/07/31/steyer-democrats-millions-midterms-751245> [<https://perma.cc/6B89-4HEF>].

75. *Id.*

the environment and impeachment.⁷⁶ Likewise, media billionaire Michael Bloomberg has launched two organizations, Partnership for a New American Economy and Mayors Against Illegal Guns, that aim, in turn, to enact immigration reform and to restrict access to guns.⁷⁷ Both groups have unleashed ad blitzes at times when congressional action looked feasible and built grassroots networks to reach voters and encourage them to contact their representatives.⁷⁸

Beyond wealthy individuals, labor unions have long been major spenders on quasi campaign finance on behalf of liberal causes. In recent years, the Service Employees International Union (“SEIU”) has set aside as much as \$10 million for calling members of Congress, after elections are over, and pressing them on health care and other issues.⁷⁹ The SEIU has also staged protests and conducted door-to-door canvassing to fight anti-union proposals in several states.⁸⁰ The AFL-CIO has begun a program called “Working America” as well, with canvassing offices across the country and an emphasis on “year-round mobilization and education.”⁸¹ In earlier periods, labor’s nonelectoral activities were even more widespread, creating an “anchoring” relationship between it and the Democratic Party that “pull[ed] the [Democrats] to the left on economic issues.”⁸² The

76. See, e.g., Monica Hesse, *Want To Impeach the President?*, WASH. POST (Mar. 26, 2018, 6:30 AM), https://www.washingtonpost.com/lifestyle/style/want-to-impeach-the-president-this-billionaire-is-on-the-case/2018/03/26/da7d0fdc-2d13-11e8-8688-e053ba58f1e4_story.html [https://perma.cc/GBU8-XN3J]; Alicia Mundy, *Billionaire’s Climate Group Targets Seven Elections*, WALL ST. J. (May 22, 2014, 1:20 AM), <http://on.wsj.com/1krc3kB> [https://perma.cc/DBC7-YN8Y].

77. See, e.g., Michael Barbaro, *Bloomberg’s TV Blitz on Guns Puts Swing Senators on the Spot*, N.Y. TIMES (Mar. 23, 2013), <https://nyti.ms/Y6FSMY> [https://perma.cc/A5NG-T6M9]; Anna Palmer, Maggie Haberman & John Bresnahan, *Bloomberg’s D.C. Footprint Explodes*, POLITICO (Jan. 29, 2013, 2:06 PM), <https://www.politico.com/story/2013/01/bloomberg-washington-footprint-086874> [https://perma.cc/4T3Q-8MJ7]; Anna Palmer, *Immigration Groups To Target GOP*, POLITICO (July 31, 2013, 5:00 AM), <https://www.politico.com/story/2013/07/immigration-groups-target-house-gop-094949> [https://perma.cc/L895-KDEU].

78. See Barbaro, *supra* note 77; Palmer, Haberman & Bresnahan, *supra* note 77; Palmer, *supra* note 77.

79. Kris Maher, *SEIU Plans to Spend Big on Its Agenda*, WALL ST. J. (Jan. 8, 2009, 12:01 AM), <https://www.wsj.com/articles/SB123137926891763113?st=jeabkop6l3etjth> [https://perma.cc/46KK-HFVE].

80. See, e.g., Ben Smith, *New Labor Plan: Nationwide Protests*, POLITICO (Apr. 21, 2011, 2:31 PM), <https://www.politico.com/story/2011/04/new-labor-plan-nationwide-protests-053547> [https://perma.cc/56CL-T6EA].

81. Amy Dean, *Is “Working America” the Way Forward?*, 21 NEW LAB. F. 60, 63 (2012).

82. Skocpol & Hertel-Fernandez, *supra* note 21, at 690; see generally DANIEL SCHLOZMAN, WHEN MOVEMENTS ANCHOR PARTIES (2015) (discussing the anchoring function of unions for the Democratic Party).

Supreme Court acknowledged labor's voluminous investment in midcentury quasi campaign finance in the 1957 case of *United States v. UAW*.⁸³ One union, the Court noted, had "an annual budget for 'educational' work approximating \$1,500,000" and "supplie[d] over 500 radio stations with 'briefs for broadcasters.'"⁸⁴ Another union, "with an annual budget of over \$300,000 for political 'education,' ha[d] distributed some 80,000,000 pieces of literature."⁸⁵

The Court discussed business-backed quasi campaign finance, too, in the 1961 case of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*⁸⁶ Trucking and railroad companies in Pennsylvania each sought the enactment of legislation that would benefit their sector and undercut the competition.⁸⁷ The truckers thus "wrote to and made personal contacts with legislators in support of bills increasing the weight of trucks," and encouraged other parties to "make personal contacts with legislators in Harrisburg without disclosing trucker connections."⁸⁸ Not to be outdone, the railroads "utilized the so-called third-party technique," by which "the publicity matter circulated in the campaign was made to appear as spontaneously expressed views of independent persons and civic groups when, in fact, it was largely prepared and . . . paid for by the railroads."⁸⁹ In sum, the truckers and the railroads each "utilized all the political powers [they] could muster in an attempt to bring about the passage of laws that would help [one sector] or injure the other."⁹⁰

83. *United States v. UAW*, 352 U.S. 567, 579–80 (1957).

84. *Id.* at 580–81.

85. *Id.* at 581. On the merits, the Court held that union spending on *conventional* campaign finance—specifically, "television broadcasts designed to influence the electorate to select certain candidates for Congress"—violated federal law. *Id.* at 585.

86. *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

87. *Id.* at 127, 132.

88. *Id.* at 141 n.22 (quoting *Noerr Motor Freight, Inc. v. E. R.R. Presidents Conf.*, 155 F. Supp. 768, 803 (E.D. Pa. 1957)).

89. *Id.* at 129–30.

90. *Id.* at 145. On the merits, the Court held that none of these activities violated the Sherman Act. *See id.* at 135–45. Antitrust law thus also does not reach quasi campaign finance. For other examples of historical quasi campaign finance, see GOLDSTEIN, *supra* note 14, at 22–23, discussing the efforts of the Anti-Saloon League to enact Prohibition and of the American Cotton Manufacturers Institute to levy protectionist tariffs; and see generally ISAAC WILLIAM MARTIN, *RICH PEOPLE'S MOVEMENTS: GRASSROOTS CAMPAIGNS TO UNTAX THE ONE PERCENT* (2013), surveying mass movements aimed at cutting taxes for the wealthy.

D. Volume

There are many examples of quasi campaign finance, then, spanning many funders and many years. In fact, it is probably fair to say that American politics is unthinkable without quasi campaign finance—without, that is, efforts to communicate with voters about nonelectoral matters while still depending on electoral connections. But the above examples are just that: a series of anecdotes that cannot reveal the overall landscape of quasi campaign finance. What is the shape of this terrain when it is surveyed systematically rather than piecemeal? How much money is spent on quasi campaign finance, and by whom? What causes this spending to rise or fall? What effects does the spending have on voters, on politicians, and on American democracy as a whole?

The unfortunate truth is that it is hard to say. Because neither conventional campaign finance law, nor lobbying law, nor tax law requires the disclosure of quasi campaign finance, no comprehensive record exists of its sources, amounts, or uses. In this Section and the two that follow, I must therefore rely on a series of inadequate studies to describe the contours of quasi campaign finance. These studies are better than nothing; they give us a glimpse, at least, of the true role of nonelectoral, yet still political, activities. But the studies are also limited in many ways, which I flag as I go through them in order to be candid about how little is currently known.⁹¹

To start, there are four kinds of potential spenders on quasi campaign finance: individuals, for-profit entities, nonprofit entities, and political entities. There is simply no information about the relevant efforts of individuals, for-profit entities, or political entities. These efforts do not have to be disclosed, nor has any academic work attempted to estimate them. However, there is reason to think they might all be minor in scope. Individuals and for-profit entities spend quite little (directly)⁹² on ordinary campaign finance, via express

91. As a pair of scholars remarked about the challenge of assessing grassroots lobbying, understanding quasi campaign finance is also like “a blind man searching for a black cat in a coal bin at midnight.” Linda L. Fowler & Ronald G. Shaiko, *The Grass Roots Connection: Environmental Activists and Senate Roll Calls*, 31 AM. J. POL. SCI. 484, 487 (1987) (quoting Burdett A. Loomis, *A New Era: Groups and the Grass Root*, in INTEREST GROUP POLITICS 184 (Allan J. Cigler & Burdett A. Loomis eds., 1983)); see also, e.g., SCHLOZMAN ET AL., UNHEAVENLY CHORUS, *supra* note 29, at 401 (“[T]here is no obvious source of systematic information . . . about grassroots lobbying efforts . . .”).

92. Indirectly, individuals and for-profit entities provide the bulk of political entities’ resources, which are then spent primarily on ordinary campaign finance. See, e.g., *Top Individuals*

advocacy or electioneering communication.⁹³ It is thus unlikely, though not impossible, that they would devote significant resources to quasi campaign finance. If they *did* conduct extensive nonelectoral activities, after all, why would they not complement them with electoral advocacy?⁹⁴ Analogously, political entities such as political action committees (“PACs”), super PACs, and § 527 organizations are structured as such because they mostly urge the election or defeat of particular candidates.⁹⁵ It would be outside these groups’ missions to communicate frequently with voters about *nonelectoral* issues.

This leaves nonprofit entities, which notably include almost every organization discussed thus far.⁹⁶ AFP and the other Koch-funded groups are 501(c)(4)s, as are Steyer’s NextGen Climate Action and Bloomberg’s Partnership for a New American Economy Action

Funding Outside Spending Groups, CTR. FOR RESPONSIVE POL. (Feb. 1, 2019), [https://www.opensecrets.org/outsidespending/summ.php?cycle=2018 &disp=D&type=V&superonly=N](https://www.opensecrets.org/outsidespending/summ.php?cycle=2018&disp=D&type=V&superonly=N) [<https://perma.cc/3XUJ-2V5U>] (listing the largest individual donors to outside spending groups in 2018); *Top Organizations Funding Outside Spending Groups*, CTR. FOR RESPONSIVE POL. (Feb. 1, 2019), <https://www.opensecrets.org/outsidespending/summ.php?cycle=2018&disp=D&type=O&superonly=N> [<https://perma.cc/7VG5-A4NM>] (same for organizations).

93. In 2018, for example, the most an individual spent directly on federal elections was \$271,864 (by Bill Bloomfield) and the most a corporation spent directly was \$53,546 (by Patagonia Inc.). See *2018 Outside Spending, by Group*, CTR. FOR RESPONSIVE POL. (Mar. 26, 2019), <https://www.opensecrets.org/outsidespending/summ.php?cycle=2018&chrt=V&disp=O&type=A> [<https://perma.cc/H747-4DHF>]; see also, e.g., Adam Bonica, *Avenues of Influence: On the Political Expenditures of Corporations and Their Directors and Executives*, 18 BUS. POL. 367, 367 (2016) (finding that, after *Citizens United*, “[t]he anticipated flood of corporate political cash has amounted to no more than a trickle”). By comparison, ninety-nine other entities spent more than \$1 million. *2018 Outside Spending, by Group, supra*.

94. There could be sensible answers such as maintaining anonymity and obtaining tax advantages. However, electoral advocacy can also be conducted anonymously (through donations to dark money groups) and donations to 501(c)(4)s are not tax-deductible.

95. For a helpful discussion of the different kinds of political entities, see *Types of Advocacy Groups*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/527s/types.php> [<https://perma.cc/73AU-JDSN>].

96. More specifically, it leaves 501(c)(4)s, 501(c)(5)s, and 501(c)(6)s. “[N]o substantial part of the activities” of 501(c)(3) charities may be “carrying on propaganda, or otherwise attempting, to influence legislation.” 26 U.S.C. § 501(c)(3) (2018). Even among 501(c)(4)s, “advocacy, whether lobbying or campaign intervention . . . takes place in less than one-third of . . . organizations and generates less than one-seventh of the subsector’s revenue.” Ellen P. Aprill, *Examining the Landscape of § 501(c)(4) Social Welfare Organizations*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 345, 364 (2018).

Fund.⁹⁷ The SEIU and the AFL-CIO are both 501(c)(5)s.⁹⁸ Drew Dimmery and Andrew Peterson recently published the best available (though still far from satisfactory) analysis of the political activities of nonprofit entities. Dimmery and Peterson first used a machine-learning algorithm to scour the websites of hundreds of thousands of nonprofit groups and categorize them as political or nonpolitical.⁹⁹ The authors then obtained from the Internal Revenue Service the political groups' tax returns, which contain their annual budgets.¹⁰⁰ Lastly, the authors multiplied the total annual spending of the political groups by an estimate of the share of the groups' budgets that is devoted to political activities.¹⁰¹ This method yielded a total of \$760 million in nonprofit political spending in 2011.¹⁰²

This figure must be taken with a large grain of salt, at least as an approximation of the volume of quasi campaign finance. First, it covers *all* political activities carried out by political nonprofit groups. But these activities include not just quasi campaign finance but also regular campaign finance (which non-501(c)(3)s may fund as long as it is not their primary function¹⁰³) and direct lobbying (which non-501(c)(3)s may undertake without limit¹⁰⁴). Second, the figure does not take into

97. See Ams. for Prosperity Found., Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2017), <https://projects.propublica.org/nonprofits/organizations/753148958/201803189349307405/full> [<https://perma.cc/STK6-D8BF>]; Nextgen Climate Action, Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2016), <https://projects.propublica.org/nonprofits/organizations/461957345/201733199349313158/full> [<https://perma.cc/2GV6-5MNJ>]; P'ship for a New Am. Econ. Action Fund, Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2017), https://projects.propublica.org/nonprofits/display_990/273604435/03_2019_prefixes_27-31%2F273604435_201712_990O_2019030716156901 [<https://perma.cc/H2AY-EYKJ>].

98. See AFL-CIO Laws. Coordinating Comm., Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2017), <https://projects.propublica.org/nonprofits/organizations/521304063/201830959349300148/full> [<https://perma.cc/GU82-HXZW>]; Serv. Emp. Int'l Union, Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2017), https://projects.propublica.org/nonprofits/display_990/930323147/06_2020_prefixes_87-95%2F930323147_201709_990O_2020061117187336 [<https://perma.cc/949B-LWHT>].

99. See Dimmery & Peterson, *Shining the Light*, *supra* note 10, at 54–61. The algorithm was trained using groups known to be political (such as PACs). See *id.* at 55.

100. See *id.* at 62.

101. See *id.* at 62–64.

102. See *id.* at 65.

103. See 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii) (2020) (permitting “participation or intervention in political campaigns” as long as groups are not “operated primarily” for this purpose).

104. Compare *id.* § 1.501(c)(4)-1 (imposing no lobbying restrictions on 501(c)(4)s), with *id.* § 1.501(c)(3)-1(b)(3)(i) (permitting 501(c)(3)s to “devote [no] more than an insubstantial part of [their] activities” to lobbying).

account quasi campaign finance paid for by entities that are *not* nonprofit groups. These entities may not be the most lavish spenders in this area,¹⁰⁵ but their efforts still cannot be ignored. And third, Dimmery and Peterson “simply use a figure of 1 percent” as their estimate of the share of political nonprofit groups’ budgets that is devoted to political activities.¹⁰⁶ This is nothing more than an educated guess, which is why the authors “invite readers to adjust [the] estimate[] according to their prior beliefs.”¹⁰⁷

Despite these problems, \$760 million is probably in the ballpark of what is spent annually on quasi campaign finance. Several other data points also suggest a sum on the order of \$1 billion, or maybe somewhat more.¹⁰⁸ For instance, Edward Walker has surveyed grassroots lobbying firms and concluded that they amount to a roughly \$1 billion industry.¹⁰⁹ As noted earlier, there is considerable overlap between grassroots lobbying and quasi campaign finance, one of whose aims is often motivating contacts between voters and their representatives.¹¹⁰ Similarly, 501(c)(4)s that engage in “civil rights, social action, and advocacy” have a total annual revenue of around \$2 billion.¹¹¹ These groups include many of the most familiar and prolific spenders on quasi campaign finance. And according to the Wesleyan Media Project, close to \$400 million was disbursed on issue advertising that did not overtly support or oppose candidates in the 2016 election cycle.¹¹² Such

105. See *supra* notes 96–102 and accompanying text.

106. Dimmery & Peterson, *Shining the Light*, *supra* note 10, at 64.

107. *Id.*

108. Dimmery and Peterson agree that their \$760 million figure is “a conservative estimate of the actual political expenditure of nonprofits.” *Id.*

109. See Edward T. Walker, Opinion, *Grass-Roots Mobilization*, by *Corporate America*, N.Y. TIMES (Aug. 10, 2012), <https://nyti.ms/O9zvBX> [<https://perma.cc/QM2Z-PUH5>]; see also, e.g., EDWARD T. WALKER, GRASSROOTS FOR HIRE: PUBLIC AFFAIRS CONSULTANTS IN AMERICAN DEMOCRACY 68 (2014) (noting an earlier estimate that grassroots lobbying was an \$800 million industry in the 1990s).

110. See *supra* note 46 and accompanying text.

111. See JEREMY KOULISH, FROM CAMPS TO CAMPAIGN FUNDS: THE HISTORY, ANATOMY, AND ACTIVITIES OF 501(C)(4) ORGANIZATIONS 16 (2016). Of course, it is unclear what proportion of this \$2 billion is spent on quasi campaign finance rather than on other political activities.

112. This data is on file with the author and was obtained from the Wesleyan Media Project. *Data Access*, WESLEYAN MEDIA PROJECT, <http://mediaproject.wesleyan.edu/dataaccess> [<https://perma.cc/58DP-JV2J>]. The Wesleyan Media Project only tracks commercials that refer to at least one candidate, so spending on issue ads that do *not* mention a candidate is unknown. The \$400 million figure also includes only congressional and gubernatorial elections; it omits presidential and down-ballot races. See also, e.g., JOSEPH E. CANTOR, CONG. RSCH. SERV., 97-91GOV, SOFT AND HARD MONEY IN CONTEMPORARY ELECTIONS: WHAT FEDERAL LAW

advertising about nonelectoral politics is a classic tool of quasi campaign finance.

The Wesleyan Media Project's advertising dataset also hints that the volume of quasi campaign finance may be rising. Only \$250 million was spent on issue advertising that refrained from using magic words in the 2012 election cycle—more than 30 percent less than in the 2016 cycle.¹¹³ Likewise, Professor John Cluverius has shown that “[t]he rate[] of citizen contact to politicians has increased as much as tenfold in the last decade.”¹¹⁴ This surge may be attributable to both greater funding of nonelectoral communications with voters and the emergence of more convenient digital means of reaching out to elected officials.¹¹⁵ And Skocpol and Hertel-Fernandez's survey of the Koch network indicates that its groups' budgets have exploded. Koch-backed entities that pay for quasi campaign finance had combined budgets of just \$6 million in 2001–2002, compared to \$433 million in 2013–2014.¹¹⁶

If the scale of quasi campaign finance is, in fact, about \$1 billion per year, then it belongs in the same conversation as conventional campaign finance and direct lobbying. Ordinary campaign spending has averaged approximately \$3 billion per year over the last few election cycles.¹¹⁷ Direct (non-grassroots) lobbying expenditures have also hovered near \$3 billion annually in recent years.¹¹⁸ Yet both of these activities are the subjects of entire cottage industries of scholarly

DOES AND DOES NOT REGULATE 5 (Mar. 15, 2002) (citing an estimate of \$509 million spent on broadcast issue advocacy in 2000); Richard L. Hall & Molly E. Reynolds, *Targeted Issue Advertising and Legislative Strategy: The Inside Ends of Outside Lobbying*, 74 J. POL. 888, 888 (2012) (noting that spending on issue advertising in the Washington, D.C. media market totaled \$400 million in the 108th Congress).

113. Again, this data is on file with the author.

114. John Cluverius, *How the Flattened Costs of Grassroots Lobbying Affect Legislator Responsiveness*, 70 POL. RSCH. Q. 279, 281 (2017).

115. See *id.* at 280–81; see also, e.g., GOLDSTEIN, *supra* note 14, at 24 (noting “[g]rowth in the use of grass roots tactics by corporations and trade associations”); Anthony J. Nownes & Patricia Freeman, *Interest Group Activity in the States*, 60 J. POL. 86, 93 (1998) (finding that “in the 1990s grass-roots techniques [were] more common everywhere than they were in the early 1980s”).

116. See Skocpol & Hertel-Fernandez, *supra* note 21, at app. A. All calculations are by the author. The budgets of the Koch-backed groups, of course, pay for activities beyond quasi campaign finance.

117. See *Cost of Election*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/overview/cost.php> [<https://perma.cc/PCX7-L654>] (showing total costs of \$5.7 billion for the two-year 2018 federal election cycle and \$6.5 billion for the 2016 cycle).

118. See *Lobbying Data Summary*, CTR. FOR RESPONSIVE POL. (July 23, 2020), <https://www.opensecrets.org/federal-lobbying> [<https://perma.cc/6ATJ-J6DW>] (showing total direct federal lobbying of almost \$3.5 billion in 2018 and close to \$3.4 billion in 2017).

commentary, while, until now, quasi campaign finance has evaded sustained academic scrutiny. Quasi campaign finance is much more voluminous, too, than the dark money that the Supreme Court's 2010 decision in *Citizens United v. FEC* legalized.¹¹⁹ Nonprofit entities that do not disclose their donors make less than \$100 million of campaign expenditures per year.¹²⁰ These same groups devote perhaps ten times more resources to quasi campaign finance, which nevertheless draws only a fraction of the attention.

E. Drivers

If quasi campaign finance warrants as close an examination as other categories of political spending, then it is important to understand its drivers: the factors that cause it to go up or down. One such factor is organizational type. Certain sorts of groups may have a greater inclination (or ability) to pay for nonelectoral communications than other kinds of entities. The relevant literature, however, is of two minds about who is more likely to engage in quasi campaign finance. More recent studies have noted the vast sums deployed by conservative nonprofit groups—within the Koch network, in particular¹²¹—and compared them to the sparser spending of liberal nonprofits.¹²² Political scientist Jason Sclar and his coauthors, for example, tracked donations to Koch-backed groups and to groups approved by the liberal Democracy Alliance (“DA”) over a ten-year period.¹²³ “The aggregate resources orchestrated by the DA fall far short of those directed by the Koch seminars,” determined Sclar’s team.¹²⁴ “[T]he Koch seminars are not only raising greater sums than the DA partners,

119. *Citizens United v. FEC*, 558 U.S. 310, 319 (2010). Prior to *Citizens United*, nonprofit entities were generally prohibited from making campaign expenditures. Indeed, *Citizens United* itself, the plaintiff in the landmark case, is a nonprofit corporation. *See id.*

120. *See Dark Money Basics*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/dark-money/basics> [<https://perma.cc/PWL3-UAXY>] (showing total dark money spending of nearly \$160 million in both the 2016 and the 2018 two-year federal election cycles, or around \$80 million per year).

121. *See, e.g.*, Skocpol & Hertel-Fernandez, *supra* note 21, at 684–87.

122. *See, e.g.*, Jason Sclar, Alexander Hertel-Fernandez, Theda Skocpol & Vanessa Williamson, Donor Consortia on the Left and Right: Comparing the Membership, Activities, and Impact of the Democracy Alliance and the Koch Seminars, presented at the Annual Meeting of the Midwest Political Science Association 4 (Apr. 8, 2016) (transcript available at *Papers*, HARV. UNIV., https://terrain.harvard.edu/files/terrain/files/donor_consortia_on_the_left_and_right_comparing_the_membership_activities_and_impact_of_the_democracy_alliance_and_the_koch_seminars.pdf?m=1463891744 [<https://perma.cc/G8AS-WKM9>]).

123. *See id.* at 40 fig.6.

124. *Id.* at 4.

they are channeling those heftier resources to a more compact set of organizations directly controlled by the Koch network itself.”¹²⁵

In contrast, earlier studies tended to distinguish between left-leaning public interest groups and labor unions on the one hand, and right-leaning corporations, trade associations, and professional associations on the other. Relying on surveys of groups’ activities rather than audits of their resources, these works found that the former organizations were more apt to mount grassroots lobbying campaigns,¹²⁶ to hold protests,¹²⁷ to broadcast issue advertising,¹²⁸ and to use their websites for political expression.¹²⁹ These diverging lines of scholarship may be reconcilable temporally or methodologically. Temporally, it is possible that liberal groups used to be the biggest spenders on quasi campaign finance but have been surpassed by conservative groups over the last couple decades. Methodologically, it may be that liberal groups have been outgunned all along, and that earlier studies missed this imbalance by treating all organizations alike, regardless of the scale of their spending. More research is necessary to sort between these (and other) explanations.

Another factor that influences the decision to resort to quasi campaign finance is the broader political environment. Mass communications with the electorate are expensive (due to the number

125. *Id.* at 41; *see also, e.g.*, Alexander Hertel-Fernandez, Theda Skocpol & Jason Sclar, *When Political Mega-Donors Join Forces: How the Koch Network and the Democracy Alliance Influence Organized U.S. Politics on the Right and Left*, 32 *STUD. AM. POL. DEV.* 127, 144 (2018) (observing that “the hundreds of millions generated by the Koch seminars exceed DA giving by two- to threefold”). This analysis, however, does not distinguish between quasi campaign finance and other kinds of political spending.

126. *See, e.g.*, KOLLMAN, *supra* note 29, at 41 (“[P]ublic interest groups and labor unions comprise the bulk of the organizations using outside lobbying tactics, while professional and trade associations and corporations comprise the bulk of the organizations at the lower end of the scale.”); Anthony J. Nownes & Krissy Walker DeAlejandro, *Lobbying in the New Millennium: Evidence of Continuity and Change in Three States*, 9 *STATE POL. & POL’Y Q.* 429, 445 (2009) (“[L]obbyists for citizen groups . . . tend to rely more on outside lobbying techniques than lobbyists for business firms . . .”).

127. *See, e.g.*, Nownes & Freeman, *supra* note 115, at 100 (“[L]abor, citizen, and religious/charitable groups are much more likely than corporate, trade/professional, and intergovernmental groups and lobbyists to say they engage in protest activity.”).

128. *See, e.g.*, Hogan, *supra* note 12, at 900 (“[C]ompared to professional associations . . . labor unions are more likely to use [independent spending and issue advertising]” and “citizen groups . . . are more likely to use issue advertising.”).

129. *See, e.g.*, SCHLOZMAN ET AL., *UNHEAVENLY CHORUS*, *supra* note 29, at 403 (“[C]orporations are very unlikely to use their Web sites for political information and activation,” while “labor unions,” “public interest organizations,” and “organizations on behalf of the poor” are “quite likely to do so.”).

of voters who must be reached) and risky (since voters' reactions to the messages cannot be perfectly forecast).¹³⁰ As a result, Professor Frank Baumgartner and his coauthors showed, after reviewing almost a hundred policy areas, groups seeking to change the status quo are more likely to conduct "outside advocacy" and "grassroots advocacy."¹³¹ These efforts include "organiz[ing] a public relations campaign," "mobiliz[ing] the general public," and "mobiliz[ing] [the groups' own] rank-and-file members."¹³² Conversely, actors hoping to preserve existing laws tend to employ less costly tactics with a narrower range of possible outcomes.¹³³ These actors are the beneficiaries of the status quo bias of American politics, and so have less reason to disrupt the prevailing policy configuration.

The mass nature of quasi campaign finance also makes it a poor vehicle for addressing obscure or technical issues. Ordinary voters cannot easily be galvanized about such matters by canvassing, rallies, commercials, and the like. Consequently, groups communicate more frequently with the electorate when nonelectoral topics are highly salient. Across a set of bills debated by a single Congress, "grassroots advocacy" was "more often used by groups active on high-priority issues."¹³⁴ Similarly, over a wider range of subjects considered by Professor Ken Kollman, both the salience and the popularity of policies correlated with an "outside lobbying index" measuring "the number of outside lobbying tactics used and the scope of those tactics."¹³⁵

An incumbent's electoral vulnerability is a further aspect of the political environment that drives the use of quasi campaign finance. When a politician is secure in her seat, there is little point in

130. See, e.g., Marie Hojnacki & David C. Kimball, *The Who and How of Organizations' Lobbying Strategies in Committee*, 61 J. POL. 999, 1003 (1999) (noting the "inherent unpredictability of grassroots campaigns").

131. FRANK R. BAUMGARTNER, JEFFREY M. BERRY, MARIE HOJNACKI, DAVID C. KIMBALL & BETH L. LEECH, *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* 151, 156 (2009).

132. *Id.* at 156; see also, e.g., Hojnacki & Kimball, *supra* note 130, at 1019 ("[O]rganizations advocating a change to the legislative status quo are much more likely than proponents of the status quo to lobby . . . through the grassroots."). Of course, quasi campaign finance includes more than grassroots lobbying.

133. See BAUMGARTNER ET AL., *supra* note 131, at 156; Hojnacki & Kimball, *supra* note 130, at 1020.

134. Hojnacki & Kimball, *supra* note 130, at 1019.

135. KOLLMAN, *supra* note 29, at 89-93; see also, e.g., BAUMGARTNER ET AL., *supra* note 131, at 158 (finding that "[o]utside advocacy tactics . . . rise from 32 to 57 percent [in frequency] when we move from the least to the most salient issues"). Again, grassroots lobbying and quasi campaign finance are not synonymous.

communicating nonelectorally with voters in that constituency. These messages rely on electoral mechanisms to be effective (otherwise they would not be quasi campaign finance),¹³⁶ but the mechanisms are unlikely to succeed when the incumbent is unassailable. On the other hand, when a politician's reelection chances are less certain, the electoral links are more apt to make a difference. In that case, the incumbent may be more threatened by a group's future electoral mobilization, or more sensitive to shifts in the direction or intensity of public opinion.¹³⁷ Consistent with this logic, Professor Kenneth Goldstein found in a survey of close to a hundred grassroots lobbying campaigns that groups mostly "targeted those members whom they viewed as being potentially vulnerable."¹³⁸ An in-depth analysis of a single legislative battle (over the 2003 Medicare prescription drug bill) confirmed that groups "target their issue advertising buys in areas . . . where incumbent legislators are electorally vulnerable."¹³⁹

The final factor that scholars have tied to the volume of quasi campaign finance is the legal (as opposed to the political) environment. Professor Robert Hogan polled more than a thousand groups in almost forty states about their political activities.¹⁴⁰ He also coded the contribution limits in each state, which vary from very low to entirely absent.¹⁴¹ Connecting these two datasets, he determined that groups treat quasi and regular campaign finance as substitutes, switching from one to the other as the legal regime changes. Specifically, groups are 12 percent more likely to make independent expenditures and 8 percent more likely to broadcast issue advertising when contribution limits are most stringent rather than most lenient.¹⁴² Groups' political efforts are thus like "a water balloon" that "shifts or adjusts in response to contact with a barrier."¹⁴³ If the balloon is squeezed at one end (due to tighter

136. See *supra* Part I.A (defining quasi campaign finance).

137. See *supra* Part I.A (identifying the electoral mechanisms upon which quasi campaign finance depends for its effectiveness).

138. GOLDSTEIN, *supra* note 14, at 68.

139. Hall & Reynolds, *supra* note 112, at 901. Once more, neither the grassroots lobbying studied by Goldstein, nor the issue advertising analyzed by Hall and Reynolds, comprises the entirety of quasi campaign finance.

140. See Hogan, *supra* note 12, at 895–97.

141. See *id.* at 890–92 (referring specifically to PAC contribution limits).

142. See *id.* at 900–01.

143. *Id.* at 889. I reiterate that independent expenditures and issue advertising are not the whole of quasi campaign finance. Hogan's study is also admittedly "cross-sectional," and thus "not ideal for establishing causation." *Id.* at 890 n.3. For another scholar positing an inverse relationship between quasi and regular campaign finance, see Michael S. Kang, *The End of*

conventional campaign finance regulations), it swells on the other side (through more quasi campaign finance).

F. Effects

Distilling the above studies, we may tentatively conclude that more money is spent on quasi campaign finance by conservative (rather than liberal) groups, which want to upset the status quo (rather than maintain it), on higher- (rather than lower-) profile issues, in more competitive (rather than safer) constituencies, and when ordinary campaign finance law is stricter (rather than laxer). Now let us turn the telescope around, from the causes of quasi campaign finance to the effects it has on voters, on politicians, and on enacted policy.

With respect to the electorate, there is no academic literature on point. No scholar, that is, has examined how communications about nonelectoral politics influence mass public opinion. An array of informed observers, however, believe they do *not* have much of an impact. After interviewing many activists, for instance, Goldstein concluded that grassroots campaigns against the Clinton administration's health care proposal did not "chang[e] national public opinion."¹⁴⁴ "We were trying to move congressional votes, not Gallup numbers," a lobbyist explained to Goldstein.¹⁴⁵ More recently, Koch-network officials have bemoaned their failure to convince voters of their "goal of advancing a free society."¹⁴⁶ "[W]e were not able to educate many in the tea party more about . . . how free markets work," remarked one donor.¹⁴⁷ Even the Supreme Court has expressed skepticism about the efficacy of issue advertising. In the 2007 case of *FEC v. Wisconsin Right to Life*, the Court opined that "[a]n issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions."¹⁴⁸

Campaign Finance Law, 98 VA. L. REV. 1, 41 (2012), predicting that, in the wake of *Citizens United*, "campaign money [formerly] spent by outside groups on issue advocacy . . . now will be spent largely on express advocacy in the form of independent expenditures." *Id.*

144. GOLDSTEIN, *supra* note 14, at 77.

145. *Id.*

146. Kenneth P. Vogel, *Behind the Retreat of the Koch Brothers' Operation*, POLITICO (Oct. 27, 2016, 5:03 AM), <https://www.politico.com/story/2016/10/koch-brothers-campaign-struggles-230325> [<https://perma.cc/GR8J-VKR2>].

147. *Id.*

148. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007); *see also, e.g.*, Sharon Beder, *Public Relations' Role in Manufacturing Artificial Grass Roots Coalitions*, 43 PUB. RELS. Q. 20, 23 (1998) (noting that "it would be virtually impossible" for "letter-writing campaigns . . . actually

Assuming these views are correct, why would quasi campaign finance have so little sway over the electorate? One answer is that shifting public opinion is simply very difficult. Any given lever must compete with unforeseen events, media coverage, other actors who want to move sentiment in a different direction, and the poorly grasped intricacies of how people make up, and change, their minds. Notably, a meta-study of *regular* campaign finance by Professors Joshua Kalla and David Broockman found that it, too, does not affect voters' choices in general elections.¹⁴⁹ This null result holds for canvassing, phone calls, direct mail, and television and online advertising—in short, just about every tactic in the modern campaign toolkit.¹⁵⁰

Another explanation is that many spenders on quasi campaign finance do not *try* to communicate with the whole electorate. Instead, they tend to limit their outreach to a subset of voters: higher socioeconomic-status individuals whose preferences, the funders expect, will carry more weight with policymakers.¹⁵¹ As predicted by this account, when Goldstein created a regression model for being asked to contact a member of Congress, its output showed that “whites, males, and the better educated were significantly more likely to receive a request.”¹⁵² Walker's survey of grassroots lobbying firms, likewise, indicated that their “requests for citizen engagement are targeted primarily at pre-existing political activists, strong political participants, likely voters, and the college educated.”¹⁵³

Turning from voters to politicians, the anecdotal evidence is again consistent, only this time it points the other way. Namely, quasi campaign finance *does* affect the positions that elected officials take and the policies they adopt. “In virtually all of [Professor Anthony

to get a majority of the people behind a position” (quoting ROBERT SHERRILL, *WHY THEY CALL IT POLITICS: A GUIDE TO AMERICA'S GOVERNMENT* 376 (5th ed. 1990)).

149. See Joshua L. Kalla & David E. Broockman, *The Minimal Persuasive Effects of Campaign Contact in General Elections: Evidence from 49 Field Experiments*, 112 *AM. POL. SCI. REV.* 148, 148 (2018) (analyzing dozens of field experiments). However, campaigns *can* have significant effects in primary elections, voter initiatives, and referenda. *Id.* at 149.

150. *Id.* at 148.

151. Note that this is still quasi campaign finance because it remains segments of voters (rather than policymakers) who are contacted.

152. GOLDSTEIN, *supra* note 14, at 114.

153. WALKER, *supra* note 109, at 11; see also, e.g., KAY LEHMAN SCHLOZMAN, HENRY E. BRADY & SIDNEY VERBA, *UNEQUAL AND UNREPRESENTED: POLITICAL INEQUALITY AND THE PEOPLE'S VOICE IN THE NEW GILDED AGE* 134–36 (2018) (showing that the percentage of respondents asked to engage in at least one of five political acts rises in tandem with socioeconomic status).

Nownes's] interviews with [grassroots] lobbyists," he heard that "[t]he influence of constituent opinion on the behavior of elected officials—especially legislators—cannot be overestimated."¹⁵⁴ Congressional employees surveyed by the Congressional Management Foundation agreed about "the value of grassroots advocacy campaigns."¹⁵⁵ Huge majorities of staffers stated that "in-person visits by constituents," "[i]ndividualized postal letters," and "individualized e-mails from constituents"—all forms of contact often induced by quasi campaign finance—are "effective strateg[ies] for influencing Members."¹⁵⁶

Fortunately, we have more to go on here than anecdotes. Professor Daniel Bergan conducted a pair of studies (the latter in collaboration with Professor Richard Cole) in which state legislators were randomly assigned to groups that either were or were not the targets of grassroots lobbying. In the first study, New Hampshire legislators who received e-mails from anti-smoking activists were twenty percentage points more likely to vote for a smoke-free workplace bill.¹⁵⁷ In the second experiment, Michigan legislators who were called by their constituents were twelve points more inclined to support an anti-bullying bill.¹⁵⁸ Bergan thus determined that "outside lobbying has a large effect on legislative voting,"¹⁵⁹ though he and Cole cautioned that its impact may be weaker when issues "have been on the public agenda longer," when "policymakers have prior information about public opinion," or when "the policy in question is central to one or both of the parties' legislative agendas."¹⁶⁰

Even as to these thornier issues, Skocpol and Hertel-Fernandez's work suggests that quasi campaign finance moves public policy in the

154. NOWNES, *supra* note 36, at 79; *see also, e.g.*, WALKER, *supra* note 109, at 99 (noting the important role of "in-person visits with public officials, as well as hard-copy letters, phone calls, emails, and faxes" in "[c]ampaigns focused on shaping legislation").

155. CONG. MGMT. FOUND., COMMUNICATING WITH CONGRESS: PERCEPTIONS OF CITIZEN ADVOCACY ON CAPITOL HILL 5 (2011).

156. Fielding, *supra* note 29, at 770–71; *see also, e.g.*, Nicholas W. Allard, *Lobbying Is an Honorable Profession: The Right to Petition and the Competition to Be Right*, 19 STAN. L. & POL'Y REV. 23, 49 (2008) (reporting similar results from another survey of congressional staff).

157. *See* Bergan, *supra* note 15, at 342–43.

158. *See* Daniel E. Bergan & Richard T. Cole, *Call Your Legislator: A Field Experimental Study of the Impact of a Constituency Mobilization Campaign on Legislative Voting*, 37 POL. BEHAV. 27, 28 (2015).

159. Bergan, *supra* note 15, at 343.

160. Bergan & Cole, *supra* note 158, at 37; *see also, e.g.*, Cluverius, *supra* note 114, at 286–87 (refining Bergan and Cole's results by showing that a "higher volume" of emails makes "legislators less willing to take meaningful action on legislation"). I also add my usual caveat that grassroots lobbying and quasi campaign finance are not identical.

funders' preferred direction. In one study, the authors tallied whether AFP had a paid director in each state as well as whether each state restricted public-sector union bargaining rights in the wake of the 2010 Republican wave election.¹⁶¹ The presence of a paid AFP state director, which is indicative of more intense AFP activity, made it almost thirty points more likely that union bargaining rights would be curbed.¹⁶² In another analysis, Hertel-Fernandez, Skocpol, and Daniel Lynch used a more sophisticated scale to measure the strength of both AFP and some of its sister organizations in each state.¹⁶³ Shifting from the least to the most powerful Koch network reduced the probability of a state expanding Medicaid by fully *seventy* percentage points.¹⁶⁴

Even more strikingly, the public consistently opposed AFP's efforts. In no state did a majority back the limitation of public-sector union bargaining rights; the average level of support was close to 40 percent.¹⁶⁵ An even larger share of respondents (almost two-thirds) favored Medicaid expansion.¹⁶⁶ Thus whenever AFP succeeded, it "pull[ed] government policy away from the preferences held by most Americans and toward those of a smaller group of businesses, activists, and donors."¹⁶⁷ AFP's quasi campaign finance, in other words, widened the gap between what people want and what they actually get from their representatives.

This presents a bit of a puzzle: How can nonelectoral communications with voters fail to affect them—the messages' recipients—while still influencing politicians? One possibility is that, thanks to the communications, elected officials wrongly *think* their

161. See Skocpol & Hertel-Fernandez, *supra* note 21, at 694.

162. See *id.*; see also ALEXANDER HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES—AND THE NATION 182 (2019) (finding that greater Koch network strength is associated with a higher likelihood of public employee bargaining cutbacks).

163. See Hertel-Fernandez, Skocpol & Lynch, *supra* note 4, at 243, 247–48 (using statistical models and case studies to analyze the impact of the American Legislative Exchange Council ("ALEC") and the State Policy Network ("SPN"), in addition to AFP, on the Medicaid expansion debate in four states).

164. See *id.* at 254; see also HERTEL-FERNANDEZ, *supra* note 162, at 202 (finding "a very strong relationship between levels of [Koch network] strength and coordination and Medicaid expansion"). The main caveats to these studies are that they are cross-sectional and that Koch network strength is a function of more than just quasi campaign finance.

165. See Skocpol & Hertel-Fernandez, *supra* note 21, at 694.

166. See HERTEL-FERNANDEZ, *supra* note 162, at 254 (reporting only a national figure).

167. *Id.*; see also Skocpol & Hertel-Fernandez, *supra* note 21, at 692 ("Koch network operations have contributed to growing gaps across issue-areas between GOP policy stands and majority citizen preferences . . .").

constituents' views have been swayed, and then adjust their own stances to align with public opinion as they incorrectly perceive it. This is not an implausible scenario. In a pioneering study, Broockman and political scientist Christopher Skovron found that most state legislators err when asked to estimate their voters' policy preferences, usually overestimating these attitudes' conservatism.¹⁶⁸ This right-wing bias may arise because Republican constituents are more likely to contact their representatives than are Democrats.¹⁶⁹ The asymmetric pattern of grassroots contacts, in turn, could well be the product of the higher conservative spending on quasi campaign finance.¹⁷⁰

Another solution to the riddle might be the targeting, noted above,¹⁷¹ of higher socioeconomic-status individuals. Nonelectoral communications may change *their* minds—or, at least, make issues more salient for them and easier to link to politicians—while not impacting the broader electorate. Politicians could then be responsive to the shifting concerns of these especially influential voters. This story has anecdotal support; as one grassroots lobbyist said to Goldstein, members of Congress “spend ninety percent of their time with one percent of the population,” and “[w]e want[] that one percent to be people who [are] going to communicate our message.”¹⁷² More rigorous studies corroborate the story, too. As I have explained in earlier work, most campaign donors are higher socioeconomic-status individuals,¹⁷³ and elected officials' voting records almost perfectly

168. See David E. Broockman & Christopher Skovron, *Bias in Perceptions of Public Opinion Among Political Elites*, 112 AM. POL. SCI. REV. 542, 547–57 (2018); see also HERTEL-FERNANDEZ, *supra* note 162, at 255 (finding that “the average legislator overestimated constituent conservatism”).

169. See Broockman & Skovron, *supra* note 168, at 557–59.

170. See *supra* notes 121–25125 and accompanying text; cf. HERTEL-FERNANDEZ, *supra* note 162, at 256 (finding that politicians who report relying more heavily on ALEC (the Koch-funded support group for legislators) are even more mistaken in their views of their constituents' preferences).

171. See *supra* notes 151–53153 and accompanying text.

172. GOLDSTEIN, *supra* note 14, at 87.

173. See Stephanopoulos, *Aligning Campaign Finance*, *supra* note 24, at 1474 (noting the consensus that donors are “overwhelmingly wealthy, highly educated, male, and white” (quoting PETER L. FRANCA, JOHN C. GREEN, PAUL S. HERRNSON, LYNDA W. POWELL & CLYDE WILCOX, *THE FINANCIERS OF CONGRESSIONAL ELECTIONS: INVESTORS, IDEOLOGUES, AND INTIMATES* 16 (2003))).

mirror their donors' desires while bearing little relation to their constituents' views.¹⁷⁴

A final answer is the first electoral mechanism I outlined earlier: the threat of future electoral mobilization.¹⁷⁵ Say that politicians accurately perceive their voters' policy preferences. Also assume that nonelectoral communications do not target any particular group. Quasi campaign finance could *still* affect politicians by signaling to them that the funders could undertake an equivalent effort—only this time, an electoral one—during the next campaign. For this signal to work, politicians simply have to want to be elected¹⁷⁶ and to think that electoral spending makes some difference for their electoral odds.¹⁷⁷ As long as these conditions are satisfied, politicians have an incentive to do what the funders of nonelectoral communications want, even if these messages are ineffective. The reason is that the messages' electoral successors, disseminated during the next campaign, may not be so impotent.

II. THE LEGAL STATUS OF QUASI CAMPAIGN FINANCE

To this point, I have only tried to grasp the concept of quasi campaign finance: to define it and distinguish it from other kinds of political activity, to present some examples of it, and to explain what is known about its scale, causes, and consequences. I have *not* yet grappled with the question that is likely the most salient to legal audiences: May quasi campaign finance constitutionally be regulated in the same ways as conventional campaign finance? Or, conversely, is it unregulable under the First Amendment? Thinking through this question is my object in this Part.

I begin by noting the range of laws that apply to ordinary campaign finance—disclosure requirements, contribution limits, and, formerly, expenditure caps—but not to garden-variety political speech. The validity of these laws, I argue, is best understood as following from

174. *See id.* at 1476 (summarizing work showing that “the [ideological] distributions of donors and members of Congress are more or less identical” and “in marked contrast to the normal distribution of the general public”).

175. *See supra* note 35 and accompanying text. This threat is also far from an empty one. Many groups that fund nonelectoral—yet still political—communications pay lavishly for traditional campaign finance, too. *See supra* Part I.C.

176. The canonical work presenting politicians as single-minded seekers of reelection is DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (2d ed. 2004).

177. As noted above, it is quite unclear if electoral spending actually makes a difference in general elections. *See supra* note 149 and accompanying text.

the assignment of regular campaign finance to a specialized electoral domain rather than the general sphere of public discourse. Next, I consider a number of reasons for equating quasi and conventional campaign finance: that they (1) share the same functional features and (2) are partial substitutes, which are both capable of (3) corrupting officeholders, (4) distorting public opinion, and (5) misaligning governmental outputs from popular preferences. Some of these reasons are better than others; together, they render plausible (if not necessary) the placement of quasi campaign finance in the electoral domain. Lastly, I address a couple of other classificatory options. Quasi campaign finance could be located in a different specialized domain: a policymaking instead of an electoral realm. Quasi campaign finance could also be conceived as public discourse—but without becoming unregulable as a result.

Before starting this analysis, I must flag my uncertainty about the right conclusion. After weighing all the points and ripostes, I remain unsure what legal status should be assigned to quasi campaign finance. My goal here is thus to explore rather than to persuade: to probe the arguments for and against pairing quasi and ordinary campaign finance, but not definitively to accept or reject them. A further caveat is that I bracket, for present purposes, the debate over how *regular* campaign finance may permissibly be regulated. This is obviously a vital issue on which oceans of ink have been spilled.¹⁷⁸ But I ignore it here since my interest is the analogy between quasi and conventional campaign finance, not the legal treatment of the latter.

A. *Elections Versus Politics*

It is undeniable that ordinary campaign finance is subject to much more regulation—*valid* regulation upheld by the Supreme Court—than generic political speech. In *Buckley* and *Citizens United*, the Court sustained requirements that campaign contributions,¹⁷⁹ express

178. Some of this ink has been my own. I am generally sympathetic to the regulation of regular campaign finance, at least if the result is closer alignment between voters' preferences and the government's outputs. See Stephanopoulos, *Aligning Campaign Finance*, *supra* note 24, at 1486–99; see also Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 336–42 (2014) [hereinafter Stephanopoulos, *Elections and Alignment*] (“Under the alignment approach, then, the central issue for courts assessing campaign finance laws would be the measures’ capacity to curb the noncongruence that stems from electoral spending and fundraising.”).

179. See *Buckley v. Valeo*, 424 U.S. 1, 68–74 (1976) (per curiam).

advocacy,¹⁸⁰ and electioneering communication¹⁸¹ all be disclosed to the FEC. The *Buckley* Court also announced the principle, which still endures more than forty years later, that contribution limits are reviewed relatively deferentially and are usually ratified.¹⁸² Even bans on independent expenditures by corporations and unions were good law for virtually the entire twentieth century¹⁸³—and would still be allowed today if the four dissenters in *Citizens United* had prevailed.¹⁸⁴

In contrast, standard-issue political speech has never been restricted like this.¹⁸⁵ Neither its content nor its funding typically has to be reported to any authority. When its disclosure *has* been mandated, the Court has been quick to step in and strike down the offending requirement.¹⁸⁶ Contribution limits and expenditure bans are even rarer policies in the generic political context. Indeed, it is hard to come up with good historical examples of such measures¹⁸⁷—let alone laws the Court did or would uphold. Just imagine a ceiling on how much one

180. *See id.* at 80 (upholding FECA’s disclosure requirements for independent expenditures after construing them “to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate”).

181. *See Citizens United v. FEC*, 558 U.S. 310, 368–69 (2010) (upholding BCRA’s disclosure requirements for electioneering communication and refusing to limit them to “express advocacy and its functional equivalent” (citing *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469–476 (2007))).

182. *See Buckley*, 424 U.S. at 20–23. Since *Buckley*, contribution limits have been invalidated by the Court on only two occasions. *See McCutcheon v. FEC*, 572 U.S. 185, 193 (2014) (plurality opinion) (striking down the federal limits on aggregate contributions in an election cycle); *Randall v. Sorrell*, 548 U.S. 230, 236–37 (2006) (plurality opinion) (striking down Vermont’s unusually low contribution limits).

183. *See Citizens United*, 558 U.S. at 411 (Stevens, J., concurring in part, dissenting in part) (“State legislatures have relied on their authority to regulate corporate electioneering . . . for more than a century. The Federal Congress has relied on this authority for a comparable stretch of time . . .” (citing Brief for the State of Montana et al. as Amici Curiae Addressing June 29, 2009 Order for Supplemental Briefing and Supporting Neither Party at 5–13, *Citizens United*, 558 U.S. 310 (No. 08-205); Supplemental Brief of John McCain et al. as Amici Curiae in Support of Appellee at 1a–8a, *Citizens United*, 558 U.S. 310 (No. 08-205))).

184. *See id.* at 478–79.

185. By “standard-issue” political speech I mean to exclude regular and quasi campaign finance as well as direct and grassroots lobbying. *See supra* Part I.B (discussing these categories).

186. *See, e.g., McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (striking down Ohio’s ban on anonymous political pamphleteering); *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 784 (1988) (invalidating North Carolina’s requirement that charitable fundraisers disclose certain information to potential donors); *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (protecting the NAACP’s membership lists from disclosure to the state of Alabama).

187. Coming closest, perhaps, is the Colorado ban on paying circulators of initiative petitions that the Court invalidated in *Meyer v. Grant*, 486 U.S. 414, 415–16 (1988). *See also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 291, 300 (1981) (striking down California’s limit on contributions to committees supporting or opposing ballot measures).

could give to a political group, or a prohibition on one's own political spending. There probably has not been a Justice in modern times who would sustain this sort of regulation.

Why does First Amendment doctrine tolerate restrictions of regular campaign finance that would be unthinkable for garden-variety political speech? It could simply be the vagaries of the common law method.¹⁸⁸ Perhaps a series of precedents have accumulated, without any grand plan, that are particularly sympathetic to constraints on electoral funding. Path dependency would then account for the disparate treatment. Another explanation might be the force of the governmental interests that are advanced by the regulation of conventional campaign finance. These include preventing politicians from being corrupted by large sums of electoral funding¹⁸⁹ and informing voters about the activities of campaign donors and spenders.¹⁹⁰ Maybe these aims are especially compelling and thus able to justify speech burdens that would otherwise be unacceptable.

Maybe.¹⁹¹ In my view, though, there is a more persuasive (and more interesting) reason to distinguish between ordinary campaign finance and generic political speech. It is that the former may reasonably be assigned to a specialized electoral domain, while the latter belongs squarely in the sphere of general public discourse. On this account, which one might call a *partitionist* theory of the First Amendment,¹⁹² there exist multiple zones of human activity, within which the legal status of speech varies. One of these zones, and doctrinally the most familiar, is public discourse.¹⁹³ Here, people

188. See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (advocating the virtues of common law constitutional interpretation).

189. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 25–29 (1976) (per curiam).

190. See, e.g., *id.* at 66–67.

191. I am skeptical of both these explanations. The path-dependency hypothesis is undermined by the fact that the Court's regular campaign finance decisions very frequently cite other First Amendment cases. See John O. McGinnis, *Neutral Principles and Some Campaign Finance Problems*, 57 WM. & MARY L. REV. 841, 887–90 (2016). I also do not see why preventing corruption and informing voters are uniquely compelling goals. They seem no more urgent to me than many other ends the government pursues.

192. I believe this term is new, but I do not otherwise claim to have developed this theory myself. For other scholars advancing similar positions, see generally POST, *supra* note 17; Baker, *supra* note 19; Briffault, *Issue Advocacy*, *supra* note 19; Neuborne, *supra* note 19; and Schauer & Pildes, *supra* note 19. For a related perspective with respect to all of society, not just the free speech context, see generally Niklas Luhmann, *Differentiation of Society*, 2 CAN. J. SOC. 29 (1977).

193. See, e.g., *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (“At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254,

communicate continuously, ceaselessly, and recursively about matters of public relevance. Through these exchanges, public opinion is formed and then reformed in a never-ending cycle. Through this interaction, too, people come to feel that their government is responsive to their views. This sense arises because elected officials, just like the people they represent, are participants in, and observers of, the ongoing public debate.¹⁹⁴

Under this conception, regulation of public discourse is highly suspect. When the government burdens speech on public issues, it interferes with the free flow of ideas. Public opinion then emerges not (wholly) through the voluntary updating of people's attitudes but rather (at least in part) thanks to the government's heavy hand. Even worse, people may start to believe that their representatives are not actually responsive to their needs and interests. How can people maintain their faith, after all, in a state that is hindering their expression of the very preferences that their elected officials are supposed to be heeding?¹⁹⁵

The crux of the partitionist theory, however, is that not all human activity is public discourse. Some of it, rather, takes place within specialized institutional domains that the government itself has established. Classic examples of these institutions include state-run schools, workplaces, and prisons, where the government is, respectively, educator, employer, and jailer. Inside these institutions, crucially, speech *may* be lawfully limited in order to promote the domains' particular goals. Such restrictions make the institutions work better, and thus serve the governmental interests that led to their creation in the first place. Such restrictions also do *not* cause the same harms as curbs on public discourse. They do not disrupt the formation

270 (1964) (noting “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (praising the “unfettered interchange of ideas for the bringing about of political and social changes desired by the people”).

194. In the academy, Post has discussed the nature of public discourse at greatest length and with the most theoretical sophistication. See generally POST, *supra* note 17; Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993) [hereinafter Post, *Meiklejohn's Mistake*]; Robert Post, *Regulating Election Speech Under the First Amendment*, 77 TEX. L. REV. 1837 (1999) [hereinafter Post, *Regulating Election Speech*].

195. As Post has put it, “government restrictions on public discourse potentially impair democratic legitimation.” POST, *supra* note 17, at 74. Consequently, “courts may properly prevent the state from restricting public discourse unless in the service of the most compelling interests.” *Id.*

of public opinion because people's attitudes on public matters are not as shaped by their involvement in specialized domains. Nor do the restrictions result in an erosion of people's trust in their government's responsiveness since this conviction, too, is forged elsewhere.¹⁹⁶

Elections, then, are one more institution that may be demarcated from public discourse. Elections are held only because the government decides to authorize and administer them. There can be no legally binding vote in the absence of state action.¹⁹⁷ Elections also have a series of aims separate from those of public discourse. These include enabling citizens to deliberate over, and choose between, candidates for office; encouraging citizens to participate in the electoral process; accurately tallying voters' preferences when the moment for decision arrives; peacefully transferring (or retaining) power in accordance with voters' wishes; and motivating elected officials adequately and non-corruptly to represent their constituents.¹⁹⁸ Under the partitionist theory, it is therefore reasonable to recognize elections as a distinct institutional domain, run by the government for instrumental ends.¹⁹⁹

If elections are carved out of public discourse, then the doctrine's seemingly permissive stance toward restrictions of regular campaign finance ceases to be a mystery. Why are disclosure requirements,

196. I should clarify that these are normative rather than empirical claims. People's attitudes on public matters, and their trust in their government's responsiveness, *could* be affected by their involvement in specialized domains. But the partitionist theory *assumes* they are not so affected (at least not much). Post, again, addresses so-called "managerial domains" in the most detail. See POST, *supra* note 17, at 81–84, 91–92; Post, *Meiklejohn's Mistake*, *supra* note 194, at 1128–33; Post, *Regulating Election Speech*, *supra* note 194, at 1840. Other scholars have advanced analogous claims of specialized institutional domains. See Baker, *supra* note 19, at 17–19 (discussing "institutionally bound" speech); Briffault, *Issue Advocacy*, *supra* note 19, at 1763 (discussing the "distinctive jurisprudential regime for election speech"); Neuborne, *supra* note 19, at 800 (discussing "'institutionally bounded' setting[s]"); Schauer & Pildes, *supra* note 19, at 1805 (discussing "bounded domains of communicative activity").

197. See, e.g., Richard H. Pildes, *The Supreme Court 2003 Term—Forward: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 51–52 (2004) ("[E]lections and related democratic processes are pervasively regulated.").

198. For a thoughtful article comparing the deliberative and tabulative goals of elections, see generally James A. Gardner, *Deliberation or Tabulation? The Self-Undermining Constitutional Architecture of Election Campaigns*, 54 BUFF. L. REV. 1413 (2007). I have also discussed the values served by elections (and election law) in more detail elsewhere. See Stephanopoulos, *Elections and Alignment*, *supra* note 178, at 356–60.

199. For other scholars portraying elections as specialized institutional domains, see *supra* note 196. For the Court doing so as well, see *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 186–87 (1999), distinguishing between "core political speech" and electoral speech and remarking that "there must be a substantial regulation of elections . . . if some sort of order, rather than chaos, is to accompany the democratic processes" (first quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988); then quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

contribution limits, and (formerly) certain expenditure bans valid when they apply to electoral funding but invalid when they extend to generic political speech? Precisely because when they apply to electoral funding, they operate within the electoral domain, where more regulation is allowed. When they extend to generic political speech, conversely, they amount to burdens on public discourse that are, for that reason, subject to stringent scrutiny.

I should acknowledge that the partitionist theory is not without its critics. Scholars including Lillian BeVier,²⁰⁰ John McGinnis,²⁰¹ Geoffrey Stone,²⁰² and Kathleen Sullivan²⁰³ have argued that elections should be conceived as part of—not apart from—public discourse because electoral and political speech cannot be disentangled. In McGinnis’s words, the partitionist theory “wrongly suggests that expression at election time can be segregated from the political debate that is ever-billowing in a democracy.”²⁰⁴ On the Court, similarly, several Justices have opposed erecting a boundary between elections on the one side and politics on the other. This “line between electoral advocacy and issue advocacy dissolves in practice,” according to Justice Antonin Scalia,²⁰⁵ because “discussions of candidates and issues are quite often intertwined,” as Justice Anthony Kennedy has put it.²⁰⁶

Since the partitionist theory has been ably defended elsewhere,²⁰⁷ I only want to make one observation here about these attacks: they are normative, not descriptive, and so do not undermine the theory’s ability to explain current First Amendment law. The attacks’ common

200. See Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis*, 85 VA. L. REV. 1761, 1773 (1999) (arguing that *Buckley* “eschewed the notion [of] a dichotomy between free politics generally and elections in particular as bounded institutions”).

201. See McGinnis, *supra* note 191, at 908.

202. See Geoffrey R. Stone, “*Electoral Exceptionalism*” and the First Amendment: A Road Paved with Good Intentions, 35 N.Y.U. REV. L. & SOC. CHANGE 665, 673 (2011) (portraying “electoral speech” as “largely indistinguishable from general public discourse”).

203. See Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 674–75 (1997) (“[E]lections are seamlessly connected to the informal political debates that continue in the periods between them.”).

204. McGinnis, *supra* note 191, at 908.

205. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 494 (2007) (Scalia, J., concurring).

206. *McConnell v. FEC*, 540 U.S. 93, 327 (2003) (Kennedy, J. concurring), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010). *Buckley* also stated at one point that “[a]dvocacy of the election or defeat of candidates . . . is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.” *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (per curiam).

207. See *supra* note 196.

theme is that an electoral domain *should not* be demarcated from public discourse because electoral speech *should be* seen as equivalent to political speech. This may or may not be correct; I think it is not. But even if it is right, it only means that contemporary doctrine should be amended to eliminate the greater deference that restrictions on conventional campaign finance receive at present. It does not change the fact that these restrictions *do* currently receive greater deference than analogous limits on garden-variety political speech. It does not change the fact, that is, that contemporary doctrine adheres to the partitionist theory.²⁰⁸

B. Assignment to the Electoral Domain

This adherence forms the backdrop for my core inquiry in this Part: analyzing whether quasi campaign finance should be assigned to the electoral domain (along with ordinary campaign finance) or to public discourse (joining generic political speech). As the preceding discussion makes clear, the stakes of this choice are high. If quasi campaign finance is placed in the electoral domain, then it may permissibly be regulated to further that domain's ends. But if quasi campaign finance is part of public discourse, then it is largely unregulable. As I also noted above, I do not come down firmly on one side or the other of this difficult debate.²⁰⁹ I develop the dueling arguments without trying to adjudicate between them.

1. *Characteristics.* One reason to equate quasi and regular campaign finance is that they share several key characteristics. Both activities are paid for primarily by the same actors, namely, wealthy, ideologically extreme, and politically active individuals. They make most contributions to candidates²¹⁰ and provide the bulk of the funding for entities, such as super PACs, that engage in independent electoral

208. I readily concede that, post-*Citizens United*, contemporary doctrine does not reflect the partitionist theory to the extent that it did before the decision. The Court used to distinguish between electoral expenditures by corporations and unions (which were banned) and nonelectoral spending by these entities (which was permitted). The Court no longer makes this distinction. *Buckley*, too, did not adhere to the partitionist theory when it treated electoral expenditures by *individuals* identically to their nonelectoral spending, prohibiting restrictions on the former.

209. See *supra* note 178 and accompanying text.

210. See Stephanopoulos, *Aligning Campaign Finance*, *supra* note 24, at 1474–76 (summarizing the literature on campaign donors).

spending.²¹¹ They are also the main donors to the 501(c)(4) groups that are the most active practitioners of quasi campaign finance.²¹² Not only do quasi and conventional campaign finance have analogous funding sources, they pay for analogous tactics, too. Electoral money funds television and online advertisements, fundraising solicitations, door-to-door canvassing, phone banking, speeches, rallies, and protests. The same goes for nonelectoral, yet still political, money.²¹³ In both cases, spenders purchase mass communications with voters.

Furthermore, quasi and ordinary campaign finance rely on similar mechanisms to be effective. When electoral money has an impact, it is through its influence on either voters or politicians. It may convince voters to support (or oppose) a candidate, or to go to (or stay home from) the polls. It may also prod politicians to do what the funders want, whether out of gratefulness for the funders' resources or fear of how these resources could be weaponized in the future. Likewise with nonelectoral, yet still political, money. As I explained earlier, it depends on electoral links involving either voters or politicians to achieve its aims.²¹⁴ It may change voters' minds about an issue or make that issue more salient and easier to connect to candidates. Voters' behavior at the polls may then shift as a result. Quasi campaign finance may also sway politicians thanks to its convertibility down the road into regular campaign finance, to which politicians are famously attuned.

To make this discussion more concrete, consider two recent ads aired by AFP. One of them, paid for by conventional campaign finance, criticized then-Senator Joe Donnelly of Indiana for saying "he'd support tax cuts for hard-working Hoosiers" but then "voting against tax cuts for you."²¹⁵ It added that viewers should "tell Senator Donnelly to put Hoosier jobs first."²¹⁶ The other commercial, underwritten by

211. *Compare Top Individuals Funding Outside Spending Groups*, *supra* note 92 (showing the biggest individual donors to outside spending groups in the 2018 election cycle), with *Top Organizations Funding Outside Spending Groups*, *supra* note 92 (showing the biggest organizational donors).

212. *See supra* notes 121–25125 and accompanying text (noting that the Koch network and the Democracy Alliance are both comprised of individual donors).

213. *See supra* Part I.C (providing examples of these tactics in the quasi campaign finance context).

214. *See supra* notes 35–37 and accompanying text.

215. Ams. for Prosperity, *Senator Donnelly Voted Against Tax Cuts for Hoosiers*, YOUTUBE (Feb. 13, 2018), <https://www.youtube.com/watch?v=8gnB6HYFhos> [<https://perma.cc/FTL3-ZPJA>].

216. *Id.* Note that this ad, while obviously electoral, is neither express advocacy (since it avoids the use of magic words) nor electioneering communication (since it was aired too long before the next election).

quasi campaign finance, warned that “some members of Congress want a new trillion-dollar [border adjustment] consumer tax that could drive up your costs and hurt our economy.”²¹⁷ It continued: “Tell Congress that’s not the change we’re asking for.”²¹⁸

These ads were both funded by AFP. They were both also, well, ads—broadcast messages directed at large numbers of voters. Their subject matter and policy perspective were identical too: Tax cuts are good; tax hikes are bad. And if they had any effect, it was via voters or politicians. The first ad may have persuaded voters to oppose Senator Donnelly (who ended up losing his 2018 reelection bid) while incentivizing Senator Donnelly to modify his stance on taxes. The second ad may have caused voters and members of Congress alike to disfavor the border adjustment tax proposal that was floated in 2017.²¹⁹ Voters’ views might have shifted on the merits of the proposal, while members of Congress could have changed their stances out of concern about voters’ or AFP’s future actions. This is obviously a substantial list of similarities. It cuts in favor of treating quasi and ordinary campaign finance symmetrically under the First Amendment due to their overlapping features.

Nor is this form of functional reasoning alien to the Supreme Court. In the 2003 case of *McConnell v. FEC*, the Court evaluated BCRA’s extension of the existing regulations of express advocacy—namely, disclosure requirements and a ban on corporate and union spending—to electioneering communication.²²⁰ The Court held that the extension was constitutional because electioneering communication substantively resembled express advocacy. “[T]he two categories of advertisements proved functionally identical in important respects.”²²¹ “Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads,” most of which were electioneering communication, “eschewed the use of magic words.”²²² The Court thus denied that “the First

217. Ams. for Prosperity Comm., *Tell Congress That’s Not the Change We’re Asking for*, iSPOT.TV (Apr. 17, 2017), https://ispot.tv/a/wL1_ [<https://perma.cc/38SJ-YMEW>].

218. *Id.*

219. See Timothy M. Todd, *What Is a Border Adjustment Tax?*, FORBES (Jan. 17, 2017), <https://www.forbes.com/sites/timtodd/2017/01/17/what-is-a-border-adjustment-tax/#2febddc2bc1b> [<https://perma.cc/4AKP-SVJH>].

220. *McConnell v. FEC*, 540 U.S. 93, 189–202 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

221. *Id.* at 126.

222. *Id.*

Amendment erects a rigid barrier between express advocacy and so-called issue advocacy.”²²³

A future, differently constituted Court could make an equivalent move with respect to quasi and regular campaign finance. Since they share the same funders, pay for the same kinds of communications, and rely on electoral mechanisms involving the same voters and politicians, they could be ascribed the same legal status. True, quasi and conventional campaign finance are not alike in every way, since the latter is and the former is not overtly electoral. But electioneering communication and express advocacy are not identical either, since the latter does and the former does not necessarily use magic words. This contrast did not prove dispositive in *McConnell*, and neither must the electoral distinction between quasi and ordinary campaign finance.

On the other hand, the relevant portion of *McConnell* is no longer good law. In *Wisconsin Right to Life*, the Court “reject[ed] the contention,” which it had accepted in *McConnell*, that “issue advocacy may be regulated because express election advocacy may be.”²²⁴ Also disagreeing with *McConnell*, the Court held that some ads that *are* electioneering communication “are *not* the functional equivalent of express advocacy.”²²⁵ Therefore the state interests that authorize limits on express advocacy “cannot justify regulating” these messages.²²⁶

More importantly here, the electoral distinction between quasi and regular campaign finance is hardly trivial. The issue at hand is whether quasi campaign finance should be located in the electoral domain. It is plainly a strike against this placement that quasi campaign finance is, by definition, nonelectoral. Yes, quasi campaign finance

223. *Id.* at 193. Interestingly, Justice Clarence Thomas has made a similar functional argument for treating contribution and expenditure limits symmetrically—and presumptively striking them both down. See *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 636 (1996) (Thomas, J., concurring in part, dissenting in part) (“When an individual donates money . . . he enhances the donee’s ability to communicate a message and thereby adds to political debate, just as when that individual communicates the message himself.”). In the academy, Heather Gerken and Alex Tausanovitch have urged the pairing of campaign finance and lobbying because they are “both important means of converting money into political influence.” Heather K. Gerken & Alex Tausanovitch, *A Public Finance Model for Lobbying: Lobbying, Campaign Finance, and the Privatization of Democracy*, 13 *ELECTION L.J.* 75, 75 (2014); see also Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 *STAN. L. & POL’Y REV.* 105, 112 (2008) [hereinafter Briffault, *Lobbying*] (“Both lobbying and campaign finance are means to the end of influence over government action.”).

224. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 477 (2007) (citing *McConnell*, 550 U.S. at 205).

225. *Id.* at 478.

226. *Id.* at 479.

shares *other* characteristics of conventional campaign finance: its funding sources, its messaging tactics, its underlying mechanisms, and so on. But it does *not* exhibit the feature that arguably defines ordinary campaign finance: the fact that it pays for communications that are actually about elections.

It is also significant that the mechanisms underpinning quasi campaign finance are less directly electoral than those on which regular campaign finance depends. When electoral money influences voters or politicians, it does so without any intervening steps. Voters' electoral preferences change, and politicians' behavior shifts, too, because of the immediate electoral consequences they perceive. In contrast, when nonelectoral money has an electoral impact, it does so at one remove. It sways voters' nonelectoral attitudes, which may, in turn, affect their electoral views. Or it puts politicians on notice that while *this* policy-focused campaign may not help or hurt them, a future electoral mobilization could be relevant to their careers. These are real electoral mechanisms—but they are also more complex, more attenuated links than those of conventional campaign finance.

Lastly, it is unclear what the stopping point is for the argument that quasi campaign finance is similar enough functionally to ordinary campaign finance that it should be treated like it legally. Take mass communications that do *not* rely on electoral connections to be effective, like requests that people give money to protect the environment or to fight disease.²²⁷ These messages are often funded by politically active nonprofit groups, and they use many of the same methods as regular campaign finance (here, fundraising solicitations). Why should these parallels not be enough to assign these communications, too, to the electoral domain? Or consider reports from think tanks about political issues. While these publications rarely target the mass electorate, their funding commonly comes from the same sources as conventional campaign finance, and they certainly hope to make an electoral difference.²²⁸ So are they part of the electoral domain as well?

These questions are rhetorical. These activities cannot be situated in the electoral domain, because if they were, then not much speech would remain within public discourse. But that is precisely the point. If

227. Here, the requested funding *is* the operative mechanism. If money is donated, it will be used directly to advance the group's aims.

228. For example, the State Policy Network is a constellation of conservative think tanks funded in part by the Koch brothers. See HERTEL-FERNANDEZ, *supra* note 162, at 146–60.

the electoral domain can be stretched to include quasi campaign finance, it is hard to explain why its boundaries cannot be enlarged a little more, to cover activities a bit further afield. Once the expansion project begins, in other words, there is no obvious point at which it ends.²²⁹

2. *Substitutability*. A related reason for conferring the same legal status to quasi and ordinary campaign finance is that they are partial substitutes for each other. In particular, if more restrictions are imposed on electoral money, its suppliers may respond by shifting their efforts to nonelectoral, yet still political, spending.²³⁰ This reallocation is feasible because, as discussed above, quasi and regular campaign finance share several key characteristics.²³¹ These overlapping features mean that funders may still accomplish their objectives even if they are obliged to pay for quasi instead of conventional campaign finance. The overlap also suggests that quasi and ordinary campaign finance should be treated—and regulated—equally by the law. Otherwise, savvy funders could circumvent limits on electoral money simply by switching to its nonelectoral cousin.²³²

Charles Koch is one prominent advocate of the substitutability thesis. To repeat an earlier quote, he sees “education,” “grassroots organizations,” “lobbying,” and “political action” as components of “a strategy that is vertically and horizontally integrated,” among which resources may be freely shuffled.²³³ The Koch network’s activities reflect this view. They include not just the quasi campaign finance I have emphasized here,²³⁴ but also a good deal of regular campaign finance,²³⁵ both of whose volumes ebb and flow from year to year.

229. See, e.g., Post, *Regulating Election Speech*, *supra* note 194, at 1842 (“If all that were necessary to bring speech within the authority of a managerial domain were that the speech produce effects on the domain, nothing much would be left of public discourse.”).

230. See *supra* notes 140–43143 and accompanying text.

231. See *supra* notes 210–19 and accompanying text.

232. For other scholars making substitutability arguments, except in the context of campaign finance and lobbying, see Briffault, *Lobbying*, *supra* note 223, at 111–12 (“Both lobbying and campaign finance are means to the end of influencing our government action.”); Gerken & Tausanovitch, *supra* note 223, at 75 (commenting that they “function as substitutes and complements within a democratic system”).

233. MAYER, *supra* note 2, at 173.

234. See *supra* notes 55–73 and accompanying text.

235. For example, AFP spent nearly \$37 million on independent expenditures in the 2012 election, making it one of the election’s ten biggest spenders. See *2012 Outside Spending*, by Group, CTR. FOR RESPONSIVE POL., <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V &disp=O&type=A> [<https://perma.cc/UQ7S-QANE>].

Further support for the substitutability claim comes from the academy. Hogan, again, found that when state contribution limits become tighter, groups respond by spending more on independent expenditures and issue advertising.²³⁶ Less conventional campaign finance, that is, leads to more quasi campaign finance.

The *McConnell* Court, too, embraced the logic that Congress may restrict electioneering communication to prevent groups from evading the (then-applicable) ban on express advocacy by corporations and unions. Surveying the era before BCRA, the Court observed that electioneering communication “accomplished the same purposes as express advocacy,” and thus “enabled unions, corporations, and wealthy contributors to circumvent protections that FECA was intended to provide.”²³⁷ More generally, the Court held that the potential replacement of one form of campaign finance by another is a valid reason to regulate them both. “[I]nterests” that are “sufficient to justify” certain limits also vindicate “laws preventing the circumvention of such limits.”²³⁸

Once more, though, this position did not survive the Court’s subsequent decision in *Wisconsin Right to Life*. In that case, the Court pointed out that campaign finance restrictions are prophylactic, since most electoral money is not corruptive or otherwise invidious.²³⁹ The Court then noted that efforts to prevent restrictions from being circumvented, through the transfer of funds from one use to another, are prophylactic as well.²⁴⁰ “[S]uch a prophylaxis-upon-prophylaxis approach to regulating expression,” the Court concluded, “is not consistent with strict scrutiny.”²⁴¹ The multiple layers of prevention are overkill for achieving any governmental interest.

Also undermining the argument for equal legal status due to substitutability is that quasi and ordinary campaign finance may not, in fact, be very good substitutes. If they *were* suitable alternatives, then one would expect to see similar amounts of each activity at all times. There would be no reason for funders to prefer one activity over the

236. See Hogan, *supra* note 12, at 900–01.

237. *McConnell v. FEC*, 540 U.S. 93, 131 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010); *see id.* at 129 (noting that, before BCRA, “political parties and candidates used the availability of so-called issue ads to circumvent FECA’s limitations”).

238. *Id.* at 144; *see also* *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) (“[A]ll Members of the Court agree that circumvention is a valid theory of corruption.”).

239. *See* *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 479 (2007).

240. *See id.*

241. *Id.*

other if they could be swapped without much loss of effectiveness. In reality, however, Professor Richard Hasen discovered a huge imbalance when he examined issue advertising during the periods before two federal elections.²⁴² The vast majority of commercials were sham issue ads—that is, electoral ads—and only a tiny fraction were true issue ads underwritten by quasi campaign finance.²⁴³ A perusal of AFP’s library of commercials paints the same picture.²⁴⁴ When an election is near, most of the spots are electoral; when no vote is imminent, the ads typically mention issues but not candidates.²⁴⁵ Despite Charles Koch’s comments, AFP thus exhibits clear preferences about when to use quasi and regular campaign finance. It does not behave as if the activities are interchangeable.

A final concern about the substitutability argument is that it may sweep too broadly. This worry arises because quasi campaign finance is not the only partial substitute for conventional campaign finance. The direct lobbying of elected officials, the publication of reports by think tanks, mass communications with voters that do not rely on electoral mechanisms—all these activities serve the ends of those who supply electoral funding, more or less well, and so could replace that funding if it were limited, more or less effectively. Consider again the multitudinous efforts of the Koch network, which span quasi and ordinary campaign finance, the lobbying of state and federal officials, support for the sixty-plus conservative think tanks in the State Policy Network (“SPN”), and backing for the American Legislative Exchange Council (“ALEC”), the country’s main supplier of right-wing legislative language.²⁴⁶ If the Koch network’s quasi and regular campaign finance were curtailed, it would likely devote more resources to lobbying, to SPN’s think tanks, and to ALEC’s draft bills. These activities could therefore be curbed themselves, on an anti-

242. See Hasen, *supra* note 41, at 1795–99 (studying the 1998 and 2000 elections, both of which preceded BCRA).

243. Specifically, true issue ads made up about 7 percent of ads in 1998, and 2 percent in 2000. See *id.* at 1796.

244. See *Americans for Prosperity*, YOUTUBE, <https://m.youtube.com/user/AforP/videos> [<https://perma.cc/7Y4N-7JRE>] (last updated Aug. 2020).

245. See *id.*

246. For detailed discussions of the Koch network, see generally HERTEL-FERNANDEZ, *supra* note 162, Skocpol & Hertel-Fernandez, *supra* note 21, and Vogel, *Koch Network*, *supra* note 59.

circumvention theory, but that is just the problem. The theory drags too much speech from public discourse into the electoral domain.²⁴⁷

3. *Anti-Corruption.* The above rationales for treating quasi and conventional campaign finance symmetrically did not involve the governmental interests that might justify their regulation. I now turn to these interests, starting with the most doctrinally prominent of them, the prevention of corruption.²⁴⁸ The Supreme Court's understanding of corruption has famously fluctuated.²⁴⁹ Around the time of *Buckley* and then again in recent years, the Court conceived of corruption narrowly, as explicit quid pro quo exchanges and nothing more.²⁵⁰ In the 1990s and early 2000s, in contrast, the Court embraced a broader notion of corruption encompassing funders' undue access to, and influence over, elected officials.²⁵¹

Under either of these definitions, could quasi campaign finance be corruptive (in which case it could be restricted to prevent the corruption from occurring)? Certainly. Nonelectoral, yet still political, spending has at least some value for candidates. Because its value is not zero, candidates might plausibly do something in return for the spending. If that something is a specific act tied overtly to the spending, then we have a classic quid pro quo—a transaction even the current Court would think corrupt. If the something is a little subtler, like greater contact with, or responsiveness to, the payors of the quasi campaign finance, then today's Court would be unperturbed—but the rest of us need not be. Like the Court of the 1990s and early 2000s, we

247. See, e.g., Sullivan, *supra* note 203, at 688 (“[G]rim efforts to close down every ‘loophole’ in campaign finance laws will inevitably trench unacceptably far upon current conceptions of freedom of political speech.”).

248. According to the contemporary Court, indeed, this is the “only one legitimate governmental interest for restricting campaign finances.” *McCutcheon v. FEC*, 572 U.S. 185, 206 (2014) (plurality opinion).

249. See, e.g., *id.* at 208 (“[W]e have not always spoken about corruption in a clear or consistent voice.” (quoting *Citizens United v. FEC*, 558 U.S. 310, 447 (2010) (Stevens, J., concurring in part, dissenting in part))).

250. See, e.g., *id.* at 207 (“Congress may target only a specific type of corruption—‘quid pro quo’ corruption.”); *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976) (per curiam) (“To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.”).

251. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 153–54 (2003) (holding that the “sale of access” and “undue influence” are “[j]ust as troubling to a functioning democracy as classic quid pro quo corruption”), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000) (recognizing “a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors”).

could deem it corrupt when these payors enjoy access and influence that ordinary voters do not.²⁵²

Suppose, for example, that Steyer's NextGen America is considering spending \$1 million in a congressional district to inform voters about climate change and to urge them to support policies to mitigate it. Suppose, too, that the Democratic candidate in this district believes this spending would increase her odds of being elected, and so promises Steyer to vote for anti-climate change legislation if NextGen America opens its coffers. This would be a quid pro quo that virtually everybody would label a corrupt exchange. Imagine, instead, that the Democratic candidate makes no explicit pledges, but still meets repeatedly with Steyer, echoes NextGen America's rhetoric, and eventually votes for the group's preferred bills. The current Court would no longer be alarmed, but other observers might reasonably object to "politicians too compliant with the wishes of large [funders]," as a different Court described corruption in 2000.²⁵³

It is worth stressing just how untroubled today's Court would be by this scenario. In *Citizens United*, the Court held that independent *electoral* expenditures cannot "give rise to corruption."²⁵⁴ This is because these expenditures allegedly "do not lead to . . . *quid pro quo* corruption," and "there is only scant evidence that [they] even ingratiate."²⁵⁵ "Ingratiation and access, in any event, are not corruption."²⁵⁶ It is indisputable, given this reasoning, that the current Court would not find *nonelectoral* spending to be corruptive either. If expenditures about elections necessarily do not corrupt, there is no way that spending about nonelectoral issues could be invidious.

As a predictive matter, this is true enough. Today's Court would not agree that quasi campaign finance could ever be corruptive. Logically, though, this position is untenable. Nonelectoral, yet still political, spending could plainly be the funder's quid that is traded for the politician's quo. Since quasi campaign finance benefits the politician to at least some extent, she might be willing to swap

252. As Justice Kennedy noted in *McConnell* (albeit disapprovingly), under the broader definition of corruption, "Congress would have the authority to outlaw even pure issue ads, because they, too, could endear their sponsors to candidates who adopt the favored positions." 540 U.S. at 329 (Kennedy, J., concurring).

253. *Shrink Mo. Gov't PAC*, 528 U.S. at 389.

254. *Citizens United*, 558 U.S. at 357.

255. *Id.* at 360.

256. *Id.*; see also, e.g., *id.* at 359 ("The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt . . .").

something for it. Even more clearly, nonelectoral spending could result in greater access and influence for its funder. This is not corruption, according to the current Court, but that is just its ipse dixit. It is corruption according to many others, including this Court's own predecessors.²⁵⁷

Nevertheless, it must be conceded that quasi campaign finance is less valuable to candidates, dollar for dollar, than other kinds of funding. Compare a given sum of quasi campaign finance, of independent electoral expenditures, and of campaign contributions. This dollar amount would be most prized by candidates when it takes the form of donations that they may use as they please, based on their own assessments of their races. The pool of money would be somewhat less helpful as independent electoral spending that reiterates candidates' messages but is not under their direct control.²⁵⁸ And the funding would be least desirable as independent *nonelectoral* spending that is both beyond candidates' control and not aimed directly at electing them.

The upshot is that quasi campaign finance cannot be as corruptive as regular campaign finance. It *can* provide some benefit to candidates, so its ability to tempt them from their duties is not nil. But this capacity is limited, compared to independent electoral expenditures and, especially, campaign contributions, by the weaker dollar-for-dollar punch of nonelectoral spending. Rational candidates would therefore be less likely to exchange access and influence, let alone outright promises, for quasi campaign finance. Even if they did make such deals, they probably would not be willing to part with as much. A smaller quid would merit, at most, a similarly minor quo.²⁵⁹

257. See, e.g., Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 994 (2005) (“[I]ndependent expenditures provide candidates with sufficient benefit that they are grateful for the expenditures and inclined to reward the independent spenders with preferential access, if not government decisions”); *supra* note 251 and accompanying text.

258. As the *Buckley* Court observed, “[I]ndependent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive.” *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam). See also, e.g., Kang, *supra* note 143, at 44 (“Even if independent expenditures are valuable to candidates and parties, contributions are better dollar for dollar.”).

259. See *supra* note 250. Probably for this reason, there is no evidence that grassroots lobbying is linked to corruption. “[T]here is not a demonstrated or widely accepted connection between spending on such efforts and improper actions by the government officials ultimately contacted.” Lloyd Hitoshi Mayer, *Politics and the Public’s Right To Know*, 13 ELECTION L.J. 138, 157–58 (2014).

One more (by now familiar²⁶⁰) point about the argument that quasi and conventional finance warrant the same legal status because they may both be corruptive: this claim does not distinguish quasi campaign finance from other types of political communications that may also be useful to candidates. Take a think tank report that praises a politician's proposal or bashes her opponent's ideas. Or a draft bill provided to a legislator, which she may then introduce and thereby cement her reputation as a policy entrepreneur. These materials have at least some value for candidates, who may agree, for that reason, to trade something for them. But if we brand these transactions as corrupt—and, consequently, authorize the regulation of the potentially corruptive materials—then we have again expanded the electoral domain beyond any sensible boundary. We have again allowed it to swallow much of public discourse.

4. *Anti-Distortion.* Another harm that many have linked to ordinary campaign finance is the distortion of public opinion. Electoral expenditures, on this view, may affect voters' candidate preferences, shifting them from what they would have been had there been equal, less, or no spending. In Justice Wiley Rutledge's words in a 1948 case, "large expenditures" may "bring about an undue, that is . . . a disproportionate sway, of electoral sentiment."²⁶¹ The prevention of such distortion may thus be a legitimate governmental interest that justifies the restriction of regular campaign finance. As the Supreme Court put it in the 1990 case of *Austin v. Michigan Chamber of Commerce*, a law may validly target "the corrosive and distorting effects of immense aggregations of wealth" on the electorate.²⁶²

Quasi campaign finance could plausibly skew public opinion in the same ways as conventional campaign finance. In particular, when voters are *persuaded* by nonelectoral spending, their revised views

260. See *supra* notes 227–29, 246–247 and accompanying text.

261. *United States v. CIO*, 335 U.S. 106, 143 (1948) (Rutledge, J., concurring) (summarizing, but not agreeing with, the government's position in the case); see also, e.g., *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) (discussing "the corrosive influence of concentrated corporate wealth" on "the integrity of the marketplace of political ideas"); *United States v. UAW*, 352 U.S. 567, 582 (1957) (noting "the corroding effect of money employed in elections by aggregated power").

262. *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 660 (1990), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010); see also, e.g., David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 *YALE L. & POL'Y REV.* 236, 238–39 (1991) (praising the *Austin* Court for upholding "limited government intervention designed to correct the distorting effects of corporate wealth").

could be considered distorted. In this case, the views are not what they would have been had the spending not occurred. Even when quasi campaign finance merely heightens the salience of certain issues, the result could be seen as distortion. Here, too, the pattern of voters' attention differs from how it would have looked in the absence of the activity.

These effects, moreover, are exactly what spenders on quasi campaign finance want. Through their expenditures, they *hope* to change voters' minds and to get them to focus more on particular policies. If the payors were to fail to sway public opinion, they would surely be disappointed. An adviser to Charles Koch, for instance, has said that he "see[s] politicians [not] as setting the prevalent ideology but as reflecting it."²⁶³ "This explain[s] the Kochs' political modus operandi": trying to mold the mass ideology that politicians will then mirror.²⁶⁴ The political director of Steyer's NextGen America, similarly, has remarked that the group seeks to "make a real connection" with voters about "how climate hits them at the household level."²⁶⁵ If voters' attitudes about the environment were unaltered by the group's communications, these messages would be judged unsuccessful.

Unfortunately for Koch and Steyer, quasi campaign finance does *not* appear to influence voters' views significantly.²⁶⁶ As I explained earlier, this could be because public opinion is generally quite difficult to move.²⁶⁷ Or it could be because most nonelectoral communications are directed at higher socioeconomic-status individuals who make up a relatively narrow slice of the electorate.²⁶⁸ Whatever the reason, the empirical case for regulating quasi campaign finance because of its distortive impact is weak. Nonelectoral messages simply do not seem to cause much distortion. Accordingly, the governmental interest in unskewing public opinion—in restoring it to the configuration it would otherwise have exhibited—cannot be very compelling. There is no urgent need to solve a problem that isn't there.

263. DANIEL SCHULMAN, *SONS OF WICHITA: HOW THE KOCH BROTHERS BECAME AMERICA'S MOST POWERFUL AND PRIVATE DYNASTY* 255 (2014) (ebook).

264. *Id.*

265. Evan Halper, *Climate Change a Wedge Issue in 2014? Billionaire Tom Steyer Hopes So*, L.A. TIMES (May 21, 2014, 9:00 PM), <https://www.latimes.com/local/political/la-pn-steyer-20140521-story.html> [<https://perma.cc/ED8M-77S3>].

266. *See supra* notes 144–48148 and accompanying text.

267. *See supra* note 149 and accompanying text.

268. *See supra* notes 152–53 and accompanying text.

But suppose there is a problem. Suppose that quasi campaign finance *is* capable of materially shifting voters' attitudes. Even then, it is hard to call this distortion unless one can first identify an undistorted baseline: a normatively attractive benchmark to which the status quo may be compared. What this baseline should be, however, is far from clear. Should it be a world where AFP and NextGen America do not spend any money at all? One where they spend as much as every other political organization? One where they do not outspend other groups by more than a certain multiple? Or, as the Court suggested in *Austin*, one where their resources are proportional to the popularity of their ideas?²⁶⁹ There is obviously no consensus on the correct answer. Without agreement, though, it borders on the incoherent to speak of distortion. Distortion is inherently a relative concept, one that condemns a state of affairs for deviating from some ideal. If we do not know the ideal, then we also do not know how far—or even whether—the status quo diverges from it.²⁷⁰

But assume away this objection as well. Assume, in other words, that quasi campaign finance does change voters' preferences, and that we can measure the resulting gap between actual and undistorted public opinion. A further difficulty remains: the slippery slope from quasi campaign finance to other forms of political expression that may also affect how voters think. Without more evidence, it is uncertain how long this slide is—that is, how much more speech has an impact on public opinion and so may be labeled distortive. But if we are positing (against the weight of the available facts²⁷¹) that quasi campaign finance skews voters' stances, it is only reasonable to imagine that many other messages are similarly influential: fundraising solicitations, white papers, fact and opinion journalism, and so on.²⁷² All of this communication, then, could be regulated on the same anti-distortive basis as quasi campaign finance. As Chief Justice John Roberts

269. See *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 660 (1990) (endorsing the idea “that expenditures reflect actual public support for the political ideas espoused by [campaign spenders]”), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010).

270. For other scholars criticizing the concept of distortion on this basis, see POST, *supra* note 17, at 53 (“There is thus no ‘baseline’ from which ‘distortion’ can be assessed.”) and Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045, 1078 (1985) (“‘Distortion,’ of course, implies a norm, but reformers scarcely describe or defend the norm upon which they rely.”).

271. See *supra* notes 144–48 and accompanying text.

272. For a recent study supporting this assumption, see Gregory J. Martin & Ali Yurukoglu, *Bias in Cable News: Persuasion and Polarization*, 107 AM. ECON. REV. 2565, 2565–66 (2017) (finding that Fox News viewership leads to a higher likelihood of Republican voting).

observed in *Citizens United*, “[t]he First Amendment theory underlying *Austin*’s holding” might “authorize government prohibition of political speech” even “outside the original context of corporate advocacy.”²⁷³

Lastly, for those who are impressed by doctrinal points, it is relevant that *Citizens United* did not just criticize the anti-distortion interest invoked in *Austin* and other cases. Rather, *Citizens United* held that this justification is categorically forbidden: an “aberration” that “interferes with the ‘open marketplace’ of ideas” and enables “censorship . . . vast in its reach.”²⁷⁴ The claim that quasi and conventional campaign finance should be treated symmetrically because of their distortive potential must therefore grapple with a contrary Court ruling in addition to the other issues noted above.

5. *Alignment.* A final reason to regulate ordinary campaign finance, which I and other scholars have explored elsewhere,²⁷⁵ is the promotion of alignment between voters’ preferences and the government’s outputs. On this account, the actions that elected officials take, especially the policies they implement, should be congruent with the desires of the electorate. Empirically, however, unrestricted electoral funding is a powerful driver of misalignment.²⁷⁶ It causes legislators’ voting records and enacted laws to reflect the funders’ priorities while straying from those of regular constituents.²⁷⁷ Therefore, the argument continues, the government has an interest in limiting electoral funding in order to better align what voters want with what the state does. Such restraints advance the democratic goal of a polity that heeds the will of the people.

This logic extends to quasi campaign finance. As I showed earlier, there is considerable evidence that nonelectoral, yet still political, spending pushes the government’s outputs in the directions favored by the spenders, but not necessarily by voters. Grassroots contacts with

273. *Citizens United*, 558 U.S. at 381 (Roberts, C.J., concurring).

274. *Id.* at 354–55 (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)).

275. See generally Stephanopoulos, *Aligning Campaign Finance*, *supra* note 24 (emphasizing that an interest “of the gravest importance” is the alignment “between voters’ policy preferences and their government’s policy outputs”); Stephanopoulos, *Elections and Alignment*, *supra* note 178 (same); Lawrence Lessig, *What an Originalist Would Understand “Corruption” to Mean*, 102 CALIF. L. REV. 1 (2014) (same).

276. See, e.g., Stephanopoulos, *Aligning Campaign Finance*, *supra* note 24, at 1467–79.

277. See *id.*

legislators paid for by quasi campaign finance, for example, make them significantly more likely to vote for the bills being advocated, regardless of the bills' popularity with their constituents.²⁷⁸ Likewise, the greater the state-level activity of AFP—the country's most prolific spender on quasi campaign finance—the more probable it is that a state curtails public-sector union bargaining rights and declines to expand Medicaid.²⁷⁹ By comparison, “variations in public views ha[ve] little relevance” to the adoption of these policies, which are “as readily enacted in states . . . where people express[] high levels of support . . . as they [are] in states . . . where people [are] much less supportive.”²⁸⁰

If the misalignment produced by conventional campaign finance can justify its regulation, then, arguably, so can that yielded by quasi campaign finance. The reasoning is identical for the latter activity. Nonelectoral, yet still political, spending drives a wedge between voters' preferences and the government's outputs. This noncongruence is troubling from a democratic perspective. Accordingly, the state may intervene to prevent the noncongruence from arising. Through its intervention, the state furthers its compelling interest in a properly aligned political system.

The argument that quasi and ordinary campaign finance should be equated because of their misaligning potential, moreover, avoids two of the pitfalls of the analogous claim about their distortive capacity. First, the misaligning potential, unlike the distortive capacity, is real. Empirically, quasi campaign finance does appear to induce elected officials to behave in ways opposed by their constituents,²⁸¹ while it does not seem to exert much influence on public opinion.²⁸² Second, the dilemma of how to choose a baseline relative to which distortion may be measured does not exist for misalignment. Unlike distortion, misalignment comes with a normatively attractive benchmark built in: voters' attitudes on specific issues and overarching ideologies. *They* are the reference point for determining whether, and how far, the government's outputs have diverged from where they ought to be.²⁸³

278. See *supra* notes 157–60 and accompanying text.

279. See *supra* notes 161–64 and accompanying text.

280. Skocpol & Hertel-Fernandez, *supra* note 21, at 694.

281. See *supra* notes 157–67 and accompanying text.

282. See *supra* notes 144–48 and accompanying text.

283. There are still some baseline-setting issues, however, with the alignment approach. See Stephanopoulos, *Aligning Campaign Finance*, *supra* note 24, at 1434–41 (discussing them in detail); Stephanopoulos, *Elections and Alignment*, *supra* note 178, at 304–13 (same).

However, the argument based on misaligning potential remains vulnerable to the slippery-slope objection. Other kinds of political communication, beyond quasi and regular campaign finance, are also able to create noncongruence between politicians and their constituents. In particular, Hertel-Fernandez found that it is not just AFP's strength in a state that drives restrictions on public-sector union bargaining rights and refusals to expand Medicaid. Rather, these unpopular policies are linked to the clout of the entire Koch network, including the reach of ALEC and the budgets of SPN think tanks.²⁸⁴ This result suggests that the circulation of conservative bills to legislators, and the publication of right-wing white papers, could be regulated as well on a misalignment theory. But this is a disturbing conclusion since these activities have always been viewed as part of public discourse. If they are moved to the electoral domain instead, then that zone becomes overly capacious, and the public sphere unduly narrow.

Nor has the Supreme Court ever endorsed the argument based on misaligning potential. The Court has used some similar language, like its passage in *McConnell* calling it "troubling to a functioning democracy" when "officeholders . . . decide issues not on . . . the desires of their constituencies, but according to the wishes of those who have made large financial contributions."²⁸⁵ But the Court has never explicitly held that the promotion of alignment is a legitimate governmental interest that may justify some restriction of political speech. To date, it is only scholars who have advanced this position.

C. Other Assignments

Whether to assign quasi campaign finance to the electoral domain or to public discourse, then, is quite a difficult question. There are sensible reasons to pair quasi and conventional campaign finance: they share several functional features and so may be substituted for each other, and they are both capable of corrupting officeholders, distorting public opinion, and misaligning the government's outputs from voters' preferences. On the other hand, even if slippery-slope claims are often

284. See HERTEL-FERNANDEZ, *supra* note 162, at 182 (looking at public-sector union bargaining rights); *id.* at 202 (Medicaid expansion); *see also* Hertel-Fernandez, Skocpol & Lynch, *supra* note 4, at 254 (same).

285. *McConnell v. FEC*, 540 U.S. 93, 153 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010); *see also, e.g., Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000) (discussing "the broader threat from politicians too compliant with the wishes of large contributors"—and not compliant enough with their constituents' desires).

overstated,²⁸⁶ they have real force here. If quasi campaign finance may be placed in the electoral domain—despite being nonelectoral by definition—then so, perhaps, may be even more political speech. But then the public sphere starts to shrink beyond recognition.

1. *Regulable Public Discourse.* Are there classificatory options for quasi campaign finance that are not so fraught? There are at least two other possibilities, but they pose their own problems. The first of these is situating quasi campaign finance in public discourse—but not deeming it unregulable due to this location. It is true that governmental restrictions of public discourse are usually unconstitutional because they interfere with the free formation of public opinion. As the Court has declared, the First Amendment “is designed and intended to remove governmental restraints from the arena of public discussion.”²⁸⁷ “[G]overnmental regulation of this crucial process” therefore cannot “be exercised consistent with First Amendment guarantees.”²⁸⁸

However, some prominent theories of public discourse *would* allow some limitation of quasi campaign finance. For instance, Professor Owen Fiss (echoing philosopher Alexander Meiklejohn²⁸⁹) has argued that the point of public discourse is not to safeguard individual autonomy but rather to “allow[] people to [deliberate] intelligently and freely, aware of all the options and in possession of all the relevant information.”²⁹⁰ Public discourse should thus be “protected when (and only when)” it “enrich[es] public debate,” not “because it is an exercise of autonomy.”²⁹¹ From this perspective, quasi campaign finance could be regulated so long as the regulation resulted in a more informed populace better able to make judgments on public issues. This is certainly conceivable. Say that a package of interventions²⁹² yielded somewhat less libertarian spending by the Koch network, and somewhat more communication advocating higher

286. See generally Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003) (noting the weaknesses of many slippery-slope claims).

287. *Cohen v. California*, 403 U.S. 15, 24 (1971).

288. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); see also, e.g., POST, *supra* note 17, at 74 (“[C]ourts may properly prevent the state from restricting public discourse . . .”).

289. See MEIKLEJOHN, *supra* note 32, at 25 (“What is essential is not that everyone shall speak, but that everything worth saying shall be said.”).

290. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1410 (1986).

291. *Id.* at 1411.

292. For a discussion of potential regulations of quasi campaign finance, see *infra* Part III.

taxes and greater redistribution. Presented with more balanced information, people might have more illuminating exchanges about these topics and, ultimately, reach better decisions about them. In this case, the interventions would further the mission of public discourse, not undermine it.

Alternatively, Post has claimed that we value public discourse because it is a source of “democratic legitimation.”²⁹³ When people “participate in the ongoing dialogue that constitutes public opinion,” they come to “believe that government is potentially responsive to their views.”²⁹⁴ These subjective feelings of responsiveness cause “government [to] enjoy democratic legitimacy [because] it carries the trust and confidence of its people.”²⁹⁵ On this theory, too, the regulation of quasi campaign finance could be allowed if it bolstered people’s faith in government. And again, this scenario is plausible on its face. People might feel less alienated from government—more confident that government is listening to them—if a handful of billionaires were not able to dominate quasi campaign finance with their idiosyncratic messages. People might be even more sure that government is responsive to their views if they were offered grants to make these views known. This subsidization of quasi campaign finance is one of the regulatory options I address below in Part III.²⁹⁶

Both of these accounts of public discourse, though, require us to believe in the state’s competence and good faith. According to Fiss, who decides if a limit on quasi campaign finance will enrich the public debate? In Post’s model, who makes the call that a restriction will enhance people’s feelings of responsiveness? The answer in both cases is the government.²⁹⁷ But the government might be bad at these jobs; it might misjudge regulations’ implications for the vibrancy of public

293. POST, *supra* note 17, at 49.

294. *Id.*

295. *Id.*

296. *See infra* Part III. Even though Post believes that public discourse is generally unregulable, *see* POST, *supra* note 17, at 74, he concedes that limits are valid if “uncontrolled expenditures threaten to undermine the electoral integrity of our representative system.” *Id.* at 91. In this case, “we also face a potential loss of democratic legitimation if we choose to do nothing.” *Id.*; *see also* James Weinstein, *Campaign Finance Reform and the First Amendment: An Introduction*, 34 ARIZ. ST. L.J. 1057, 1093 (2002) (pointing out that public discourse could be regulated if doing so “would result in a net gain in legitimation”).

297. Fiss is quite open about his view that “the state can enrich as much as it constricts public debate.” Fiss, *supra* note 290, at 1415. Likewise, Post explains that “government regulations” can “advance the goal of sustaining public confidence that elections select officials who are attentive to public opinion.” POST, *supra* note 17, at 91.

debate or for people's subjective attitudes. Even worse, the government might not approach these tasks benevolently; instead, it might use its jurisdiction over public discourse to exclude certain categories of speakers or speech. If, as the Court has said, the First Amendment is "[p]remised on mistrust of governmental power,"²⁹⁸ we might reasonably worry about conceptions of public discourse that ask us to accept the state's skill and goodwill.

Furthermore, there is another understanding of public discourse—probably the dominant understanding in the doctrine—that focuses above all on people's freedom to participate in it. What really matters, on this view, is people's "liberty to discuss publicly . . . all matters of public concern,"²⁹⁹ *not* whether this discussion ultimately results in richer public debate or greater democratic legitimation. This theory plainly would not authorize restraints on quasi campaign finance. Yes, such curbs might have consequences that some would think desirable. But these positive effects would be beside the point. No ends could justify means that abridge anyone's ability to engage in public discourse.

2. *A Policymaking Domain.* The second classificatory possibility is to assign quasi campaign finance *neither* to the electoral domain *nor* to public discourse, but rather to a different specialized sphere: one dedicated to the formulation and implementation of governmental policy. Courts and scholars have not previously recognized a policymaking domain, but one may readily be imagined. Its instrumental purpose would be the enactment of sound laws and regulations—measures that promote the public's welfare and reflect its preferences. This is a different goal from that of public discourse, whether it is conceived in Fiss's, Post's, or the Court's usual terms. This is also an inherently *governmental* objective since only the state may ratify legally binding policy. This governmental nature is important because, under the partitionist theory, only the state's valid aims may justify the creation of specialized domains separate from public discourse.³⁰⁰

298. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

299. *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940); *see also, e.g., Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968) (noting the "public interest in having free and unhindered debate on matters of public importance"); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").

300. *See supra* notes 192–208 and accompanying text (discussing the partitionist theory).

Strong evidence that a policymaking domain already (implicitly) exists comes from the procedures used in legislation and regulation. In an assembly, legislators and witnesses called to testify cannot speak whenever they want, for as long as they wish, or on whatever topics they like. Rather, their speech is comprehensively controlled by recognition requirements, time limits, and germaneness conditions.³⁰¹ This is so even though the speech is quintessentially political. Likewise, parties interested in expressing their views on draft regulations are not free to contact agencies whenever and however they choose. Instead, they must comply with rules restricting their comments to certain time periods and insisting on the disclosure of identifying information.³⁰² This, again, despite the classically political character of the communication.

Quasi campaign finance, then, could be placed in a policymaking domain along with legislative and regulatory speech. Like those types of messages, nonelectoral, yet still political, spending seeks the enactment or amendment of laws or regulations. Indeed, that is its whole point, and what distinguishes it from electoral spending. With quasi campaign finance, policy change (or preservation) is the overt goal, and elections are the indirect mechanism used to achieve it. The legal ramifications of this designation would also be far-reaching. If quasi campaign finance were part of a specialized policymaking sphere, then it could be managed in the service of the sphere's purpose: the production of good public policy. Various kinds of checks might then become valid, even if they would be unlawful for generic public discourse.

Yet there is at least one significant difference between quasi campaign finance and legislative and regulatory speech. The latter are directed at policymakers—fellow legislators and agency administrators, respectively—while nonelectoral, yet still political, spending necessarily targets *voters*.³⁰³ Voters, however, do not make decisions in our system, at least outside the context of ballot initiatives. Quasi campaign finance may therefore be an awkward fit for a

301. See, e.g., RULES OF THE HOUSE OF REPRESENTATIVES, 116th Cong., Rule XVI (2019), <https://rules.house.gov/sites/democrats.rules.house.gov/files/documents/116-House-Rules-Clerk.pdf> [<https://perma.cc/YQU2-PJAN>].

302. Although different agencies follow different commenting procedures, they all impose restrictions in fulfilling their obligation to “give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments.” 5 U.S.C. § 553(c) (2018).

303. See *supra* Part I.A.

policymaking domain since those who run the domain are not its audience. Rather, those managers are reached only through the intervening steps of the constituents who actually receive the communications.

It is also notable that legislative speech is subject to much more draconian limits than regulatory speech. This is probably because legislative speech takes place under conditions of scarcity while regulatory speech does not.³⁰⁴ With legislative speech, there is only so much time to hear from speakers on the assembly floor, whereas with regulatory speech, the agency can process all the comments that are submitted. Of the two, quasi campaign finance more closely resembles regulatory speech. More ads can always be aired; more canvassers can always go door to door; more rallies can always be held. One actor's nonelectoral spending does not necessarily come at the expense of another's. In that case, though, the restrictions applicable to regulatory speech are more indicative of the constraints that could be imposed on quasi campaign finance if it were assigned to a policymaking domain. And those restrictions are not particularly onerous—certainly a far cry from Robert's Rules of Order.

The slippery-slope objection must make one last appearance as well. If quasi campaign finance may be situated in a policymaking domain, despite not being directed at policymakers or occurring under conditions of scarcity, then so may be fundraising solicitations, think tank reports, editorials, and so on. All of these messages, too, have policy aspirations, are heard by audiences other than legislators and regulators, and may be conveyed without cannibalizing other views. But if a policymaking domain is elastic enough to fit these kinds of political communication, then not enough space is left for public discourse. Once more, a realm of specialized speech ends up annexing large swathes of the public sphere.

III. THE REGULATION OF QUASI CAMPAIGN FINANCE

In the preceding Part, I considered *whether* quasi campaign finance may constitutionally be regulated. Under the partitionist theory of the First Amendment, the answer hinges largely on the zone of speech in which the activity is located. If nonelectoral, yet still political, spending is deemed part of a specialized electoral or

304. *Cf.* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 367, 376, 400–01 (1969) (upholding regulations on broadcasters under the Federal Communications Commission's "fairness doctrine" in part because "broadcast frequencies constitute[] a scarce resource").

policymaking domain, then it may be limited to accomplish the domain's objectives. Conversely, if this sort of spending is situated in public discourse, then it is presumptively unregulable, at least per the Court's usual view of generic political communication.

In this Part, I assume that quasi campaign finance may be restricted and turn to the question that logically follows: How *should* it be curbed in order to realize goals like the prevention of corruption, distortion, and misalignment and the enactment of sound public policy? I address three types of regulations: (1) ceilings on nonelectoral, yet still political, spending in the form of contribution or expenditure caps; (2) floors for the activity in the form of public subsidies; and (3) disclosure requirements for the sources, amounts, and uses of quasi campaign finance. Of these three categories, I find the latter two preferable: more practical, more consistent with American tradition, and still potentially quite effective. As this verdict reveals, I also focus on the regulations' normative appeal while commenting on their constitutionality only in passing.

A. *Ceilings*

Beginning with ceilings, both contribution and expenditure limits on quasi campaign finance are conceivable. A contribution limit might bar a donor from giving more than a certain annual dollar amount to an entity that plans to use the funds to pay for mass communications "with regard to . . . the formulation, modification, or adoption of . . . legislation" or a "rule, regulation, Executive order, or any other [governmental] program, policy, or position."³⁰⁵ The quoted language is from the Lobbying Disclosure Act and nicely captures the range of nonelectoral, yet still political, issues that could be the subjects of messages to voters.³⁰⁶ Analogously, an expenditure limit might bar any actor from *spending* more than a certain yearly sum on mass communications about governmental policy. Policy would presumably be defined the same way whether the money was disbursed via a donation or a direct outlay.

305. 2 U.S.C. § 1602(8)(A)(i)–(ii) (2018).

306. However, the quoted language does not define mass communications with voters, nor does it distinguish between mass communications that do and do not rely on electoral mechanisms to be effective. *See supra* Part I.A (defining quasi campaign finance). Any actual legislation would have to work out these issues. But they are not my concern here because I want to comment generally on contribution and expenditure limits, not take a first pass at drafting them.

An initial point about these restrictions is that there is no reason to distinguish between contribution and expenditure limits. There *is* a basis for treating these measures differently in the ordinary campaign finance context. As the Court held in *Buckley*, contributions to candidates are more valuable to them, and therefore more potentially corruptive, than independent electoral expenditures on their behalf.³⁰⁷ But this logic does not transfer to the quasi campaign finance context. This is because donations of nonelectoral money are necessarily made to noncandidate entities such as nonprofit groups.³⁰⁸ These entities, of course, cannot hold governmental office and so cannot exchange official acts (or access or influence) for the money they receive. Accordingly, there is no greater risk of corruption when a nonelectoral dollar is given to another actor than when it is spent directly. Either way, that dollar cannot make its way into a candidate's coffers.³⁰⁹

It is also plain that, if they have any teeth, contribution and expenditure limits on quasi campaign finance would reduce its volume. Some would-be donors would be unable to give as much money as they would like to some groups. Similarly, some would-be spenders would be prevented from making all of their desired disbursements.³¹⁰ To the extent the current quantity of quasi campaign finance is problematic, this decrease would be beneficial. In particular, if the amount of spending on nonelectoral politics is correlated with the prevalence of corruption, distortion, or misalignment, then less of this spending would lead to fewer of these harms. The pool of funding responsible for the problems would be partly drained.

It does not seem to me, however, that the trouble with quasi campaign finance is its volume. In fact, extensive communication with voters about nonelectoral politics has much to commend it, potentially yielding a more informed electorate capable of making better policy judgments. In my view, rather, the primary concern is the *balance* of quasi campaign finance: the *distribution* of messages that are conveyed

307. See *Buckley v. Valeo*, 424 U.S. 1, 46 (1976) (per curiam) (“[I]ndependent advocacy . . . does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.”).

308. If the donations were made to candidates, of course, they would no longer be nonelectoral.

309. Nor is there any reason to think that contributions of quasi campaign finance are more distortive or misaligning than expenditures, or vice versa. A nonelectoral dollar that Steyer gives to NextGen America seems as impactful as a nonelectoral dollar that he spends himself.

310. Cf. Briffault, *Lobbying*, *supra* note 223, at 113 (“Capping the amounts an individual or group could spend either on hiring a lobbyist or on lobbying personally would cut directly into the amount of lobbying . . .”).

to voters. It is when one side of a debate enjoys a large resource advantage that fears about corruption, distortion, and misalignment become more acute.³¹¹ In such an environment, corruptible candidates find that most of the quids for which they may promise quos come from the same ideological camp. Public opinion is also more likely to be skewed when it is pressed hard from one direction but only faintly from the other. And if elected officials veer toward the preferences of nonelectoral spenders—thereby diverging from what voters want—they probably veer further when the payors form a mostly unified bloc.

Contribution and expenditure limits on quasi campaign finance, though, are a poor tool for promoting greater communicative symmetry. They cannot promise that when the volume of nonelectoral spending declines, its composition will be any different. Suppose, for example, that a thousand conservative donors each currently give \$1 million a year to the Koch network, and that five hundred liberal donors annually write equally sized checks to the Democracy Alliance.³¹² Next, imagine that a \$500,000 limit on quasi campaign finance contributions is imposed. If this restriction cannot be circumvented, then the Koch network's and the DA's budgets both will fall by half. But their relative scale will be unaffected. The Koch network will continue to spend twice as much as the DA in furtherance of its right-wing agenda.³¹³

The caveat about circumvention is also important. For two reasons, ceilings on quasi campaign finance would likely be easier to evade than regular campaign finance regulations. First, groups may freely multiply, transforming one organization into several, while candidates cannot. This means that if limits were levied on nonelectoral, yet still political, contributions, groups could sidestep them by splitting into a number of new entities. Donors who wanted to give amounts above the thresholds could then divide their payments among the array of sister organizations.³¹⁴ In contrast, this option is

311. Cf. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 789 (1978) (suggesting that when corporate advocacy “drown[s] out other points of view,” it may “threaten[] imminently to undermine democratic processes”).

312. This is a reasonable approximation of reality. See *supra* notes 121–25 and accompanying text.

313. Of course, if there were *equal* numbers of conservative and liberal donors, then each side's spending would be the same in this hypothetical. But that just means that contribution limits *could*—not that they *would*—result in spending parity.

314. *Aggregate* limits on *total* annual quasi campaign finance donations could potentially stop this sort of circumvention. See *generally* *McCutcheon v. FEC*, 572 U.S. 185 (2014) (plurality opinion) (discussing the aggregate limits on contributions to candidates for federal office).

unavailable to candidates. They cannot convert from a single seeker of office into many.³¹⁵ Caps on their receipts thus have more bite because human beings, unlike artificial entities, are incapable of at-will proliferation.

Second, there are probably more substitutes for nonelectoral than for electoral funding. If contribution or expenditure limits were enacted for quasi campaign finance, payors could simply switch to a number of alternative activities: lobbying officeholders directly, underwriting the work of think tanks or university centers, subsidizing journalistic coverage, and so on. All of these activities are also instruments for pursuing policy goals.³¹⁶ On the other hand, at least before *Citizens United*, laws and norms blocked those wishing to influence elections from fully deploying their resources to this end. Laws capped their contributions to candidates, parties, and PACs. And norms restrained them from spending much money directly or from creating vehicles like super PACs that could make unlimited expenditures.³¹⁷ For several decades, the dike against excessive electoral funding thus held, even though in theory it could have been breached the whole time.

A final strike against contribution or expenditure limits on quasi campaign finance is their sheer novelty. There is no modern American tradition of restricting nonelectoral, yet still political, speech. To the contrary, the Court has a consistent record of striking down such constraints.³¹⁸ Accordingly, even if they were permissible, ceilings on quasi campaign finance would likely seem odd and discomfiting to many observers. They would be a new feature on the legal landscape, and one unlike the terrain's current profile.

315. *See id.* at 201–02 (describing the FEC regulations that prevent candidates from benefiting from single-candidate committees or from funds given to other entities but earmarked for them). Federal law also “prohibit[s] donors from creating or controlling multiple affiliated political committees,” thus blocking the spread of PACs to some degree. *Id.* at 201 (emphasis added) (citing 2 U.S.C. § 441a(a)(5) (2012); 11 C.F.R. § 100.5(g)(4) (2012)). An equivalent anti-proliferation rule could be imagined for groups engaging in quasi campaign finance.

316. The ready availability of these activities, of course, is what gives force to the slippery-slope objection to regulating quasi campaign finance. *See supra* Parts II.B–C.

317. *See, e.g.*, Adam Bonica, Nolan McCarty, Keith T. Poole & Howard Rosenthal, *Why Hasn't Democracy Slowed Rising Inequality?*, 27 J. ECON. PERSP. 103, 112 (2013) (showing the lower (though still rising) share of campaign funding by the wealthy prior to *Citizens United*).

318. *See supra* notes 185–87 and accompanying text; *see also, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 369 (2010) (“Congress has no power to ban lobbying itself.”); Briffault, *Anxiety*, *supra* note 45, at 164 (“[L]imits on lobbying expenditures, like limits on campaign expenditures, would run straight into the First Amendment.”).

B. Floors

Say that ceilings are a bad idea, here, because they do not necessarily change the distribution of nonelectoral spending, they are easy to circumvent, and they are legally unfamiliar. What about floors, by which I mean public subsidies for quasi campaign finance? Such subsidies could be configured in many ways, so to anchor the discussion, I consider only one of them: a voucher program under which each eligible voter would receive a small annual sum (for example, \$100), which could then be spent directly on nonelectoral politics or donated to a group that would deploy it for this purpose. Scholars have long urged this sort of program in the conventional campaign finance context,³¹⁹ and Seattle recently became the first jurisdiction to enact it.³²⁰ I envision the same policy in the quasi campaign finance context—except that no strings would be attached to the vouchers. Eligible voters would not have to do anything to get them, nor groups to be their recipients, beyond using them for quasi campaign finance.³²¹

Vouchers along these lines could reduce the risk of corruption by adding many small nonelectoral spenders to the few big payors who currently predominate. Take the hypothetical Democratic candidate in the congressional district where NextGen America may spend \$1 million to combat climate change.³²² As noted above, this candidate has a considerable incentive to promise quos—official acts, access, influence—in return for this large quid.³²³ But now assume that vouchers are available and will result in an additional \$1 million in quasi campaign finance, paid for by dozens of groups and thousands of voters. In this scenario, the candidate would have less reason to enter

319. See generally, e.g., ACKERMAN & AYRES, *supra* note 26 (proposing a voucher system for electoral donations); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1 (1996) (same). Scholars have also supported public financing in the direct lobbying context. See, e.g., Dorie Apollonio, Bruce E. Cain & Lee Drutman, *Access and Lobbying: Looking Beyond the Corruption Paradigm*, 36 HASTINGS CONST. L.Q. 13, 46 (2008); Brian Galle, *Charities in Politics: A Reappraisal*, 54 WM. & MARY L. REV. 1561 (2013); Gerken & Tausanovitch, *supra* note 223, at 87–90.

320. See *Democracy Voucher Program*, *supra* note 27.

321. In the conventional campaign finance context, voucher programs typically require candidates to agree to a series of conditions in order to qualify for donations. See, e.g., *Democracy Voucher Program—I am a Candidate*, SEATTLE.GOV, <https://www.seattle.gov/democracvoucher/i-am-a-candidate> [<https://perma.cc/SR3C-3B4X>] (noting that, to participate, Seattle candidates must collect a number of qualifying contributions and signatures and abide by spending limits).

322. See *supra* note 253 and accompanying text.

323. See *id.*

into a corrupt transaction with NextGen America. Its potential spending would still be valuable but would no longer carry the same weight after being equaled by the voucher-enabled payments. Nor would the candidate be motivated to make corrupt deals with the holders or recipients of the vouchers. Their individual quids would be too minor to warrant quos.

That this regime could limit distortion is even clearer. In a setting where NextGen America is the only major spender on nonelectoral politics, its environmental message might skew public opinion, in the sense of shifting it from what it would have been absent the spending. But if NextGen America's advocacy were supplemented by many more voices—some sympathetic, others hostile, and still others advancing unrelated positions—people's views would likely be more resistant to change. Public opinion would then be shaped by an array of perspectives, not pushed inexorably in the same direction by a single actor.

Quasi campaign finance vouchers could improve alignment as well. When NextGen America is the main nonelectoral spender, politicians may feel pressure to back its preferred policies. If these policies are more liberal than most voters would like, then a gap may emerge between the electorate's views and representatives' positions. But if quasi campaign finance were paid for by groups and voters across the ideological spectrum, then politicians' calculations might be quite different. In that case, they might stop parroting NextGen America's stances and start reflecting the attitudes, now backed by the vouchers, of the general public.

A common objection to all public financing proposals is cost. There are more than 200 million eligible voters in the United States,³²⁴ so if 10 percent of them (likely a generous estimate³²⁵) were to use a \$100 voucher each year, the program's annual price tag would be around \$2 billion. This is real money, though still a pittance in the

324. See *Voting and Registration in the Election of November 2018, Table 1: Reported Voting and Registration, by Sex and Single Years of Age: November 2018*, U.S. CENSUS BUREAU (Apr. 23, 2019), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-583.html> [<https://perma.cc/MD5K-9EM5>] (reporting almost 229 million American citizens over the age of eighteen).

325. In Seattle, only 3.3 percent of residents used their vouchers in the 2017 election. See Sarah Kliff, *Seattle's Radical Plan To Fight Big Money in Politics*, VOX (Nov. 5, 2018), <https://www.vox.com/2018/11/5/17058970/seattle-democracy-vouchers> [<https://perma.cc/3CFE-H6DJ>]. A low voucher use rate raises the issue of representativeness: voucher users might be different (older, whiter, wealthier) than eligible voters, in which case vouchers might be less effective at preventing distortion and misalignment.

context of a federal budget now approaching \$4.5 *trillion*.³²⁶ Also recall that the best estimate of the existing volume of quasi campaign finance is about \$1 billion per year.³²⁷ This means that, at the price of a tiny fraction of the federal budget, public financing of nonelectoral politics could roughly double its private financing. Public funds could thus drown out private funds in this area—and, with them, the democratic harms they sometimes cause.

Quasi campaign finance vouchers might also raise First Amendment hackles because they would subsidize some speech (nonelectoral, yet still political, communication) but not other speech (electoral messages, non-political messages, and so on).³²⁸ But this differentiation would not be on the basis of viewpoint. No policy perspectives would be endorsed or disapproved. In this circumstance, the Court has long held that speech subsidies are “consistent with the First Amendment” because they “respect[] the principle of viewpoint neutrality.”³²⁹ For precisely this reason, in the 1983 case of *Regan v. Taxation with Representation*, the Court upheld the federal law deeming contributions tax-deductible if they are made to 501(c)(3) groups but not if they are made to other nonprofit groups.³³⁰ This tax deductibility is a selective subsidy, but no constitutional problem arises when “Congress subsidizes some speech, but not all speech” without “discriminat[ing] invidiously in its subsidies.”³³¹

Lastly, to be viable, quasi campaign finance vouchers would have to work out some tricky definitional issues. If an eligible voter decides to spend (not to donate) her voucher, on which activities may she use the money? Similarly, what may (and may not) a recipient group do

326. See *The Federal Budget in 2019: An Infographic*, CONG. BUDGET OFF. (Apr. 2020), <https://www.cbo.gov/publication/56324> [<https://perma.cc/VK5P-G8VG>].

327. See *supra* Part I.D.

328. Another, more radical argument might be that vouchers violate the First Amendment because they force taxpayers to pay for political speech they do not support. Cf. *Janus v. Am. Fed’n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2459–60 (2018) (striking down arrangements under which “public employees are forced to subsidize a union, even if they . . . strongly object to the positions the union takes”). But see *Elster v. City of Seattle*, 444 P.3d 590, 592 (Wash. 2019) (rejecting this argument and upholding Seattle’s voucher program).

329. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 234 (2000); see also, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995) (“[R]eaffirm[ing] the requirement of viewpoint neutrality in the Government’s provision of financial benefits.”).

330. *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983).

331. *Id.* at 548; see also *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (upholding the “[n]ondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation”).

with its funds?³³² And what happens if a recipient group pays for electoral, nonelectoral, *and* nonpolitical communications? Does the group have to segregate its quasi campaign finance from the rest of its budget so that the vouchers flow only into the former? These issues are too fine-grained to explore here. But it is not obvious how to address them, and their proper resolution would plainly take time and care.

C. Transparency

Disclosure is the final regulation of quasi campaign finance I discuss. As with public subsidies, several measures could be devised to compel the release of information about nonelectoral, yet still political, spending.³³³ But in the interest of brevity, I comment on only one proposal: extending BCRA's disclosure requirements for electioneering communication to quasi campaign finance. BCRA mandates that *sources* of electioneering communication identify themselves: “[e]very person who makes a disbursement . . . in an aggregate amount in excess of \$10,000 during any calendar year.”³³⁴ The statute further directs the *quantities* of electioneering communication to be made public: “[t]he amount of each disbursement of more than \$200.”³³⁵ The law instructs as well that the *uses* of electioneering communication be revealed: “[t]he elections to which the [disbursements] pertain and the names . . . of the candidates identified.”³³⁶

I have in mind analogous disclosure requirements for quasi campaign finance. Actors who annually spend more than a certain total figure—whether they are individuals, corporations, unions, nonprofit

332. A related issue is that some charities currently use most of their budgets to pay for fundraising rather than programs or services. *See, e.g., 10 Charities Overpaying Their For-Profit Fundraisers*, CHARITY NAVIGATOR, <https://www.charitynavigator.org/index.cfm?bay=topten.detail&listid=28> [<https://perma.cc/X5ED-8KHT>]. So would groups remain eligible for quasi campaign finance vouchers if they spent most of their proceeds on soliciting still more vouchers?

333. Another possibility is requiring disclaimers for nonelectoral, yet still political, communications identifying the messages' funders. *Cf.* 52 U.S.C. § 30120(d)(2) (2018) (providing for such disclaimers for electioneering communication); *Citizens United v. FEC*, 558 U.S. 310, 366–71 (2010) (upholding these disclaimers). Still another idea is applying the disclosure requirement for grassroots lobbying to all taxpayers, not only 501(c)(3) groups that engage in lobbying. *See United States v. Harriss*, 347 U.S. 612, 620 (1954) (interpreting a lobbying statute to require disclosure of not only “direct pressures” but also those exerted “through an artificially stimulated letter campaign”); Briffault, *Anxiety*, *supra* note 45, at 187 (observing that “most state lobbying disclosure laws do cover some grassroots lobbying activity”).

334. 52 U.S.C. § 30104(f)(1).

335. *Id.* § 30104(f)(2)(C).

336. *Id.* § 30104(f)(2)(D).

groups, or other entities—would thus have to file reports with the government. These reports would list the amounts of nonelectoral, yet still political, disbursements. The reports would also specify the topics and modes of the outlays: the policy areas they involve and the means of communication for which they pay. A sample AFP entry, for instance, might state that the organization spent some sum on door-to-door canvassing in a state in opposition to that state’s Medicaid expansion.³³⁷

An obvious benefit of such disclosure is the prevention of corruption. As explained earlier, quasi campaign finance has at least some value for candidates.³³⁸ They may therefore be willing to trade official acts, access, or influence for the spending. At present, if such corrupt exchanges are consummated, no one necessarily knows about them. The quid does not have to be revealed, making it difficult to find out if it has been swapped for a quo. But if quasi campaign finance had to be disclosed, a spotlight would shine on nonelectoral, yet still political, disbursements. In the face of this publicity, both candidates and spenders would be less likely to make corrupt deals. They could not be as sure as before that their arrangements would stay secret. As the Court observed in *Buckley*, where it upheld FECA’s disclosure requirements, “exposure may discourage those who would use money for improper purposes.”³³⁹ “A public armed with information . . . is better able to detect any . . . special favors that may be given in return.”³⁴⁰

A subtler effect of disclosure could be to promote greater communicative symmetry—and thus to curb corruption, distortion, and misalignment in a single stroke. If one actor currently outspends

337. For a similar proposal, focusing on “disclosure of all donors to social welfare organizations that engage in political activity,” see Roger Colinvaux, *Social Welfare and Political Organizations: Ending the Plague of Inconsistency*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 481, 501 (2018).

338. See *supra* Part II.B.3.

339. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam).

340. *Id.*; see also, e.g., *Citizens United v. FEC*, 558 U.S. 310, 370 (2010) (noting that, thanks to disclosure, “citizens can see whether elected officials are in the pocket of so-called moneyed interests” (internal quotation marks omitted)); *McConnell v. FEC*, 540 U.S. 93, 196 (2003) (holding that disclosure requirements “deter[] actual corruption and avoid[] any appearance thereof”), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010). That said, I agree with other scholars that “disclosure is not a strong anticorruption tool” because it merely “shed[s] a light” on potentially corrupt transactions rather than directly stopping them. Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557, 567 (2012) [hereinafter Hasen, *Chill Out*] (citing Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 Election L.J. 273, 287 (2010)).

all other parties on quasi campaign finance, the other parties may not be aware of the imbalance. They may guess at, but they cannot be sure of, the volume of the first actor's advertisements, rallies, door knocks, and so on. Oblivious to the extent to which they are outgunned, the other parties may fail to deploy all the resources at their disposal. They may not realize these assets are necessary in the debate.

But if the other parties *knew* they were being outspent—thanks to disclosure—they could respond more forcefully. In Professor Anita Krishnakumar's words, "greater transparency . . . could lead to more balanced political participation by interests on both sides of an issue, as opposing groups seek to match or 'check' each other's efforts in true Madisonian fashion."³⁴¹ And if the communicative environment did become more symmetric, then for the reasons discussed above, fears about corruption, distortion, and misalignment might all recede.³⁴² Quids with value for candidates would no longer be clustered in a single policy camp. Pressure on public opinion would be exerted in both directions. And officeholders would have dueling incentives after battle was joined, with both combatants (not just one side) inducing them to take certain stances.

The constitutionality of disclosure, furthermore, is reasonably clear. In *Buckley*, the Court upheld FECA's requirements that campaign contributions and express electoral advocacy be made public.³⁴³ The Court also rebuffed First Amendment challenges to BCRA's requirements that electioneering communication be accompanied by disclaimers and then summarized in reports—twice, in both *McConnell*³⁴⁴ and *Citizens United*.³⁴⁵ The same result would probably follow for the disclosure of quasi campaign finance. Such disclosure, like that of ordinary campaign finance, would impose some

341. Krishnakumar, *supra* note 45, at 517; *see also* Lloyd Hitoshi Mayer, *What Is This "Lobbying" That We Are So Worried About?*, 26 YALE L. & POL'Y REV. 485, 559 (2008) ("[D]isclosure will better inform competing interest groups about these activities, and so lead to greater and more equally matched interest group competition.").

342. *See supra* Parts III.A–B.

343. *See Buckley*, 424 U.S. at 60–84.

344. *See McConnell*, 540 U.S. at 194–202.

345. *See Citizens United*, 558 U.S. at 366–71. The Court has also held that "[i]dentification of the source of advertising may be required as a means of disclosure" even in direct democratic elections not including candidates. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792 n.32 (1978). The Court has further approved the disclosure of "information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose." *United States v. Harriss*, 347 U.S. 612, 625 (1954).

burden on speech and association rights.³⁴⁶ But this burden would be justified by the compelling interests served by the policy: informing the public about who is spending money on nonelectoral politics, and combating corruption, distortion, and misalignment.³⁴⁷

A proviso is that, in its cases about the disclosure of regular campaign finance, the Court has held that *particular* plaintiffs may succeed in as-applied suits if they show a heightened risk of “harassment or retaliation.”³⁴⁸ The same exception would likely apply in the quasi campaign finance context. So, if there were evidence that a specific spender on nonelectoral politics would face reprisals if her activity were made public, this spender might be able to keep her disbursements confidential. However, this loophole has been a minor one historically under FECA and BCRA,³⁴⁹ and its infrequent usage would presumably persist here. Most payors of quasi campaign finance simply would not be able to link the disclosure of their outlays to significant adverse consequences.

CONCLUSION

In the legal academy, the study of money and power continues to focus, as it has for generations, on conventional campaign finance. Out in the world, though, America’s richest and most politically active individuals—the Koch brothers, Steyer, Bloomberg, and the like—are increasingly turning to another tool to influence the political process:

346. See, e.g., *Citizens United*, 558 U.S. at 366 (observing that “[d]isclaimer and disclosure requirements may burden the ability to speak”).

347. Other scholars have also noted the possibility of more aggressive disclosure requirements. See Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683, 702–03 (2012) (“[T]here is a good argument that even broader definitions of . . . speech [to be disclosed] than BCRA’s ‘electioneering communication’ are constitutional.”); Richard L. Hasen, *The Surprisingly Easy Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 3 ELECTION L.J. 251, 257 (2004) (“If [BCRA’s] disclosure requirement is constitutional, why not a disclosure requirement in ballot measure elections?”).

348. *Buckley*, 424 U.S. at 68; see also, e.g., *Citizens United*, 558 U.S. at 367, 370; *McConnell*, 540 U.S. at 198–99. Also, as throughout this Part, I assume that quasi and regular campaign finance have the same legal status. If quasi campaign finance were treated as generic political speech, then its mandatory disclosure would be more dubious. See *supra* note 186 and accompanying text.

349. All such as-applied claims failed in *Buckley*, *McConnell*, and *Citizens United*. They only succeeded in *Brown v. Socialist Workers ‘74 Campaign Committee*, 459 U.S. 87, 100 (1982), where the Socialist Workers Party established a “reasonable probability” of “threats, harassment, and reprisals” due to the disclosure required by an Ohio law. See also Hasen, *Chill Out*, *supra* note 340, at 563 (summarizing the literature showing that “evidence of harassment of campaign finance contributors and spenders these days is sparse indeed”).

quasi campaign finance, the funding of *nonelectoral* communications with voters that nevertheless rely on an electoral mechanism to be effective. In this Article, I have described the little that is known about quasi campaign finance, much of which is hidden from public scrutiny. I have also weighed the arguments for and against treating quasi and ordinary campaign finance identically for First Amendment purposes. In my view, the legal status of quasi campaign finance is one of the most challenging issues in constitutional law. And I have evaluated several ways in which quasi campaign finance could be regulated (assuming it is, in fact, regulable). Ceilings on the activity seem unwise to me, but public subsidies and disclosure both promise substantial democratic benefits at little First Amendment cost.

I want to close the Article with a call, familiar in these settings, for additional academic research. The narrower objective of this future work should be to further analyze quasi campaign finance: to learn more about its empirical properties, to probe its legal status more deeply, and to consider in more detail how it could be regulated. The broader aim of the literature, though, should be to remember that American politics is a vast, sprawling edifice, which affluent actors seek to penetrate using every technique they can think of. Regular campaign finance is one of these modes of entry. So is quasi campaign finance. But there are many more ways in which wealth tries to sway governmental policy, and scholars should examine them all. This relationship between money and power is the field's true subject, of which quasi and conventional campaign finance are merely facets.