

ANTI-REGULATORY ABSOLUTISM IN THE CAMPAIGN ARENA: *CITIZENS UNITED* AND THE IMPLIED SLIPPERY SLOPE

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INTRODUCTION

Few constitutional rules are absolute. Even the most emphatic prohibitions typically are restricted in scope or riddled with exceptions. The Establishment Clause decrees that government may “make no law respecting an establishment of religion,” yet permits governments to display overtly religious symbols in public squares.¹ The Free Speech Clause squarely forbids abridgment of the freedom of speech, yet permits official suppression of speech that incites lawlessness,² provokes retali-

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¹ See *Lynch v. Donnelly*, 465 U.S. 668, 674–87 (1984).

² See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

tion,³ or disturbs private peace and tranquility.⁴ The Takings Clause decrees that private property shall not be taken without just compensation, yet such property may be subjected to regulatory burdens that substantially lower its economic value without triggering the compensation requirement.⁵ No doubt even the newly recognized personal right to bear arms⁶ soon will be found subject to numerous restrictions and limitations.

Yet there is one corner of constitutional law where “no” means “no.” In the field of campaign speech, and in the closely allied area of campaign spending, the Supreme Court has construed the Constitution to permit essentially no government regulation at all. For more than thirty years, the Court has aggressively defended a constitutional policy creating a zone of virtually complete freedom from government-imposed limitations of either speech or spending undertaken with the aim of influencing elections. In *Citizens United v. FEC*,⁷ decided last term, the Court went even further, revoking one of the very few forms of government authority to regulate campaign spending that the Court had previously held permissible. Thus, during the very period when the Court has steadily expanded loopholes and workarounds to permit government regulation in other areas of seemingly strict constitutional prohibition, it has moved to tighten a constitutional regime of already unparalleled stringency.

A great deal has been written about the Court’s jurisprudence of campaign spending, much of it critical.⁸ Not unexpectedly, the Court’s decision in *Citizens United* was subjected immediately to severe criticism from regulators, academics, journalists, and citizens.⁹ Many politi-

³ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

⁴ See *Kovacs v. Cooper*, 336 U.S. 77, 85–86 (1949).

⁵ See *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 133–38 (1978).

⁶ See *District of Columbia v. Heller*, 554 U.S. 570, 591–95 (2008); *McDonald v. Chicago*, 130 S. Ct. 3020, 3022–24 (2010).

⁷ 130 S. Ct. 876 (2010).

⁸ See, e.g., FRANK J. SORAUF, *MONEY IN AMERICAN ELECTIONS* (1988); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369 (1994); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

⁹ See, e.g., Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. OF BOOKS, May 13, 2010, available at <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy>; Editorial, *The Court’s Blow to Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30; Richard L. Hasen, *Money Grubbers: The Supreme Court Kills Campaign Finance Reform*, SLATE, (Jan. 21, 2010, 12:58 PM), <http://www.slate.com/id/2242209>; Timm Herdt, *High Court Embraces the Worst of State Politics*, VCSTAR.COM (Jan. 26, 2010, 6:29 PM), <http://www.vcstar.com/news/2010/jan/26/high-court-embraces-the-worst-of-state-politics>; David Kairys, *Money Isn’t Speech and Corporations Aren’t People: The Misguided Theories Behind the Supreme Court’s Ruling on Campaign Finance Reform*, SLATE (Jan. 22, 2010, 6:03 PM), <http://www.slate.com/id/2242210>; Lawrence H. Tribe, *What Should Congress Do*

cians enthusiastically joined in, all the way up to the President of the United States, who expressly rebuked the Supreme Court during his State of the Union Address.¹⁰

So much has been written criticizing the Court's campaign finance jurisprudence generally, and its decision in *Citizens United* specifically, that there is little point in piling on. Instead, what I propose to do here is to examine an aspect of the Court's approach to campaign finance regulation that has not gotten a great deal of attention, something that might be termed the Court's "positioning" in this area of law. The range of potential judicial reactions to government regulation in areas of constitutionally protected individual right might be conceived as lying along a spectrum. At one end lies more or less complete opposition to regulatory intervention. At the other end lies more or less complete acceptance of regulatory action. In between lie a great many possible centrist positions in which some but not all regulation is approached with some but not complete skepticism. In this territory, some forms of regulation, or some topics of regulatory interest, or some degree of regulatory intrusion, might be permissible while others are not.

What is striking about the Court's approach in campaign spending cases is that it has staked out the most extreme position available to it by adopting a kind of anti-regulatory absolutism that bars any and all regulation—not just presumptively, as is common in the case of many individual rights,¹¹ but in actual practice. This raises an interesting question, not so much about the specific shape of legal doctrine, but about the Court's general approach to this particular field of constitutional law. It is strict and rigid. It eschews nuance. It is highly unusual in the annals of constitutional law. The question I propose to explore here is: Why this approach? Why not something even a little bit more moderate? On what set of assumptions might it seem appropriate to the Court to permit not even the slightest legislative restriction of campaign spending?

About Citizens United?, SCOTUSBLOG (Jan. 24, 2010, 10:30 PM), <http://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united>; *The Daily Show: Supreme Corp* (COMEDY CENTRAL television broadcast Jan. 25, 2010), available at <http://www.thedailyshow.com/watch/mon-January-25-2010/supreme-corp>.

¹⁰ Barack Obama, State of the Union Address (Jan. 27, 2010), available at http://abcnews.go.com/Politics/State_of_the_Union/state-of-the-union-2010-president-obama-speech-transcript/story?id=9678572.

¹¹ That is to say, the effect of applying strict scrutiny—the most rights-protective standard available for application to laws that infringe constitutionally protected individual liberties—is to create a very strong, though in principle not insurmountable, presumption against the constitutionality of such laws. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 (2006) (demonstrating empirically that strictly scrutinized laws survive review in some thirty percent of all cases). What is distinctive about the Court's use of strict scrutiny in the campaign arena is that the presumption it erects seems, in this field of constitutional law, all but irrefutable.

I argue that the Court's behavior is consistent with—and is best understood as—the kind of behavior in which a court engages when it fears a slide down a slippery slope. In these circumstances, a court typically believes that the law so completely reviles some particular state of affairs that the court's job is not only to prevent the attainment of that precise state of affairs, but also to prevent any and all actions that might subsequently turn out to facilitate movement toward the disfavored outcome.

To the extent that the Supreme Court's anti-regulatory absolutism in the campaign spending arena results from its fear of facilitating—or precipitating—a slide down a dangerous slippery slope, then two useful questions, routine in any examination of the logic of slippery slopeism, become pertinent. First, what is at the bottom of the slope? What is it, exactly, that the Court so thoroughly fears? Second, how reasonable is the belief that any movement at all down the slope will result in an irreversible slide directly into the feared ultimate outcome?

The balance of this Article is organized as follows. Part I offers a very brief review of the Court's treatment of restrictions on campaign speech and spending, showing the trend toward anti-regulatory absolutism. Part II makes the case for viewing the Court's stance as reflecting an underlying fear of a slippery slope. Part III attempts to identify the monster at the bottom of the slope. This is more difficult than it seems because the Court has been extremely vague about what exactly is threatened by government regulation of campaign speech and spending. I explore several possible formulations of the relevant danger and conclude that all of them involve to some degree a fear of the loss of democratic self-rule, especially a fear that incumbents will use government power to entrench themselves in office, resulting in a catastrophic and possibly irremediable loss of popular sovereignty.

Finally, Part IV scrutinizes the absolutist position more closely by examining several possible mechanisms by which regulation might lead down the slippery slope to political slavery. Because slippery slope arguments nearly always rest on speculative empirical premises, they rarely can be rebutted in any formal sense. Nevertheless, slippery slope arguments can be more or less plausible, and I argue ultimately that none of the possible relevant formulations is sufficiently plausible to justify the Court's absolutist stance against regulation of campaign spending.

I. THE RISE OF ANTI-REGULATORY ABSOLUTISM

For much of American history, government regulation of the electoral process concerned itself mainly with two tasks: determining who is eligible to vote, and enacting administrative rules governing the casting

and counting of ballots.¹² Campaigns themselves were completely unregulated.¹³ During the late nineteenth and early twentieth centuries, states and the federal government began to take a regulatory interest in the campaign phase of the electoral process. Initially, these laws aimed at imposing modest limits on the role of money in politics, mainly by restricting the ability of corporations to contribute money to candidates for office.¹⁴ By the mid-twentieth century, many states had enacted much more far-reaching fair-campaign codes that attempted to elevate the tone and tactics of campaigns by requiring candidates to adhere to ethical rules of honesty and fair behavior in their campaign statements and actions.¹⁵

When cases challenging the constitutionality of government regulation of campaign activities began to reach the Court, its initial reaction was pragmatic and, consistent with its post-*Lochner* approach to constitutional constraints on government regulatory authority, largely deferential to exercises of governmental power. In a significant ruling in *United Public Workers v. Mitchell*,¹⁶ the Court upheld federal civil service rules that severely restricted participation in political campaigns by federal workers. In *United States v. CIO*,¹⁷ the Court deflected a constitutional challenge to a federal prohibition on union participation in political campaigns by giving a narrow construction to the challenged statute. Later, in *United States v. UAW*,¹⁸ the Court apparently felt sufficiently confident about the constitutionality of government limitations on corporate and union campaign expenditures to interpret a provision of the Federal Corrupt Practices Act broadly enough to permit criminal prosecution of a union official for using union funds to purchase political television advertisements. In the course of its opinion, the Court gave a lengthy and sympathetic account of the history of congressional efforts to “purge national politics of what was conceived to be the pernicious influence of ‘big money’ campaign contributions.”¹⁹

¹² ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 28–33, 127–29 (2000).

¹³ Even the election phase was unregulated often to the point of near-chaos. See generally RICHARD FRANKLIN BENSEL, *THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY* (2004).

¹⁴ See, e.g., Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441(b) (2006)) (prohibiting campaign contributions by corporations).

¹⁵ See James A. Albert, *The Remedies Available to Candidates Who Are Defamed by Television or Radio Commercials or Opponents*, 11 VT. L. REV. 33, 57–59 (1986); Terri R. Day, “Nasty as They Wanna Be” Politics: Campaigning and the First Amendment, 35 OHIO N.U. L. REV. 647, 658–60 (2009); *Developments in the Law—Election Law*, 88 HARV. L. REV. 1111, 1233–98 (1975).

¹⁶ 330 U.S. 75, 103 (1947).

¹⁷ 335 U.S. 106, 120–24 (1948).

¹⁸ 352 U.S. 567, 590–93 (1957).

¹⁹ *Id.* at 572.

Within a decade, however, the Court's approach to government restrictions on campaign speech and finance changed dramatically. The present era was ushered in by the Court's 1964 decision in *New York Times Co. v. Sullivan*, a case in which the Court took a sharply critical view of content-based limitations on speech of a political cast.²⁰ Holding that the First Amendment decreed a regime of politics in which debate is "uninhibited, robust, and wide-open,"²¹ the Court held that a state could not constitutionally punish speech criticizing a public official not only if the criticism were true, but even if it were false so long as the falsity was negligent rather than deliberate or reckless.²²

Although *Sullivan* did not itself apply to speech made during a campaign, its holding established an extremely strong default rule against government restriction of speech with a political valence, and the Court almost immediately proceeded to extend the *Sullivan* approach to laws purporting to regulate what candidates for elective office, voters, and other political actors might say or do during the formal campaign phase of the electoral process. In *Mills v. Alabama*,²³ for example, the Court struck down a state law prohibiting newspapers from publishing editorial endorsements on election day, a law that had been enacted for the purpose of ensuring candidates some ability to reply effectively to last-minute false or misleading statements by their opponents.²⁴ In 1971, the Court decided *Monitor Patriot Co. v. Roy*,²⁵ in which it explicitly extended *Sullivan*'s protection for criticism of sitting public officials to criticism of candidates for office.²⁶ In 1974, the Court decided in *Miami Herald v. Tornillo*²⁷ that newspapers could not be forced by law to provide candidates space in which to reply to critical speech appearing in the newspaper.²⁸

The Court's hostility toward regulation of campaign behavior intensified in its 1976 decision in *Buckley v. Valeo*,²⁹ when it expanded its approach to embrace not only campaign speech, but campaign finance, which it treated as constitutionally equivalent to campaign speech.³⁰ In

²⁰ 376 U.S. 254 (1964) (invalidating a state libel law as applied to a newspaper that published a politically tinged advertisement criticizing a local public official).

²¹ *Id.* at 270.

²² *Id.* at 283–88.

²³ 384 U.S. 214 (1966).

²⁴ *See id.* at 218–20.

²⁵ 401 U.S. 265 (1971).

²⁶ *See id.* at 277.

²⁷ 418 U.S. 241 (1974).

²⁸ *See id.* at 257–58. The Court did reach a more pragmatic result in *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969), which upheld a federal regulation imposing such a right of reply on television broadcasters. The Court's reasoning relied heavily on its view of the broadcast spectrum as a scarce public resource. *Id.* at 389–90.

²⁹ 424 U.S. 1 (1976) (per curiam).

³⁰ *See id.* at 45–59.

Buckley, the Court invalidated key portions of a comprehensive federal law intended to limit the spending of money during campaigns for federal office.³¹ Although the Court upheld limitations on direct contributions to candidates by individuals and organizations, it invalidated as “wholly foreign to the First Amendment” restrictions on how much money individuals, groups, and candidates could spend on speech for or against candidates or on the discussion of issues relevant to the campaign.³²

Buckley went much further than prior cases toward construing the Constitution to require that campaigns for political office be conducted virtually free from government control, and its impact has been substantial. In the more than thirty years since it decided *Buckley*, the Court has gone on to invalidate virtually every restriction on campaign speech or spending that has come before it. It has, for example, struck down laws prohibiting corporate expenditures³³ and individual contributions³⁴ in connection with referendum measures, limiting independent spending in favor of presidential candidates who opt to receive federal matching funds,³⁵ requiring certain non-profit advocacy organizations to pay for political spending out of a dedicated political fund,³⁶ banning editorializing by public broadcast stations receiving federal funds,³⁷ prohibiting anonymous campaign speech,³⁸ proscribing certain corporate expenditures on issue advertisements,³⁹ and relaxing contribution limitations for opponents of wealthy candidates who finance their own campaigns.⁴⁰

Over the course of more than three decades there have been, to be sure, a few small, pragmatic deviations from this general trend. For example, the Court in *Austin v. Michigan Chamber of Commerce*⁴¹ upheld a state law prohibiting corporations from making independent campaign expenditures out of general treasury funds,⁴² and in *McConnell v. FEC*⁴³ it rejected facial challenges to provisions of the Bipartisan Campaign Reform Act (BCRA) prohibiting parties and candidates for federal office from spending on electoral activities funds that had been raised by the parties for other purposes, and prohibiting corporations and unions from

³¹ See *id.* at 50.

³² *Id.* at 49.

³³ See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978).

³⁴ See *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981).

³⁵ See *FEC v. Nat'l Conservative PAC*, 470 U.S. 480 (1985).

³⁶ See *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

³⁷ See *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

³⁸ See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1994).

³⁹ See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

⁴⁰ See *Davis v. FEC*, 128 S. Ct. 2759 (2008).

⁴¹ 494 U.S. 652 (1990).

⁴² See *id.* at 666.

⁴³ 540 U.S. 93 (2003).

spending money out of general treasury funds on political advertisements during a sixty-day period preceding the general election.⁴⁴

These deviations proved ephemeral. Soon after its ruling in *McConnell*, the Court watered down its holding on corporate and union spending by approving an as-applied challenge to the very provision of BCRA it had recently upheld.⁴⁵ In its most recent decision, *Citizens United*, the Court reversed key aspects of its decisions in *McConnell* and *Austin*, thereby depriving governments of any authority to limit campaign spending by corporations and unions. After this decision, no government-imposed limitations on campaign spending whatsoever are constitutional whether applied to individuals, groups, candidates, corporations, or any other kind of organization.

Lower federal courts have clearly understood the Supreme Court's campaign jurisprudence to erect a virtually absolute prohibition on government regulation, and in consequence have routinely invalidated all manner of regulations limiting campaign speech and spending, regardless of the proffered justification. For example, lower courts have invalidated state laws prohibiting false or misleading speech during campaigns;⁴⁶ authorizing a state elections board to censure a candidate for using negative campaigning tactics;⁴⁷ limiting the release of exit poll data while voting is still ongoing;⁴⁸ requiring newspapers to charge affordable rates to candidates for office placing campaign advertisements;⁴⁹ and prohibiting contributions to candidates by government contractors⁵⁰ and lobbyists.⁵¹

In sum, then, the Supreme Court has adopted and for more than three decades has maintained a jurisprudence of campaign speech and spending so strict as to preclude virtually any government regulation at

⁴⁴ See *id.* at 178. The Court has, however, followed *Buckley's* somewhat more deferential approach to regulation of campaign contributions, and it has generally continued to uphold reasonable restrictions on contributions as adequately justified by the risk of quid pro quo corruption. See *FEC v. Beaumont*, 539 U.S. 146 (2003); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (both upholding limitations on campaign contributions).

⁴⁵ See *Wis. Right to Life*, 551 U.S. at 456.

⁴⁶ See, e.g., *Pestak v. Ohio Elections Comm'n*, 926 F.2d 573 (6th Cir. 1991); *Vanasco v. Schwartz*, 401 F. Supp. 87 (E.D.N.Y. 1975); *Rickert v. Pub. Disclosure Comm'n*, 168 P.3d 826 (Wash. 2007). For a general discussion, see William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285 (2004).

⁴⁷ See *Ancheta v. Watada*, 135 F. Supp. 26 1114 (D. Haw. 2001).

⁴⁸ See *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988).

⁴⁹ *Gore Newspapers Co. v. Shevin*, 397 F. Supp. 1253 (S.D. Fla. 1975), *aff'd*, 550 F.2d 1057 (5th Cir. 1977).

⁵⁰ *Dallman v. Ritter*, 225 P.3d 610 (Colo. 2010).

⁵¹ *Inst. of Governmental Advocates v. Fair Political Practices Comm'n*, 164 F. Supp. 2d 1183 (E.D. Cal. 2001); *Fair Political Practices Comm'n v. Superior Court*, 599 P.2d 46 (Cal. 1979).

all, and its commitment to an absolutist stance has noticeably increased as the approach of the Roberts Court has begun to emerge and solidify.⁵²

II. ABSOLUTISM AND THE FEAR OF SLIPPERY SLOPES

The Court's absolutist stance would be easy enough to understand if there were simply no good justification whatsoever for regulating campaign spending in even the slightest degree. Yet the public has long supported restrictions on campaign spending—recent polls show that between about 55 and 80 percent disapproved of the Court's ruling in *Citizens United*⁵³—and over the years advocates of regulation have advanced numerous, and in many cases powerful, justifications for permitting some sort of government intervention in what would otherwise be a laissez-faire campaign arena.

Regulation of campaign spending initially was justified at the beginning of the twentieth century by a naked fear of corporate dominance of politics. The ability of corporations to accumulate immense wealth, reformers believed, permitted large corporations to bribe or otherwise control candidates for office, and through political spending to orchestrate electoral results, thereby undermining the proper operation of democratic processes.⁵⁴ By the time Congress enacted the Federal Election Campaign Act in 1971, the panoply of justifications had grown. The corrupting potential of large donations, whether from corporations or rich individuals, still was a source of great concern,⁵⁵ as was the ability of

⁵² It has been suggested to me by more than one person that my description of the Court's position as absolutist is undermined to some degree by its approval of disclosure as an alternative to suppression. I cannot agree. First, the burden of regulatory disclosure regimes falls mainly on contributions, not expenditures, and the Court has been a good deal more generous toward contribution restrictions. *Buckley v. Valeo*, 424 U.S. 1, 20–26 (1976). Second, to the extent the Court has addressed disclosure of expenditures, it has been distinctly hostile. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1994). Finally, even if the Court were to embrace disclosure of campaign spending as a second-best alternative to direct restrictions, any burden on spending that disclosure might impose cannot be compared to the burden of outright limitation. Consequently, I think it is entirely fair to call the Court's position regarding limitation of campaign speech and spending "absolutist"—especially in comparison to its approach to other constitutionally guaranteed rights.

⁵³ Poll results cited in Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 620 n.258 (2011).

⁵⁴ The conventional story is compactly told in Justice Frankfurter's opinion for the Court in *United States v. UAW*, 352 U.S. 567 (1957). Recently, Winkler has shown that another concern also played a very important role—Winkler claims the dominant role—in justifying regulatory reform: the belief that corporate resources belong to shareholders, and that using them for non-economic purposes constitutes an abuse of a relationship of trust. Adam Winkler, "Other People's Money": *Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871 (2004) [hereinafter Winkler, *Other People's Money*].

⁵⁵ *Buckley*, 424 U.S. at 25; Richard L. Hasen, *The Nine Lives of Buckley v. Valeo*, in *FIRST AMENDMENT STORIES* (Richard W. Garnett & Andrew Koppelman eds., 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1593253.

wealthy candidates—or those with wealthy supporters—to “buy” office by outspending rivals of more modest means.⁵⁶ But other concerns were raised as well. Legislators worried that the escalating cost of campaigns required incumbent office holders to devote inordinate amounts of time to fundraising, impeding their ability to do the job for which they were elected, to the detriment of the public good.⁵⁷ The increasing cost of campaigns also was thought to create a kind of arms race that drove candidates to make ever greater use of means and tactics of mass communication that were of questionable utility to sound democratic deliberation, thereby lowering the quality of democratic discourse.⁵⁸ The sheer

⁵⁶ See, e.g., H.R. REP. NO. 93-1239, at 3 (1974) (“Under the present law the impression persists that a candidate can buy an election by simply spending large sums in a campaign.”); 120 CONG. REC. 7,897 (1974) (statement of Rep. Biaggi) (“this amendment would encourage more States to join these five thus again restricting the ability of a candidate to buy his way into public office”); *id.* at 7,936 (statement of Rep. Kastenmeier) (“one of the primary purposes of this bill . . . is to limit the ability of any candidate to literally buy an election”); 117 CONG. REC. 26,111 (1971) (statement of Sen. Prouty) (“a candidate should not be able to buy off any election in his behalf. Men and women elected to Federal office must be elected and chosen by their constituency and not by themselves”); *id.* at 29,299 (statement of Sen. Chiles) (“I do not believe the American way is that we should be able to buy an office”); *id.* at 29,321 (statement of Sen. Muskie) (“media spending should be limited so that no candidate can overwhelm his opponent or the electorate with an advertising campaign of monumental cost, and, in effect, buy his way into office It is a waste of resources and a distortion of the democratic process.”); *id.* at 29,323 (statement of Sen. Symington) (“Reasonable limitations must be applied to the expenditures of a candidate so as to prevent any person with unlimited resources from ‘buying’ an election”).

⁵⁷ See Buckley, 424 U.S. at 91; see also Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994); David A. Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 155–58. In *Randall v. Sorrell*, 548 U.S. 230, 249 (2006), Vermont assembled a significant factual record supporting its contention that candidates spend a substantial and unhealthy amount of time raising funds, although the Supreme Court ultimately rejected this as a sufficient justification for limiting campaign expenditures. See Brief of Respondents at 16, *Randall v. Sorrell*, 548 U.S. 230 (2006) (Nos. 04-1528, 04-1530, 04-1697), 2004 U.S. Briefs 1528 at *16–*20.

⁵⁸ See, e.g., 117 CONG. REC. 29,005 (1971) (statement of Sen. Brooke) (“[the proposed measure] would . . . logically bring about a second highly desirable goal—a reduction in spending for media advertising and in the superficial commercialization of candidates that has become much too familiar in American political life”); *id.* at 29,317 (statement of Sen. Hartke) (“In recent years, the promotion of this superficial imagery has been accentuated by candidates of both major parties throughout the Nation. At times it is harmless, but all too often it can be diabolical. Using advertising techniques developed by publicists of detergents, deodorants and automobiles, political candidates have used 30-second and 1-minute advertisements on radio and television to misrepresent facts and create false and baseless impressions about their opponents. . . . No 30-second commercial ever was able to explain how brand X eliminates grease and dirt, and no 30-second commercial will ever be able to allow a political candidate to engage in a rational discussion of a single issue. . . . Today, Americans are rejecting the politics of superficiality. They demand far more than clichés and invective. What they long for is an honest and frank discussion of the issues which concern them and their country.”). To very similar effect, see *id.* at 26,943 (statement of Sen. Stevenson), *id.* at 28,819 (material introduced by Sen. Cotton), *id.* at 29,320 (statement of Sen. Humphrey), *id.* at 29,322 (statement of Sen. Talmadge). The debates contain many other, similar comments. Concern over

cost of mounting an effective campaign was understood simply to preclude many highly qualified and talented individuals from running for office, a loss to the public and, in many cases, to the representativeness of legislatures.⁵⁹

Since the Court's decision in *Buckley* gutting FECA, critics of the Court's approach have developed a host of additional reasons why the Constitution should not be understood to erect an absolute barrier to government regulation of campaign spending. Money, it has been argued, is not speech, and regulating its use should therefore not be evaluated in the same way as the direct regulation of speech.⁶⁰ Special interests may bribe candidates just as easily through large expenditures on their behalf as through large contributions to their war chests.⁶¹ Foundational principles of democratic equality entail a commitment to equality of opportunity to influence politics, a commitment that is subverted when political influence is distributed according to the accident of wealth.⁶² Minimizing the degree to which economic disparities are ramified in politics will increase and broaden political participation in a democratically desirable way.⁶³ The electoral arena is a specialized area of such unique and im-

the use by politicians of techniques of commercial advertising did not arise suddenly in 1971; critics of campaign practices had been making similar complaints since at least the 1920s, with the rise of the so-called "merchandising" or "advertising" campaign. See, e.g., RICHARD JENSEN, *THE WINNING OF THE MIDWEST: SOCIAL AND POLITICAL CONFLICT, 1888–1896*, 154–77 (1971); see also ROBERT J. DINKIN, *CAMPAIGNING IN AMERICA: A HISTORY OF ELECTION PRACTICES*, 127–57 (1989); MICHAEL E. MCGERR, *THE DECLINE OF POPULAR POLITICS: THE AMERICAN NORTH, 1865–1928*, 138–83 (1986).

⁵⁹ See, e.g., S. REP. NO. 92-96, at 22 (1971) ("The crisis level has been reached in American campaign spending. . . . [According to] author John Wale: 'there is a danger that the cost of campaigning, chiefly swollen by the cost of television, will exclude the honest poor'"); *id.* at 77 (1971) (Supplemental Views of Mr. Hart) (the legislative goal must be "to place public office . . . within the reach of not the rich alone"); 117 CONG. REC. 26,111 (1971) (statement of Sen. Prouty) ("If our Government is to represent all of American and its diversified economic interests, we must assure that not only the rich have an opportunity to serve"); *id.* at 29,297–98 (statement of Sen. Mathias) ("[W]e are saying that we are going to give men equal access, to the greatest extent possible, to the privilege and to the responsibility of public office.").

⁶⁰ See, e.g., J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976); Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1586377.

⁶¹ Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 990–93 (2005).

⁶² *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659–60 (1990); Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563 (1999); Joel L. Fleishman, *Public Financing of Election Campaigns: Constitutional Constraints on Steps Toward Equality of Political Influence of Citizens*, 52 N.C. L. REV. 349 (1973); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369 (1994); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 671 (1997).

⁶³ John M. De Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CALIF. L. REV. 591, 627–34 (2005); Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV.

mense concern to a democratic public that it must be understood to be susceptible to regulation for the public good.⁶⁴

There is nothing in the case law or in the public and academic writing of supporters of the Court's strict approach to suggest that opponents of government regulation deny outright the validity of each and every one of these potential justifications for regulatory intervention. Nobody argues, for example, that the public is in fact better off when elected officials spend large amounts of time raising money instead of attending to the public's business. No one denies that our politics would be fairer and more inclusive if all citizens had access to financial resources sufficient to promote their political views to an extent commensurate with their desire to do so. Nobody has attempted to advance a theory of politics purporting to demonstrate that campaign discourse ought to be dominated by corporations or wealthy individuals. Rather, opponents of campaign regulation—including, most notably, the Supreme Court—rest their opposition on a different ground: that the Constitution cannot be understood to permit these problems to be addressed through regulatory intervention in the campaign process; that attempting to improve the quality of campaigns through government intervention would be—or at least could be—a cure worse than the disease.⁶⁵

Given the profound depths of public dissatisfaction with contemporary politics,⁶⁶ and the consequent potentially great benefits that might accrue from a regulatory remedy, it is logical to ask what could possibly

31 (2004); Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004).

⁶⁴ See, e.g., DENNIS F. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES 115 (2002) (“[E]lections and the campaigns leading up to them may be considered more a part of government than a part of politics that influences government. The standards that control the conduct of elections should therefore be determined more by collective decision than by individual choice.”). To similar effect, see Dennis F. Thompson, *Election Time: Normative Implications of Temporal Properties of the Electoral Process in the United States*, 98 AM. POL. SCI. REV. 51 (2004); Saul Zipkin, *The Election Period and Regulation of the Democratic Process*, 18 WM. & MARY BILL RTS. J. 533 (2010).

⁶⁵ This is precisely the language adopted, for example, by Kathleen Sullivan, a relatively moderate—though firm and consistent—opponent of spending regulation. See Sullivan, *supra* note 62, at 687. Elsewhere, Sullivan concedes that corruption and maldistribution of political influence are evils, but that their “assessment . . . is one best made by voters as a political question.” Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 329. Even such an implacable foe of campaign finance reform as Lillian BeVier readily conceded that achievement of a “broadly participatory” political discourse is a desirable goal, though she thought it could be brought about only through the unrestricted play of market forces. Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1259, 1261 (1994).

⁶⁶ See, e.g., JAMES A. GARDNER, WHAT ARE CAMPAIGNS FOR?: THE ROLE OF PERSUASION IN ELECTORAL LAW AND POLITICS 1–2, 40–43 (2009); JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS (1996); JOHN R. HIBBING & ELIZABETH THEISS-MORSE, STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK (2002).

lead the Court and its supporters to calculate the costs and benefits of government regulation as they do. It bears repeating that the Court and its strongest supporters do not conclude merely that some campaign regulation is a bad idea, or that most of it is, or that regulation might be tolerated up to some threshold before it becomes unwise. To the contrary, they take the position that *no* regulation of campaign spending may be permitted; *any* regulation, no matter how trivial, is therefore to be opposed as a matter of policy and invalidated as a matter of constitutional law.

This is as extreme a position as it is possible for opponents of regulation to take. What can account for it? Unfortunately, in today's polarized political climate, and following the Court's disgraceful decision in *Bush v. Gore*,⁶⁷ it is impossible to rule out a cheap, partisan explanation: Republicans and other conservatives feel they will do better in a campaign arena that is completely unregulated, or even chaotic and disorderly—a conclusion that may be well-founded.⁶⁸ However, even if some present-day defenders of a laissez-faire political marketplace might be motivated by a kind of base partisanship, this was not always the case. Liberal stalwarts such as Justices Douglas, Brennan, and Marshall regularly joined the Court's rulings invalidating government intervention in political campaigns,⁶⁹ and to this day the American Civil Liberties Union continues to oppose government restriction of campaign speech and spending despite the fact that it seems to disadvantage the kinds of interests that the ACLU more commonly works to advance.⁷⁰ Opposition to

⁶⁷ 531 U.S. 98 (2000).

⁶⁸ The conventional wisdom is that Republicans have a fundraising advantage over Democrats mainly because their support tends to be drawn more heavily from socioeconomically better-off segments of the population, ANDREW GELMAN ET AL., *RED STATE, BLUE STATE, RICH STATE, POOR STATE: WHY AMERICANS VOTE THE WAY THEY DO* (2008), although the 2008 Obama campaign showed that Democrats might be able to hold their own in a deregulated campaign arena. See, e.g., Molly J. Walker Wilson, *The New Role of the Small Donor in Political Campaigns and the Demise of Public Funding*, 25 J. L. & POL. 257 (2009) (describing fundraising strategies during the 2008 presidential campaign). It is worth pointing out that conservatives often combine opposition to government regulation of campaigns with opposition to public financing of campaigns—the constitutionality of which is not in doubt, *Buckley v. Valeo*, 424 U.S. 1, 85–108 (1976)—suggesting that they simply prefer a laissez-faire political marketplace.

⁶⁹ There is evidence that Brennan and Marshall may not always have done so with the greatest enthusiasm. See generally Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 ELECTION L.J. 241 (2003) (describing Brennan's initial inclination to join Justice White's opinion voting to uphold expenditure limitations, and noting Marshall's vote in *Buckley* to uphold limitations on expenditures from personal wealth). Nevertheless, Brennan dissented in only one of the Court's subsequent major rulings invalidating spending restrictions (*Belotti*), and Marshall dissented only twice (*Belotti* and *NCPAC*).

⁷⁰ The ACLU has long opposed any and all restrictions on campaign spending. It very recently altered a forty-year policy of complete opposition to restrictions on campaign contributions. Press Release, ACLU, ACLU Board Addresses Campaign Finance Policy (Apr. 19, 2010), <http://www.aclu.org/free-speech/aclu-board-addresses-campaign-finance-policy>.

government regulation of campaign speech and spending—even absolute opposition—therefore cannot simply be dismissed as the unprincipled pursuit of partisan advantage.

What, then, might explain the absolutist position? The most reasonable answer, it seems to me, is that anti-regulatory absolutism responds to a kind of fear that is not uncommon in the law: the fear of sliding down a slippery slope. No one, I think it is fair to say, maintains, or can plausibly maintain, that each and every instance of campaign speech, and each and every dollar of campaign spending, is intrinsically so valuable that democracy cannot survive without it. The most plausible account of anti-regulatory absolutism is therefore that it results from the belief that some kind of utterly clear line must be defended against even the slightest hint of erosion. This is the characteristic claim of the slippery slope argument.⁷¹

But what lies at the bottom of the slope that anti-regulatory absolutists so deeply fear? And on what grounds do they fear that one step might indeed lead to another and another until their worst fears are realized?

III. SLIPPERY SLOPISM AND THE REGULATION OF CAMPAIGNS

A. *Slippery Slopes in Constitutional Law*

A slippery slope argument, in its commonplace formulation, is the claim that “a particular act, seemingly innocuous when taken in isolation, may yet lead to a future host of similar but increasingly pernicious events.”⁷² One who advances such an argument claims, in essence, that “decision A, which you might find appealing, ends up materially increasing the probability that others will bring about decision B, which you oppose.”⁷³ A slippery slope argument thus furnishes a reason to oppose an action one might otherwise approve based on a calculation that the immediate benefits of approval are outweighed by the risk of much more serious long-term costs. One who makes such a calculation typically is led to oppose any and all movement from the status quo in a certain direction—and consequently to draw firm and unyielding doctrinal lines—as a kind of insurance policy against an extremely disfavored outcome even when such a stance entails forgoing benefits that might accrue

⁷¹ See Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 378 (1985) (arguing that slippery slope arguments rest on the contention that “the lack of a clear line of demarcation creates the risk of sliding down the slippery slope”).

⁷² *Id.* at 361–62.

⁷³ Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1030 (2003). To similar effect, see DOUGLAS WALTON, *SLIPPERY SLOPE ARGUMENTS I* (1992); David J. Mayo, *The Role of Slippery Slope Arguments in Public Policy Debates*, 21–22 PHIL. EXCHANGE 81(1992); Wibren van der Burg, *The Slippery Slope Argument*, 102 ETHICS 42 (1991).

from permitting movement to some intermediate position between the status quo and the feared catastrophic endpoint. So, to invoke a well-known example, even if it is true that permitting voluntary physician-assisted suicide by the terminally ill would relieve needless suffering for many, it might nevertheless reasonably be resisted if it in fact represents the first step down a slippery slope to compulsory euthanasia, which might be disastrous.⁷⁴

Slippery slope arguments have not normally found much success in constitutional law. The Court has generally been hesitant to construe the Constitution to disable all purportedly beneficial government action in some field on the speculative fear not only that the government might then take additional, more extreme actions, but that the Court would somehow find itself unable to invalidate the later actions on account of having previously approved something less extreme.⁷⁵ Evidently, the Court generally believes itself fundamentally capable of disapproving actions that deserve disapproval on the merits when and if it encounters them.

This has been true even when it comes to protecting some of the most important and sensitive of individual rights. For example, the Court has displayed no fear of slippery slopes in its evolving Fourth Amendment jurisprudence of unreasonable searches. One might plausibly think that the Constitution should be construed to draw firm lines when it comes to police searches on the theory that the police, if granted one form of authority to search, will soon press it to and beyond its logical limits, thereby guaranteeing more intrusive police work in the future. If anyone has made such an argument to the Court, it has been unmoved: a series of judicial decisions have in fact facilitated a slide down a slippery slope to the point where the Fourth Amendment provides relatively few constraints on the authority to search.⁷⁶

One of the few areas of constitutional law where fears of the slippery slope do seem to have some purchase, however, is in the area of free

⁷⁴ For discussion of the euthanasia example, see, for example, DAVID LAMB, *DOWN THE SLIPPERY SLOPE: ARGUING IN APPLIED ETHICS* (1988); Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CALIF. L. REV. 1469, 1471–72 (1999).

⁷⁵ The perceived inability of human beings to stick to their previous decisions is, to some extent, the key assumption behind a slippery slope argument. David Enoch, *Once You Start Using Slippery Slope Arguments, You're on a Very Slippery Slope*, 21 OXFORD J. LEGAL STUD. 629, 632 (2001) (“[L]imited creatures as we are, we cannot (or are not likely to). . . stop midway down the slope”); Schauer, *supra* note 71, at 374 (“At times slippery slope arguments may be pleas to decisionmakers who fear their *own* weaknesses.”).

⁷⁶ The relentless expansion of the automobile exception to the warrant requirement provides an especially clear example. Lewis R. Katz, *The Automobile Exception Transformed: The Rise of a Public Place Exemption to the Warrant Requirement*, 36 CASE W. RES. L. REV. 375 (1986). But, the trend cuts across almost all areas of Fourth Amendment jurisprudence. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

speech.⁷⁷ Although content-neutral regulation of speech based on its time, place, or manner is permitted under certain circumstances,⁷⁸ regulation of speech on the basis of its content is generally prohibited with surprising vigor even when the speech in question is undisputedly of little value. The First Amendment has thus been construed to forbid government limitation of speech promoting Nazism,⁷⁹ defaming public figures,⁸⁰ burning a cross to express a message of racial subordination,⁸¹ and using deeply offensive language in a public place, all rulings suggesting a belief that something much more is at stake in these cases than the particular instances of speech the state wished to suppress on the occasions in question.

Some First Amendment doctrines go even further by prohibiting government not only from limiting protected speech but prohibiting it from getting anywhere in the vicinity of protected speech. The First Amendment overbreadth doctrine, for example, bars state limitation even of otherwise legitimately *prohibitible* speech when doing so might cause individuals whose speech would be protected to refrain from speaking for fear of prosecution, even when the fear is unfounded.⁸² First Amendment doctrines disfavoring statutory vagueness and prior restraint serve similar purposes.⁸³ If absolutist protection for even low-value speech seems calculated to prevent even the tiniest slide down a slippery slope to government censorship, then the doctrines of overbreadth, vagueness, and prior restraint seem calculated to prevent government even from getting within shouting distance of the edge of the slope. Although anti-regulatory absolutism is thus unusual in constitutional law in general, such an approach in the campaign arena might be less surprising, at least to the extent it is tied to application of First Amendment principles of free speech.

B. *Slippery Slope Formulations in the Campaign Context*

Like any arguments, slippery slope arguments come in stronger and weaker forms. In their weakest form, slippery slope arguments often represent little more than irrational appeals to fear of change: “A horrible situation is sketched, which of course nobody would want but which is

⁷⁷ Schauer, *supra* note 71, at 363.

⁷⁸ *United States v. O'Brien*, 391 U.S. 367 (1968); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

⁷⁹ *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

⁸⁰ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁸¹ *Virginia v. Black*, 538 U.S. 343 (2003); *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

⁸² See *Ashcroft v. Free Speech Coal.*, 535 U.S. 564 (2002); *Gooding v. Wilson*, 405 U.S. 518 (1972); Mayo, *supra* note 73, at 81 (characterizing recognition of the “chilling effect” of a regulation as a kind of slippery slope argument).

⁸³ *Coates v. Cincinnati*, 402 U.S. 611 (1971) (vagueness doctrine); *Lovell v. Griffin*, 303 U.S. 444 (1938) (prior restraint).

so highly speculative that the cogency of the argument—insofar as it exists—depends more upon the horror than upon the likelihood.”⁸⁴ In their stronger and more serious forms, however, slippery slope arguments can have a good deal more force. Although all slippery slope arguments inevitably rely on both a fear of an undesirable end state and a necessarily speculative prediction about the likelihood of its arrival,⁸⁵ the stronger arguments rely on predictions that are better grounded in empirical realities. It is easy to conjure up a parade of horrors. It is more difficult—though sometimes possible—to give a plausible account of how those horrors may come to pass and how likely it is that they will do so.⁸⁶ Any analysis of slippery slope arguments that attempts to take them seriously therefore requires identification both of what lies at the bottom of the slope, and the series of events by which it is contended that any movement in the disfavored direction is likely to precipitate a slide to the bottom, thereby justifying an absolutist stance against the proposed change.

So what does lie at the bottom of the slippery slope in the campaign arena that the Court and other absolutist opponents of campaign regulation are so keen to avoid? This is, unfortunately, difficult to say with certainty. Advocates on all sides of the campaign finance debate are often vague about both what they believe to be at stake and the mechanisms by which government regulation might or might not influence those stakes.⁸⁷ Despite this reticence, it nevertheless seems possible to infer a likely and indeed rather conventional fear that may provoke the greatest anxiety concerning regulation of *campaign* speech: fear of the loss of efficacious democratic self-rule,⁸⁸ especially the fear of governmental self-perpetuation in power.

⁸⁴ See van der Burg, *supra* note 73, at 43; see also LAMB, *supra* note 74, at viii (noting that in this form “many philosophers have dismissed the slope argument as a method of fallacious reasoning”).

⁸⁵ Regarding the foundational fear of an undesirable end state, see Schauer, *supra* note 71, at 365 (“the danger case”); Mayo, *supra* note 73, at 86 (adopting Schauer’s terminology); Enoch, *supra* note 75, at 631 (“the morally unacceptable outcome”). On the empirical foundations of causal slippery slope arguments, see Enoch, *supra* note 75, at 633 (arguing that slope arguments “rely heavily on empirical evidence”); van der Burg, *supra* note 73, at 52 (arguing that whether a slope argument “is plausible is a different, empirical, question”); Schauer, *supra* note 71, at 381 (“[A] persuasive slippery slope argument depends for its persuasiveness upon temporally and spatially contingent empirical facts.”).

⁸⁶ See Volokh, *supra* note 73 (offering an especially careful cataloguing of different ways in which slippery slope-based predictions of catastrophe might come to pass).

⁸⁷ See GARDNER, *supra* note 66, at 174 (“Both critics and defenders of regulated campaign spending and contributions have generally been maddeningly vague about what they understand to be the actual relationship between money and votes.”). This is not uncommon in slippery slope arguments; often only the first and last steps are specified, and the critical intermediate steps are left to the imagination. WALTON, *supra* note 73, at 96–97.

⁸⁸ For a discussion on the widespread anxiety about the continued efficacy of democracy, see MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT* 3 (1996).

The Supreme Court has stated repeatedly that one of the core commitments of the First Amendment—perhaps its single most important commitment—is to the proposition that political debate in the United States should be “uninhibited, robust, and wide-open.”⁸⁹ “Competition in ideas and governmental policies,” the Court has elaborated, “is at the core of our electoral process and of the First Amendment freedoms,”⁹⁰ and in consequence “the First Amendment . . . has its fullest and most urgent application precisely to the conduct of campaigns for political office.”⁹¹ These are propositions that justify protection for political speech in terms of effective democratic self-governance, a common and well-rehearsed account of the structural role of First Amendment freedoms.⁹²

On this view, government regulation of campaigns might plausibly be thought to raise especially serious concerns. Because government in a representative democracy consists for the most part of elected incumbents—individuals who tend to be politicians and partisans—the levers of power in a democracy are held by those who almost by definition have a vested interest in the outcome of future election campaigns.⁹³ When government directs its powers toward the campaign phase—the critical and sensitive period in which voters formulate decisions about whom they will choose to hold power in the future—it is not unreasonable to worry that officials might attempt to use their power to insulate themselves from electoral displacement. Although there are undoubtedly more efficient means by which incumbents might entrench themselves in power,⁹⁴ limiting speech is clearly one possible route to that end. The state might thus punish political dissent, ban “unapproved” ideas, limit the opportunities for regime opponents to speak, or employ any number of methods, well-known in modern totalitarian states, to prevent the elec-

⁸⁹ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁹⁰ *Williams v. Rhodes*, 393 U.S. 23 (1968).

⁹¹ *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

⁹² See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 1–89 (1948).

⁹³ See, e.g., Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, in *THE BILL OF RIGHTS IN THE MODERN STATE* 239 (Geoffrey R. Stone, Richard A. Epstein & Cass R. Sunstein eds., 1992) (“[I]n the public domain the state is enforcing a view of the truth about itself. Because it is interested, it cannot be trusted.”).

⁹⁴ Manipulation of voter eligibility and ballot tabulation processes seem most directly calculated to secure desired electoral results, and indeed such strategies have a long and sordid history in the United States, especially as applied to blacks in the Jim Crow South. To give just one of many possible examples, some states deliberately manipulated the categories of crimes eligible for the punishment of felon disenfranchisement based upon the incidence with which such crimes were committed by whites and blacks, respectively, permitting them selectively to disenfranchise black voters. *Hunter v. Underwood*, 471 U.S. 222 (1985).

torate from hearing or adopting ideas that might dispose them to vote against incumbent power-holders.⁹⁵

To approach government regulation of campaign spending with some or even great apprehension and skepticism thus seems well justified; the monster imagined to lie at the bottom of the slippery slope is indeed monstrous. On the other hand, as previously described, many good reasons have been advanced to justify at least some government regulation of campaign spending, and they cannot all plausibly be dismissed on the merits. Consistent with the internal logic of slippery slope arguments, then, the defensibility of refusing to countenance any regulation whatsoever of campaign spending necessarily rests on the plausibility of the speculative contention that permitting some—or even any—government regulation of campaign spending will launch the nation down the slope to an inevitable loss of democratic self-rule.

But by what mechanisms or series of events might such a catastrophe occur? It is especially important to get this piece of the argument right. Most slippery slope arguments rest ultimately on empirical premises about the world,⁹⁶ and it is therefore impossible to evaluate the plausibility of such an argument without a clear understanding of the precise sequence of events that its proponents claim empirically is likely to ensue following a change from the status quo. Yet this is of course the very piece of most slippery slope arguments that is usually the least developed,⁹⁷ if for no other reason than that it requires the advocate to appeal not to vague and remote fears of imagined catastrophes but rather to concrete factual contentions and predictions that are inherently speculative and thus far more vulnerable to critique.

Anti-regulatory absolutism in the campaign context, no less than slippery slope arguments in other areas, tends to suffer from this defect. Its proponents for the most part gesture toward a vaguely articulated fear of an erosion of democratic self-rule and the freedoms it secures, and often seem to stop there without specifying how exactly permitting, say, limitations on the amount candidates can contribute to their own campaigns⁹⁸ is likely to launch us on an irreversible path to a collapse of democratic self-governance. This is precisely the piece of the argument

⁹⁵ This nightmare vision reaches its apotheosis in GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949) where, according to Orwell himself, the tools of the state were deployed so that “heretical thought . . . should be literally unthinkable,” quoted in MICHAEL HALBERSTAM, *TOTALITARIANISM AND THE MODERN CONCEPTION OF POLITICS* 121 (1999).

⁹⁶ See van der Burg, *supra* note 73.

⁹⁷ See WALTON, *supra* note 73, at 97 (slippery slope arguments can appear “worrisome and even menacing partly because so much is unstated”); Mayo, *supra* note 73, at 91 (the premises of slippery slope arguments may be “wildly hypothetical” and undeveloped); van der Burg, *supra* note 73, at 43 (noting that a parade of horrors may substitute for sound argument).

⁹⁸ Invalidated in *Buckley v. Valeo*, 424 U.S. 1, 51–54 (1976).

that I wish to explore, however, and as a result I must speculate a bit myself about the slippery slope mechanics that might underlie the very pronounced anti-regulatory absolutism of the Supreme Court and its supporters.

Subject to these limitations, I want to suggest three different (though related) possible formulations of the slippery slope, all of which rest on the fear of incumbent self-entrenchment and a consequent loss of popular democratic agency, and all of which find some support in what is for the most part a scanty and indirect record. For now, I will simply lay these out without comment, reserving discussion for the next Part.

First and most straightforwardly, it is possible that permitting government regulation of campaign spending will send us down the slippery slope to incumbent self-entrenchment through an escalating sequence of direct prohibitions of dissenting speech and ideas. On this account, it is a short and certain step from permitting any regulation of campaign spending at all to the conversion of the United States into another Soviet Union or North Korea, where all speech must meet the approval of the government.

A second and more sophisticated version of the slippery slope is that creeping limitations on campaign spending will lead increasingly to losses of information in the political sphere to the point where democracy ceases to function adequately. Here, the idea is that democratic citizens need good information to perform their functions properly; restricting campaign speech limits the amount of good information available to voters; and at some point political information becomes so scarce that voters cannot make reasoned decisions about how to vote.

Finally, it has been argued that the mechanics of the slippery slope of campaign regulation lead to incumbent self-entrenchment by way of an indirect prohibition of dissent, effectuated by limiting campaign spending to the point where it is insufficient to unseat an incumbent. On this account, spending limits favor incumbents because it is cheaper for an incumbent than for a challenger to win elected office, and government, once permitted to enact such limitations, will inevitably make them lower and lower until the point where no incumbent, no matter how undeserving of reelection, can reliably be dislodged.

In the next Part, I subject each of these versions of the slippery slope to closer scrutiny. I conclude that none of them is especially plausible, and that even the best account of the absolutist position against regulation of campaign speech and spending therefore rests on weak foundations.

IV. EVALUATING THE SLIPPERY SLOPE MECHANISMS

Although slippery slope arguments necessarily rest on speculation, and speculative arguments are inherently weak, this very weakness paradoxically provides slippery slope arguments with an odd kind of strength. Precisely because they are speculative, they can be refuted only by counter-speculation. But since counter-speculation can never be conclusive, a slippery slope argument can never be fully refuted, and one speculative avenue can always be replaced by another.⁹⁹ Consequently, slippery slope arguments display an unusual degree of resilience; they can be wounded, but not killed.¹⁰⁰ This problem is compounded here because I am myself speculating to some degree about what anti-regulatory absolutists would say if forced to articulate the details of their slippery slope arguments. Nevertheless, with this caveat in mind, I turn to the three different slippery slope mechanisms identified in the preceding Part.

A. *Slope 1: Direct Suppression of Dissent*

The first kind of slippery slope mechanism is also the most widespread in First Amendment jurisprudence. This is the argument that government must be denied completely the power to regulate campaign speech—and, to the extent it is a kind of speech, campaign spending¹⁰¹—because granting government even the tiniest authority to do so puts us on a slippery slope to a certain regime of suppression of political dissent and a consequent loss of democratic self-governance.

The idea that a significant function of the First Amendment is to prevent government suppression of political dissent is a venerable one.¹⁰² In a forthcoming article, Professor Richard L. Hasen expressly links current opposition to campaign finance regulation to the “fear that incum-

⁹⁹ As van der Burg observes, “For the slippery slope argument, especially in its empirical version, usually no conclusive proof can be given, either for or against.” van der Burg, *supra* note 73, at 64; see also Schauer, *supra* note 71, at 381 (“[I]n virtually every case in which a slippery slope argument is made, the opposing party could with equal formal and linguistic logic also make a [contrary] slippery slope claim.”).

¹⁰⁰ This strikes me as supporting an insightful argument made by Mayo to the effect that slippery slope arguments are at bottom ideologically driven and thus not subject to empirical refutation at all. Mayo, *supra* note 73, at 95–96.

¹⁰¹ The Court expressly equated campaign spending with campaign speech, and afforded to the latter the same level of protection afforded to the former, in *Buckley*. 424 U.S. at 15–23.

¹⁰² See, e.g., THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 9 (1963) (arguing that with respect to the “political process . . . [i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression”); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1965) (“What is essential is not that everyone shall speak, but that everything worth saying shall be said. [C]onflicting points of view shall have . . . an assigned share of the time available.”); *id.* at 27 (arguing that First Amendment protects against “mutilation of the thinking process of the community”).

bents will squelch criticism in a replay of the Alien and Sedition Acts,”¹⁰³ laws enacted in 1798 by a Federalist Congress to suppress criticism of the administration of John Adams.¹⁰⁴ In fact, the fear may run even deeper. A more full-throated articulation of this kind of slippery slope mechanism may be found in the opening lines of Justice Scalia’s dissent in *Austin*:

Attention all citizens. To assure the fairness of elections by preventing disproportionate expression of the views of any single powerful group, your Government has decided that the following associations of person shall be prohibited from speaking or writing in support of any candidate: _____.¹⁰⁵

In this mock announcement, which he goes on to describe as “Orwellian,”¹⁰⁶ Justice Scalia conjures the fear not merely that a sitting government might enact a law that, like the Alien and Sedition Acts, criminalizes criticism of sitting government officials, but that it might suppress dissent through a much more active process of deciding who can speak, on what topics, and with what points of view. This is, it must be stressed, an account that has been given across the spectrum of judicial opinion. In opposing a federal ban on campaign spending by labor unions more than thirty years before *Austin* was decided, Justice Douglas wrote:

Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group—labor or corporate.¹⁰⁷

The fear, then, seems to be that permitting government to regulate campaign spending will lead step by step to a dystopian world in which the government perpetuates its own power by deciding what may be said and by whom.

¹⁰³ Richard L. Hasen, *What the Court Did—and Why*, AM. INT. ONLINE (July–Aug. 2010), <http://www.the-american-interest.com/article-bd.cfm?piece=853>.

¹⁰⁴ Alien and Sedition Acts of 1798, ch. 74, §§ 1, 2, 1 Stat. 596 (expired 1801).

¹⁰⁵ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 679 (1990) (Scalia, J., dissenting).

¹⁰⁶ *Id.*

¹⁰⁷ *United States v. UAW*, 352 U.S. 567, 597 (1957) (Douglas, J., dissenting).

We can all agree, no doubt, on the undesirability of this nightmarish result.¹⁰⁸ The more pertinent question, however, is whether permitting even the slightest bit of regulation of campaign spending will launch us irreversibly toward such a fate. This seems highly improbable. The ultimate fear of slippery slopists on this account is of content-based government censorship of political speech. Limitations on campaign spending, however, are by definition content-neutral; they apply to all spending on all campaigns, regardless of the party affiliation or views of either the spender or the candidate on whose behalf campaign funds are spent.¹⁰⁹ To claim that this kind of regulation will lead to the government picking and choosing who can speak and to what issues on the basis of content presupposes one of two developments, each of which is implausible.

One possibility is that content-neutral regulation of campaign spending leads inevitably to content-based regulation of campaign spending—that permitting government to place a cap on spending by all candidates or citizens will result predictably in government gaining authority to place a spending cap selectively on Republicans, or liberals, or regime opponents, on the basis of their message. This seems highly improbable. Although always speculative, slippery slope arguments can be more plausible if the initial step that is opposed requires removing the only presently existing barrier to movement toward the bottom of the slope, and does so without proposing a new or alternative barrier.¹¹⁰ In this case, however, a plethora of other barriers make a slide into Justice Scalia's nightmare unlikely.

In First Amendment jurisprudence, the line between content-neutral and content-based regulation of speech is long-standing, well-understood, and well-defended across a wide variety of domains.¹¹¹ Content-based suppression of dissenting speech has long been publicly regarded as illegitimate, and in a way that seems firmly woven into both our law

¹⁰⁸ Consensus on the undesirability of the state of affairs at the bottom of a slippery slope is of course a condition for the validity of a slippery slope argument. LAMB, *supra* note 74, at 5.

¹⁰⁹ *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (concluding that spending limits are “neutral as to the ideas expressed”). The Court similarly acknowledged the content-neutrality of such restrictions when it explained that spending limitations were subject to strict scrutiny not because they regulated on the basis of content, but because “the present Act’s contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties in addition to any reasonable time, place, and manner regulations otherwise imposed.” *Id.* at 18. In reaching this conclusion, the Court explicitly found it unnecessary to consider whether such limitations had a disparate impact on the speech or electoral prospects of any particular class of candidates. *Id.* at 31 n.33.

¹¹⁰ van der Burg, *supra* note 73, at 58–59.

¹¹¹ See, e.g., *United States v. Kokinda*, 497 U.S. 720 (1990) (nonpublic forums); *Texas v. Johnson*, 491 U.S. 397 (1989) (symbolic conduct); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (time, place, and manner restrictions).

and our social practices. Past American experience with attempted suppression of dissent arising from the Alien and Sedition Acts, abolitionism, labor unionism, McCarthyism, the civil rights movement, and opposition to the Vietnam War, to name just a few examples, furnish ready and durable baselines against which content-based limitations on campaign spending might be found wanting both by courts and in the court of public opinion.¹¹²

One argument that is often used to defend assertions of the existence of a dangerous slippery slope is the contention that public attitudes cannot serve as an effective backstop against further sliding down the slope because such attitudes may themselves become altered by any initial movement in the direction of the disfavored outcome.¹¹³ Thus opponents of compulsory euthanasia sometimes argue that we should not permit physician-assisted suicide for the terminally ill because doing so creates a new world in which physician-assisted suicide seems acceptable, making it more likely that some next step, such as general voluntary euthanasia, could be publicly perceived as acceptable, and so on down the slope to the bottom.¹¹⁴ In the present case, one might therefore argue that we should not permit content-neutral limits on campaign spending because, even though content-based spending limitations are easily distinguished in principle, a world in which content-neutral spending caps are permitted may be one in which selectively content-based spending caps might no longer seem so obviously improper.

This is the most difficult kind of slippery slope argument to refute because such a development can never be ruled out. On the other hand, slippery slope arguments must stand or fall on the empirical plausibility of their speculations, and this speculation seems deeply implausible.

¹¹² Interestingly, it is the Court itself that, in *Citizens United*, seemed to set up the basis for a possible erosion of the longstanding distinction between content-based and content-neutral regulation of speech by introducing the idea that speech may not be restricted “based on the identity of the speaker.” See *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010). This development in categorizing speech regulation has the potential to blur the distinction between the two established categories. The Court has not previously viewed the elaboration of regulatory criteria as tantamount to singling out particular topics or viewpoints for suppression, even though that has often been the consequence. For example, in *Clark*, the Court treated as content-neutral a federal ordinance prohibiting protest camping in Lafayette Park, the small national park across the street from the White House, even though it is obvious that the “identity” of “protest campers” will be confined to people who think that sleeping in tents across the street from the White House is an effective way to express their message. See 468 U.S. 288 (1984). At a minimum, such people will be speaking in opposition to government policy.

¹¹³ Volokh calls these “attitude-altering slippery slopes.” Volokh, *supra* note 73, at 1036–132. It is unclear, however, to what extent a change in public opinion in favor of an action following taking that action should count as a reason against having taken the action. See van der Burg, *supra* note 73, at 51–52 (noting that on any moral theory other than one that conceives moral views to be permanently fixed, the possibility that taking an action might alter social understandings of morality cannot count as a reason to avoid the action).

¹¹⁴ See LAMB, *supra* note 74, ch. 4.

Content-neutral limits on campaign spending have existed in this country for more than a century¹¹⁵—or at least did exist until the last of them was invalidated in *Citizens United*—and there is no evidence whatsoever that the existence of these restrictions softened public resistance to government restrictions on speech based on its content. Indeed, during this period the Court *created* strong protections *against* content-based regulation.¹¹⁶ Regarding campaign spending in particular, the one piece of evidence we have runs the other way: apparently on the basis of fear that early restrictions on *corporate* campaign spending fell disproportionately on ideologically conservative speech, Congress subsequently attempted to make such restrictions more ideologically symmetrical by extending them to labor unions.¹¹⁷

The second possible way in which restrictions on campaign spending might precipitate a slide down a slippery slope to an Orwellian suppression of dissent is if a government that possesses the authority to regulate spending inevitably will develop expertise sufficient to permit it to deploy facially content-neutral spending restrictions in a way that selectively and effectively targets only spending that would be used to support dissenting speech. This seems even less likely. Content-neutral tools of speech regulation are by definition blunt and unreliable tools for the suppression of speech based on its content—too blunt to permit the kind of precise control that would be necessary for government regulation to have any appreciable selective impact on dissenting speech. Moreover, the contingency and constant shifting of the social practices and communication technologies to which such regulations would necessarily be applied preclude any realistic possibility that government might be able to foresee how specific campaign spending limits might influence the aggregate content of campaign speech, especially in the long term. A regulation that today falls disproportionately on regime opponents might in the next election cycle fall disproportionately on its supporters. It is,

¹¹⁵ Such limits first appeared in the Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (1907), which prohibited campaign contributions by corporations. One might even make the case that the origins of content-neutral regulation of campaign spending has even earlier roots, in the Pendleton Act of 1883, ch. 27, §§ 11–14, 22 Stat. 403 (1883), which prohibited political contributions by federal employees.

¹¹⁶ The Court's entire First Amendment jurisprudence was created after enactment of the Tillman Act; it did not issue its very first ruling construing the First Amendment's protection for freedom of speech until 1919. *Schenck v. United States*, 249 U.S. 47 (1919).

¹¹⁷ War Labor Disputes (Smith-Connally) Act, Pub. L. No. 78-89, § 9, 57 Stat. 163, 167 (1943). Some of the history is laid out in *United States v. UAW*, 352 U.S. 567, 578–79 (1957). For background, see David J. Sousa, "No Balance in the Equities": *Union Power in the Making and Unmaking of the Campaign Finance Regime*, 13 *STUD. AM. POL. DEV.* 374 (1999). For a different view, see Winkler, *Other People's Money*, *supra* note 54, at 928–30 (arguing that the principal justification for limiting spending by both corporations and unions was controlling agency problems for the purpose of preventing abuse of funds collected from others to be used for other purposes).

after all, precisely their neutrality that has for decades induced a Court deeply suspicious of content-based regulation of speech to evaluate content-neutral restrictions on speech much more leniently and generously.¹¹⁸

B. Slope 2: Loss of Electorally Relevant Information in the Public Sphere

A second slippery slope mechanism sometimes evoked in the cases and commentary has to do less with selective government censorship of disfavored expression than with a generalized choking off of all forms of electorally relevant information to the point where meaningful democratic self-governance is threatened. Although models of democracy can differ widely,¹¹⁹ even the most minimalist accounts conceive of democracy as a mechanism by which the ruled can hold their rulers accountable by throwing them out of office for unsatisfactory performance.¹²⁰ To discharge this function, voters need enough information about the performance of the incumbent regime to permit them to make informed judgments.¹²¹

In many of its campaign finance decisions, the Supreme Court has indicated discomfort with the capacity of spending and contribution limitations to restrict the amount of information available to voters. In *Buckley v. Valeo*, for example, the Court approached federally imposed

¹¹⁸ Unlike content-based regulations, which typically get strict scrutiny, content-neutral regulations typically are evaluated under the more lenient *O'Brien* standard. *United States v. O'Brien*, 391 U.S. 367 (1968).

I think the considerations mentioned in this Part are sufficient to answer the charge implicitly made by Justice Scalia in *Citizens United* that a ban on corporate campaign spending is not content-neutral in effect: “to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy,” 130 S. Ct. at 816. By this, I take Justice Scalia to mean that corporate speech inherently tilts toward support for free markets. I am not sure on what basis he believes this to be true, considering that earlier in his opinion he takes pains to point out that “religious, educational, and literary” entities also frequently take corporate form. *Id.* at 813. In any case, his fear seems, perhaps typically, badly overblown. Had Congress, by banning direct political expenditures by corporations, wished to place a thumb on the scale of public discourse to tilt it against the free market—which I do not believe to have been the case—it clearly failed miserably. Positions in favor of capitalism and the free market, I think it is fair to say, have been more than well represented in American political and electoral discourse during the period between passage of the Tillman Act and the Court’s decision in *Citizens United*. Indeed, for most (all?) of the twentieth century, support for capitalism at home and abroad was the official policy of the democratically elected United States government, even without unlimited corporate campaign spending.

¹¹⁹ See, e.g., DAVID HELD, *MODELS OF DEMOCRACY* (1987).

¹²⁰ The classic minimalist account is JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1942).

¹²¹ See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957); see also *Citizens United*, 130 S. Ct. at 898 (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people [It] is a precondition to enlightened self-government”).

spending limits from the principle that “[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.”¹²² Spending limits threaten that function, the Court suggested, because “[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression.”¹²³ Government, the Court has said, cannot be permitted to restrict the ability of speakers to “present [] both facts and opinions to the public,”¹²⁴ thereby “limiting the stock of information from which members of the public may draw.”¹²⁵ To the extent that campaign speech is curtailed, various members of the Court have argued, “the electorate is deprived of information, knowledge and opinion vital to its function.”¹²⁶

It is true, of course, that restricting campaign spending reduces the total amount of campaign speech—that is generally its goal¹²⁷—and that restricting the total amount of speech made during campaigns restricts the total volume of information available to voters. It may similarly be conceded that a sufficiently severe diminution in the amount of information available to voters during a campaign may impair the ability of some voters to do their jobs in the way contemplated by democratic theory,¹²⁸ and that this could pose dangers to meaningful democratic self-rule. The relevant question, however, is not whether restricting campaign spending limits speech, or whether it limits the total amount of information availa-

¹²² 424 U.S. 1, 14–15 (1976).

¹²³ *Id.* at 19.

¹²⁴ *Citizens United v. FEC*, 130 S. Ct. 876, 907 (2010).

¹²⁵ *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) (Powell, J., dissenting).

¹²⁶ *See United States v. CIO*, 335 U.S. 106, 144 (1948) (Rutledge, J., dissenting); *see also United States v. UAW*, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting) (“It is . . . vitally important . . . that the people have access to the views of every group in the community.”).

¹²⁷ In particular, Congress seemed concerned when it enacted FECA to reduce the amount of what it considered to be low-content “spot” advertisements—30- or 60-second ads for candidates—that, in its judgment, did not meaningfully advance the understanding of the electorate yet resulted in a serious escalation of the cost of campaigning. *See, e.g.*, 117 CONG. REC. 28,998 (1971) (material introduced by Sen. Stevenson); *id.* at 29,005 (remarks of Sen. Brooke); *id.* at 29,321 (remarks of Sen. Muskie); 117 CONG. REC. 26,943 (1971) (remarks of Sen. Stevenson); *id.* at 28,819 (material introduced by Sen. Cotton). According to the committee report, reducing the total amount of speech would, paradoxically, result in better-quality speech and therefore better quality campaigns, and thus the goals of FECA were both “wider and more penetrating dissemination of views and issues in an election, and limiting the cost of campaigning for public office,” which were understood to be consistent. S. REP. NO. 92-96, at 1777 (1971).

¹²⁸ I say “may” and “some” because I find this proposition doubtful, though I do not wish to dispute it here. I find it doubtful because I doubt that voters rely very significantly on information they obtain during a campaign to decide how they are going to vote. Most of the information they will rely upon they acquire well before the campaign ever gets underway. *See GARDNER, supra* note 66, ch. 3, for a fuller elaboration of this view. It is unnecessary to take this position to demonstrate that the slippery slope argument under consideration is weak, because it is weak even under the more common set of assumptions that I dispute in my book.

ble in the campaign environment, but whether it is plausible to think that permitting *any* limitations at all on spending will set us inevitably on the road to democratic ruin by leading eventually to what amounts functionally to an information blackout. This seems implausible.

The problem of democratic failure might come in one of two related versions, depending upon how voters actually behave when an absence of adequate campaign information leaves them so profoundly ignorant as to be unable to come to informed judgments about the merits of candidates. One possibility is that when voters lack inadequate information their decisions become essentially random.¹²⁹ In this circumstance, although incumbents do not benefit systematically from reducing the amount of available information, democratic accountability nevertheless is unacceptably undermined. A second possibility might be that a low information campaign environment disproportionately favors incumbents. If this is the case, then voters who lack information adequate to do their jobs will tend to default in their voting behavior to a baseline presumption in favor of retaining incumbents.¹³⁰ In this situation, incumbents will remain entrenched because low information chokes off democratically adequate competition. I discuss the first possibility here, and defer consideration of the second to the next Part, which deals generally with the problem of incumbent entrenchment.

The possibility that permitting some moderate and reasonable restrictions on campaign spending could lead not just eventually, but inevitably and irreversibly, to this kind of destruction of democratic accountability seems highly improbable. This is easiest to see in the context in which the Court decided *Citizens United* itself. There, the Court actually reversed field to move further *up* the slope from the point that it had previously occupied. Before *Citizens United*, the Court had already held, and then consistently affirmed in a series of rulings, that candidates for office, individual citizens who support particular candidates, private political associations, official political committees, and political parties all constitutionally cannot be barred from campaign spending in

¹²⁹ There is evidence that when voters are unable to decide among candidates on the basis of their merits, they sometimes rely on irrelevant cues such as the order in which candidates are listed on the ballot or the single piece of information to which they were most recently exposed. That is why in some jurisdictions ballot order is rotated so as to randomize the impact of irrational votes, and why in all jurisdictions electioneering at the polling place is forbidden. See James A. Gardner, *Neutralizing the Incompetent Voter: A Comment on Cook v. Gralike*, 1 ELECTION L.J. 49 (2002) (describing irrational voting and how it may be addressed).

¹³⁰ Recent research suggests that this may not in fact be the case; rather, the least knowledgeable voters may harbor a bias *against* supporting the incumbent. See Thomas G. Hansford & Brad T. Gomez, *Estimating the Electoral Effects of Voter Turnout*, 104 AM. POL. SCI. REV. 268, 270–71, 280 (2010) (discussing and then finding evidence supporting an “anti-incumbent effect” of increased voter turnout).

whatever amounts they choose.¹³¹ The only limit that existed at the time the Court decided *Citizens United*, and the one its ruling in that case overturned, was a ban on campaign spending from general treasuries by for-profit corporations and labor unions.

The Court's movement up the slope seems especially unwarranted in these circumstances. As indicated earlier, the existence of backstops that supplement the barrier sought to be removed makes a slide down the slope less probable, thereby undermining slippery slope objections to permitting the contested initial move.¹³² Here, the Court's earlier rulings guaranteeing unlimited spending by virtually every other actor in the political arena—rulings which are clear, unequivocal, and well-defended—make any further movement down the slope toward the disappearance of campaign information unlikely. The constitutional entitlement to unlimited campaign spending enjoyed by candidates, voters, and private groups, moreover, made it extremely unlikely—indeed, absurdly unlikely—that campaign information would dry up to any dangerous degree, or even to any degree at all.¹³³ It is true that before *Citizens United* not every single *dollar* in the entire U.S. economy was in principle available for spending on campaign speech, but it is equally true that every single *person* with money to spend on campaign speech and the incentive to do so was able before *Citizens United* to spend as much as he or she wished.¹³⁴

¹³¹ See *Buckley v. Valeo*, 424 U.S. 1, 50–54 (1976) (candidates); *id.* at 44–50 (individual citizens); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (private associations); *FEC v. Nat'l Conservative PAC*, 470 U.S. 480 (1985) (political committees); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (political parties).

¹³² van der Burg, *supra* note 73, at 58–59.

¹³³ It has been suggested, intriguingly, that because overtly partisan political speech of the type found in campaigns is generated by people with extraordinarily strong incentives to propagate it, such speech may exhibit all the characteristics of robustness that the Court has invoked to justify affording a lesser degree of constitutional protection to commercial speech. Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 797 (1999) (“[P]artisan political speech appears as robust as commercial speech.”).

¹³⁴ It has sometimes been complained that the Court's previous rulings drew a line between for-profit corporations and other speakers that was arbitrary—e.g., that a rich individual could spend without limit whereas a rich corporation could not, even if the individual's wealth was accrued from corporate activity. See, e.g., *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting) (“[T]he fact that corporations ‘amas[s] large treasures’ [is] not sufficient justification for the suppression of speech, unless one thinks it would be lawful to prohibit men and women whose net worth is above a certain figure from endorsing political candidates.”). It must be emphasized that an argument from arbitrariness is different from a slippery slope argument. Indeed, the existence of a line that is *clear*, even if it is also arbitrary, is generally taken to undermine the power of a slippery slope objection. Schauer, *supra* note 71, at 379–80. In this case, the line between for-profit corporations and any other institution (including individuals, candidates, parties, etc.) is relatively clear-cut and therefore easy to discern and respect.

But even if these earlier rulings had not created an environment tilted decisively toward unlimited campaign spending, the Court's fear that limiting spending could send us down a slippery slope to voter ignorance and inefficacy seems seriously overblown. This is because the Court's fears apparently rest on fundamentally mistaken conceptions about the campaign arena and how it actually works.

First, the Court has misidentified the salient problem. The real problem of contemporary election campaigns is not the risk of information starvation, but the risk of information overload. In today's society of instantaneous and ubiquitous communication, the main problem voters face is not a dearth of relevant information but an overabundance of it.¹³⁵ The amount of information available, particularly in the very kind of high-salience races in which high spending is most likely, is often far too much for any individual to work through,¹³⁶ requiring even the most responsible and dedicated of voters to develop coping strategies. As a flood of political science research demonstrates, most such strategies involve selectively *ignoring* information that is readily available.¹³⁷ To suggest, as the Court does, that every last dollop of additional speech during the campaign phase must be preserved because it might just furnish voters with the game-changing piece of information is therefore highly implausible.

In the real world of election campaigns, increased spending on campaign communication is part of the problem, not part of its solution. As early as the 1970s, members of Congress were already complaining that too much money was being spent in campaigns, and that voters were

¹³⁵ BRYAN D. JONES, RECONCEIVING DECISION-MAKING IN DEMOCRATIC POLITICS: ATTENTION, CHOICE, AND PUBLIC POLICY 95 (1994).

¹³⁶ DORIS A. GRABER, PROCESSING POLITICS: LEARNING FROM TELEVISION IN THE INTERNET AGE 15, 46 (2001).

¹³⁷ This happens in numerous ways, at numerous phases of the process by which voters engage political information. For example, a selection bias frequently causes voters to ignore information that is inconsistent with their preexisting beliefs. *See, e.g.*, GRABER, *supra* note 136, at 19 (noting that voters find it easier to ignore than to grapple with challenging new information, and that as a result, "[m]ost political information is sloughed off"); Joanne M. Miller & Jon A. Krosnick, *News Media Impact on the Ingredients of Presidential Evaluations: A Program of Research on the Priming Hypothesis*, in POLITICAL PERSUASION AND ATTITUDE CHANGE 79 (Diana C. Mutz et al. eds., 1996) (describing "'selectivity effects' on information processing"). A nearly symmetrical retention bias causes voters selectively to forget information that does not agree with their settled opinions. *See e.g.*, GRABER, *supra* note 136, at 14; Miller & Krosnick, *supra* note 137, at 79. Even more dramatic voter strategies for ignoring political information include rational ignorance, DOWNS, *supra* note 121, ch. 11, and the use of "information shortcuts" or heuristics such as party loyalty, shorthand evaluations of candidates' character and competence, and reliance on political symbols. SAMUEL L. POPKIN, THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS 7 (1991). For a fuller discussion, see GARDNER, *supra* note 66, ch. 4.

consequently bombarded excessively with political advertising.¹³⁸ Such complaints played an important role in the legislative debates leading up to enactment of the Federal Election Campaign Act. As Senator Dole complained during the 1971 debates:

In today's world of nearly instantaneous communications, a prolonged audio-visual assault on the voting public is unnecessary and increasingly annoying. It has reached the point today where the public begins to feel it is being bombarded by an endless round of political publicity and propaganda. And to a large extent, they are correct. Campaigns are too long. Their length exceeds the necessities of communications and debate and should be shortened.¹³⁹

Today, the problem has only gotten worse. Literally billions of dollars are spent in each cycle on the election of candidates. Between the Court's rulings in *Buckley* and *Citizens United*, total spending in U.S. House races increased from \$60 million in 1976 to \$808 million in 2008,¹⁴⁰ an increase of nearly 1,500 percent, about quadruple the rate of inflation over the same period.¹⁴¹ Spending in Senate races increased over the same period from \$38 million to \$389 million,¹⁴² a ten-fold increase. The accessibility and low cost of the web has only made information dissemination cheaper and easier, resulting in even greater availability of campaign information, around the clock, from a potentially unlimited number of competing sources.¹⁴³

Second, the Court's conception of the slippery slope to voter ignorance founders on a significant fact: voters *already* are ignorant *despite* an overabundance of campaign information. Study after study has shown consistently that voters tend to know little about electorally rele-

¹³⁸ See e.g., 117 CONG. REC. 29,321 (1971) (statement of Sen. Muskie) (“[M]edia spending should be limited so that no candidate can overwhelm his opponent or the electorate with an advertising campaign of monumental cost, and, in effect, buy his way into office. . . . It is a waste of resources and a distortion of the democratic process”); *id.* at 29,322 (1971) (Sen. Talmadge) (“Perhaps the most important function of this bill is that it will return elections to a mutual exchange of information instead of a massive sales campaign”).

¹³⁹ 117 CONG. REC. 30,075 (1971).

¹⁴⁰ See *House Campaign Expenditures, 1974–2008 (net dollars)*, CAMPAIGN FINANCE INSTITUTE, http://www.cfinst.org/pdf/vital/VitalStats_t2.pdf.

¹⁴¹ See *Consumer Price Index—All Urban Consumers*, BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiat.txt>.

¹⁴² See *Senate Campaign Expenditures, 1974–2008 (net dollars)*, CAMPAIGN FINANCE INSTITUTE, http://www.cfinst.org/pdf/vital/VitalStats_t5.pdf.

¹⁴³ See, e.g., C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* 88–123 (2007). Baker is quick to point out that the internet drastically reduces the cost of disseminating information; it does not necessarily lower the cost of creating content in the first place. See *id.* at 101–02.

vant facts and issues.¹⁴⁴ If, amid an ocean of campaign information, voters still do not know the duties or terms of offices for which they vote, the names of incumbents, what issues are presently important, what incumbents have done about them, or the positions of the various candidates on those issues, then it seems unlikely that the problem to be feared is a reduction of information. Indeed, it seems doubtful that there is any particularly strong relationship between the availability of information and the willingness of voters to exploit it,¹⁴⁵ or that more information is the cure to whatever might ail the polity. Remaining ignorant of campaign information, as Anthony Downs demonstrated half a century ago, can even be a rational and, on some accounts, democratically legitimate method of political participation.¹⁴⁶

Most fundamentally, however, the Court misunderstands the role of *campaign* speech in informing public political opinion. As I have explained elsewhere at some length,¹⁴⁷ public political opinion simply is not formed to any significant degree during campaigns. On the contrary, political opinion is formed continuously as a byproduct of ordinary and thoroughly routine engagement with daily public affairs. Among democratic citizens, the norm is for political opinion to form early, to evolve very gradually, to be largely immune from significant, much less sudden and dramatic revision, and for campaigns to have at best very little role in the formation of public political opinion, either at the individual or collective levels. As a result, government-imposed limits on the amount of spending and speech available *during campaigns* is unlikely to make much of a difference in how anyone votes, provided that protection for

¹⁴⁴ ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* (1960); MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1996); ERIC R.A.N. SMITH, *THE UNCHANGING AMERICAN VOTER* (1989).

¹⁴⁵ “[M]any advocates of competence-generating proposals proceed as if merely providing new information is sufficient to improve [voter] competence. However, the transmission of socially relevant information is no ‘Field of Dreams.’ It is not true that ‘if you build it, they will come.’ Nor is it true that if they come, the effect will be as advocates anticipate.” Arthur Lupia, *Deliberation Disconnected: What It Takes to Improve Civic Competence*, 65 *LAW & CONTEMP. PROBS.*, 133 (No. 2, Summer 2002), at 133, *quoted in* Lloyd Hitoshi Mayer, *Disclosures on Disclosure*, Notre Dame Law School Legal Studies Research Paper No. 10-17 (June 9, 2010), available at 44 *IND. L. REV.* 255, 260 (2010). The Mayer paper also convincingly demonstrates the futility of naive and scattershot attempts to inform voters in other contexts. *See generally* Lloyd Hitoshi Mayer, *Disclosures on Disclosure*, *supra*.

¹⁴⁶ DOWNS, *supra* note 121, ch. 11. This conclusion, however, stands in direct opposition to the conclusion reached by other branches of democratic theory, such as deliberative democracy, which conditions democratic legitimacy on a high degree of citizen engagement. *See, e.g.*, AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* (2000); Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE* (Alan Hamlin & Philip Pettit eds., 1989).

¹⁴⁷ *See* GARDNER, *supra* note 66, at 83–114.

ordinary political speech *between* campaigns is robust and consistent¹⁴⁸—as it is under the current regime.

C. *Slope 3: Inability to Unseat Incumbents*

What may be the strongest slippery slope challenge to campaign spending restrictions rests on the fear that such measures, however well-motivated, will have the unintended consequence of giving incumbents an advantage over challengers so significant that even the most rudimentary kind of democratic accountability will be destroyed. Such objections have been part of the discourse of campaign finance reform for decades. Even as Congress first contemplated restricting campaign spending during deliberations on the Federal Election Campaign Act in 1971 and its 1974 amendments, opponents objected to contribution and spending ceilings on the ground that limiting the ability of candidates to raise and spend money would amount to a kind of incumbent protection.¹⁴⁹ In its rulings, the Supreme Court has often expressed concerns to the effect that “the equalization of permissible campaign expenditures [through spending limitations] might serve not to equalize the opportunities of all candidates but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign [i.e., a challenger].”¹⁵⁰ Some commentators have strongly condemned spending and contribution limits on the ground that they “deliver[] merely the poisoned fruit of ever more entrenched incumbents.”¹⁵¹

Like its cousins, however, this slippery slope argument against spending restrictions rests on shaky foundations. In particular, it displays four characteristics of weak slippery slope arguments. First, it fails to account for the existence of alternate routes to the disfavored outcome.

¹⁴⁸ *Id.* at 182–89.

¹⁴⁹ See, e.g., S. REP. NO. 92-229, at 116 (1971) (Supplemental Views of Messrs. Prouty, Cooper, and Scott) (Congress must “insure against enacting legislation which favors incumbent officeholders who are generally better known and better able to ‘make news’”); S. REP. 92-96, at 84 (1971) (Supplemental Views of Messrs. Prouty, Griffin, Baker, Cook and Stevens), reprinted in 1972 U.S.C.C.A.N. 1773, 1808 (“Perhaps the most difficult aspect of this legislation is to provide an overall ceiling which insures that the electorate has full access to pertinent information necessary for making an informed judgment in a political campaigns without enhancing the advantages for the very wealthy or the incumbent.”). There was similar discussion during the floor debates. See, e.g., 117 CONG. REC. 42,065 (1971) (remarks of Reps. Long and MacDonald); *id.* at 46,947 (1971) (remarks of Sen. Dominick).

¹⁵⁰ See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 692–93 (1990) (Scalia, J., dissenting) (“[W]ith evenly balanced speech incumbent officeholders generally win”); *Buckley v. Valeo*, 424 U.S. 1, 57–58 (1976); see also *Randall v. Sorrell*, 548 U.S. 230, 249 (2006) (Breyer, J.) (“[L]imits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.”).

¹⁵¹ BeVier, *supra* note 65, at 1276.

Second, it overlooks the existence of backstops capable of halting an uncontrolled slide down the slope. Third, it relies on an exaggerated version of the harm that might reasonably ensue. Finally, it places excessive and implausible weight on a single variable in a complex causal environment.

1. Alternative Routes to the Same Harm

As a matter of simple logic, the proponents of any slippery slope argument must be able to show that the disfavored outcome at the bottom of the slope—the one toward which they argue we ought not take even a single step—will not come to pass in any case, even if we avoid taking the initial step which they contend courts danger.¹⁵² If the disfavored outcome will occur anyway, regardless of whether we take the particular measure that slippery slope proponents wish us to avoid, then there is no causal connection between the two events, and any tendency of the initial step to lead to the disfavored outcome cannot count as a reason to avoid taking that step because the disfavored outcome will occur anyway.¹⁵³

In the case of incumbent entrenchment, this condition clearly is not satisfied. The reason is obvious: incumbents already *are* entrenched, even though, for thirty-five years, campaign spending has been, by order of the U.S. Supreme Court, almost entirely free from limitation. Between 1980 and 2006, ninety-five percent of all incumbents nationwide who ran for reelection won their seats.¹⁵⁴ Under these conditions it is impossible to make a plausible case that limiting campaign spending could make incumbents *more* entrenched than they already are. The obvious conclusion is that the causes of incumbent entrenchment, whatever they may be, do not lie in government regulation of campaign speech or spending. Though it is of course by no means logically compelled, a more intuitively appealing conclusion seems to be exactly the opposite of what anti-regulatory absolutists contend: the *lack* of spending limits might well be a factor contributing to incumbent entrenchment, an argument that proponents of such limitations have made for decades.¹⁵⁵ Cer-

¹⁵² See Enoch, *supra* note 75, at 636; van der Burg, *supra* note 73, at 61.

¹⁵³ See van der Burg, *supra* note 73.

¹⁵⁴ See Thomas Stratmann, *Do Low Contribution Limits Insulate Incumbents from Competition?*, 9 ELECTION L.J. 125, 127 (2009). According to other sources the figures are a ninety-three percent reelection rate for members of Congress between 1992 and 2000, JENNIFER A. STEEN, SELF-FINANCED CANDIDATES IN CONGRESSIONAL ELECTIONS 11 (2006), and ninety-four percent among state office-holders in 2007–08, Peter Quist, *The Role of Money & Incumbency in 2007–2008 State Elections*, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS (May 6, 2010), <http://www.followthemoney.org/press/PrintReportView.phtml?r=423>.

¹⁵⁵ The arguments supporting this position are ably canvassed—though ultimately disputed—in the opening paragraphs of Jeffrey Milyo & Timothy Groseclose, *The Electoral Effects of Incumbent Wealth*, 42 J.L. & ECON. 699, 699–702 (1999). Stratmann's recent study,

tainly the imposition of limits could not make things any worse than they are.

2. Backstops Against an Uncontrolled Slide Down the Slope

The second immediate difficulty with a slippery slope argument based on incumbent entrenchment is that it ignores the existence of significant, defensible, and stable backstops against an uncontrollable slide all the way down the slope to the destruction of democratic accountability. As noted earlier, a slippery slope argument is weaker to the extent that barriers to a complete descent down the slope continue to exist following the initial step onto the slope.¹⁵⁶ Here, the slippery slope argument is that we cannot permit *any* government restrictions on campaign spending because some government restrictions will lead to more, which will lead to more, and sooner or later the restrictions will be so severe that no challenger will be able to mount a campaign adequate to unseat an incumbent.

This argument, however, misleadingly lumps every kind of campaign spending together into a single, undifferentiated phenomenon. In fact, many different actors in the political arena spend money during campaigns, or wish to do so—candidates, official campaign committees, parties, news media, individuals, non-profit advocacy groups, political action committees, for-profit corporations, labor unions, and so forth. Not all of these actors, moreover, spend money in the same way or for the same purposes. The Court itself has often been attentive to such differences. In striking down a federal limitation on independent spending by political parties, for example, the Court found that the political interests and objectives of parties and candidates diverge to a constitutionally significant extent.¹⁵⁷

Because campaign spending occurs in so many different domains, the slippery slope argument necessarily presupposes that if the government is permitted to restrict spending by one group of actors—for-profit corporations, perhaps—then there is no resisting the government’s eventual acquisition of authority to restrict spending by not-for-profits, political parties, individuals, and, ultimately, candidates themselves, at which point the game is lost. But this result by no means follows. In fact, the Court’s campaign jurisprudence has drawn sharp distinctions among all these categories of political actors. Rather than lumping all spending

supra note 154, finding that lower contribution limitations increase electoral competitiveness might provide some recent empirical support for this contention.

¹⁵⁶ See Enoch, *supra* note 75.

¹⁵⁷ Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 622 (plurality opinion) (“[T]he Government . . . argue[s] that the expenditure is ‘coordinated’ because a party and its candidate are identical, i.e., the party, in a sense, ‘is’ its candidates. We cannot assume, however, that this is so.”).

restrictions together, the Court has separately analyzed the application of spending restrictions to each group, conducting distinct analyses that have generally taken account of each group's particular place and function in the campaign arena.¹⁵⁸ If the Court has thus far been capable of distinguishing among different kinds of campaign spenders, there is no reason to think that a ruling permitting restrictions on one category of actors would put the Court in a position where it could no longer maintain the categorical distinctions upon which it has until now relied.

Again, the only available evidence on this issue cuts against the slippery slope argument. For a century the Court found no constitutional impediment to government limitations on campaign spending by for-profit corporations.¹⁵⁹ Yet those rulings in no way impaired the ability of the Court later to decide that limitations on many other categories of campaign spenders were constitutionally invalid. Indeed, the Court's decision in *Citizens United* demonstrates vividly its ability not merely to resist further sliding down the slope, but to scramble back uphill from a point it has become uncomfortable occupying.

3. Exaggerated Account of the Potential Harm

A threshold condition for the validity of a slippery slope argument is agreement that the result to be avoided is in fact harmful and thus something to be avoided.¹⁶⁰ In the case of incumbent entrenchment, proponents of the slippery slope argument often seem to rely on an exaggerated and therefore contestable account of what exactly the entrenchment of incumbents means, and what degree of harm it would inflict on democratic values.

One such problem arises from the difficulty of identifying incumbent entrenchment when it occurs. Everyone can agree that the "entrenchment" of incumbents is bad—therein lies the rhetorical appeal of the slippery slope argument—but what exactly does incumbent entrenchment mean, and how do we recognize it when we see it? Some possibilities may be readily excluded. It cannot be evidence of incumbent entrenchment, for example, merely that some incumbents win reelection; that sets the bar too low, because even in the absence of entrenchment it is to be expected that some incumbents may legitimately earn reelection. Similarly, incumbent entrenchment cannot be limited to the case in which every single incumbent wins every race; that definition sets the

¹⁵⁸ See cases cited *supra* note 131.

¹⁵⁹ The Court has had several opportunities to invalidate restrictions on campaign expenditures by for-profit corporations, but in every case prior to *Citizens United* declined to do so. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990); *United States v. UAW*, 352 U.S. 567 (1957); *United States v. CIO*, 335 U.S. 106 (1948).

¹⁶⁰ LAMB, *supra* note 74, at 5 ("The status of [a horrible results] argument depends primarily on agreement regarding the horrible nature of the end result.").

bar too high, because even an unfairly entrenched incumbent presumably may be defeated in the right combination of circumstances.

Rather, what the term “incumbent entrenchment” seems to mean is that some incumbents win reelection when in some sense they “should not”—when the seat “should” have been won by a challenger. Moreover, if incumbent entrenchment truly rises to the level of a genuine problem, then incumbents must be winning seats they ought to lose in significant numbers, and these wins are not offset to any meaningful extent by races in which challengers win seats that incumbents should have retained. The problem of incumbent entrenchment presumably must refer not merely to some kind of general and randomly dispersed inaccuracy in election results, but to a bias that systematically benefits incumbents disproportionately.¹⁶¹

It is immediately clear, however, that any argument based on judgments about which candidates “should” have won particular races will necessarily be controversial. On what grounds may it be determined that an incumbent who won a seat by collecting in actual fact more votes than his or her challenger “should” in truth have been outvoted? Any such judgment obviously relies to a great extent on an underlying normative model of electoral politics—whether, for example, voters “should” base their votes on party loyalty,¹⁶² economic self-interest,¹⁶³ retrospective evaluation of incumbent performance,¹⁶⁴ prospective cost-benefit analysis,¹⁶⁵ disinterested deliberation on the common good,¹⁶⁶ or some other set of criteria—indeed, whether any particular voter or group of voters “should” have concluded that showing up at the polls to vote was worth the effort in the first place.¹⁶⁷ Yet any normative account of ideal voting behavior is likely to be deeply contested.

¹⁶¹ Schauer, *supra* note 71, at 382 (the risk of slippage in a slippery slope argument must be systematic, not general).

¹⁶² AUSTIN RANNEY, *THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT: ITS ORIGIN AND PRESENT STATE*, ch. 8–9 (1954); American Political Science Association—Committee on Political Parties, *Toward a More Responsible Two-Party System*, 44 AM. POL. SCI. REV. SUPP. (1950).

¹⁶³ See Gregory B. Markus, *The Impact of Personal and National Economic Conditions on the Presidential Vote: A Pooled Cross-Sectional Analysis*, 32 AM. J. POL. SCI. 137, 151–52 (1988).

¹⁶⁴ See MORRIS FIORINA, *RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS* (1981).

¹⁶⁵ See DOWNS, *supra* note 121.

¹⁶⁶ ROBERT E. GOODIN, *REFLECTIVE DEMOCRACY* 79–80 (2003); IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 2–3, 21 (2003).

¹⁶⁷ According to Downs, rational voters will not conclude they ought to go to the polls to vote unless the expected benefit of doing so, discounted by the probability—under conditions of uncertainty—of the benefit materializing, exceeds the costs of doing so. DOWNS, *supra* note 121, ch. 3.

Second, the slippery slope argument from incumbent entrenchment often seems to proceed from the premise that insulating incumbents from electoral competition is an all-or-nothing proposition: either electoral competition is free and open, or it is not; incumbents are vulnerable to displacement, or they are not. Yet this cannot be correct. Actions having a tendency to insulate incumbents from electoral competition may provide incumbents with a greater or lesser benefit, and actions that furnish such a benefit may provide it to a greater or lesser number of incumbents, who are in a better or worse position to exploit it. As a result, the potential impact of incumbent-entrenching actions on the ultimate composition of a legislature is better conceived as lying along a spectrum ranging from measures that have no discernable impact to those guaranteeing effortless reelection for each and every incumbent office holder.

It is also possible that proponents of the slippery slope argument might be making a somewhat different point: they might contend that insulating *any* incumbents from electoral competition to *any* degree, no matter how slight, inflicts such grievous and unacceptable harm to a democratic polity that any action having a tendency to produce such a result cannot be countenanced. Yet this position similarly exaggerates the harm associated with incumbent entrenchment.

Complete and perfect responsiveness to some idealized version of the popular will is a Rousseauvian fantasy¹⁶⁸ that cannot be achieved in any real-world system of democratic rules and processes. All election procedures have consequences for electoral outcomes, and all therefore result in slippage from any conceivable standard of ideal results.¹⁶⁹ As Benn and Peters pointed out long ago: “The will of the people cannot be determined independently of the particular [voting] procedure employed, for it is not a natural will, nor is it a sum of similar wills of persons sharing common interests, but the result of going through a procedure which weighs some wills against others”¹⁷⁰ For example, the choice of an electoral system itself—proportional representation or first-past-the-post, plurality winner or runoff, and so on—makes a huge difference in how the popular will is measured. Following that choice, many procedures and practices systematically bias electoral outcomes in

¹⁶⁸ Rousseau famously (or perhaps infamously) invented the concept of the “general will” to bring the actual will of individual voters into harmony with what he conceived to be a unitary will of the collectivity. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 63–64, 69–74 (Maurice Cranston trans., Penguin Books 1968) (1762). To make this conceit work, Rousseau was forced to treat the views of electoral minorities as simply mistaken attempts to sense the true general will. *Id.* at 153 (“When, therefore, the opinion contrary to my own prevails, this proves only that I have made a mistake, and that what I believed to be the general will was not so.”).

¹⁶⁹ This assumes once again that ideal results can even be discerned for purposes of measuring deviation therefrom, a significant and doubtful assumption.

¹⁷⁰ S.I. BENN & R.S. PETERS, *PRINCIPLES OF POLITICAL THOUGHT* 397 (1959).

favor of incumbents or challengers. The imposition of term limits, for example, provides an immediate and systematic advantage to challengers. Incumbents may benefit from procedural choices ranging from the use of single-member districts instead of party lists, to allocation of re-districting decisions to sitting legislatures, to granting of the franking privilege. Other kinds of procedural choices may create bias for or against incumbents depending upon the specific context: voter qualifications, the precise days and hours of voting, the ease or difficulty of registration, and so forth.

If democratic legitimacy were irrevocably damaged by the kinds of slippage that inevitably accompany the construction and occupancy of any real electoral system, then all democracies would lack legitimacy. We are therefore forced, it seems, to reject a definition of incumbent entrenchment so uncompromising that the slightest deviations from a perfect embodiment of the popular will are understood to compromise democratic values to an intolerable degree. On the contrary, tradeoffs in the implementation of democratic ideals are inevitable, and must be tolerated to a considerable extent.¹⁷¹

This conclusion is significant. Because slippery slope arguments typically rest on a routine kind of cost-benefit analysis,¹⁷² they may be rebutted by better and more plausible accounts of the actual costs and benefits of taking or failing to take a proposed action. A slippery slope argument may therefore be rebutted by showing that the expected benefits of taking the contested action exceed the expected costs of doing so.¹⁷³ In the case of campaign spending limits, substituting a more realistic account of the harm caused by incumbent entrenchment—one that acknowledges that such harm may fall along a spectrum from minimal to grave—may change the calculus significantly.

¹⁷¹ This understanding historically has been reflected in the Supreme Court's longstanding recognition that states require a good deal of latitude in structuring their electoral systems. *See, e.g.,* *Storer v. Brown*, 415 U.S. 724, 730 (1974) (“[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”); *Doe v. Reed*, 130 S. Ct. 2811, 2819 (2010) (“States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally.” (quoting *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999))).

¹⁷² Consistent with cost-benefit analysis, most slippery slope arguments claim that the disfavored outcome carries extraordinary costs, and either that its likelihood is high, or that even if its likelihood is low, the severity of the associated costs counsel the rational decision-maker against taking the disputed action. *See* WALTON, *supra* note 73, at 260; Enoch, *supra* note 75, at 636; Mayo, *supra* note 73, at 80; Volokh, *supra* note 73, at 1039–48.

¹⁷³ *See* WALTON, *supra* note 73, at 260.

4. Attribution of Excessive Agency to a Single Factor

A final flaw that can weaken slippery slope arguments is the attribution of excessive agency to one causal factor out of many.¹⁷⁴ Undesirable outcomes often result from the complex interactions of many influences. The more various and complex the causes of a phenomenon, the less causal agency may plausibly be attributed to any one of them. In these circumstances, the fact that an action may make the existence of one causal condition more likely cannot count as a very strong reason to avoid taking the action, and the more numerous and complex the causes of the undesirable outcome, the less reason one has to avoid taking an action that operates on only one of the relevant causal conditions.

The slippery slope argument based on incumbent entrenchment makes this error by attributing to campaign spending far more significance and agency than it typically has, or is capable of having, in the exceedingly complex, multi-variable environment of a campaign for elective office. In point of fact, the possibility that limiting campaign spending will systematically advantage incumbents is speculative, and that it will do so decisively and irreversibly, as the slippery slope argument contends, is speculative to the point of implausibility.

Too often, partisans on all sides of the lengthy, ongoing debate over campaign finance, whether proponents or opponents of reform, seem to begin from two shared assumptions: that every race between an incumbent and a challenger is presumptively wide open and competitive; and that our failure to observe widespread competitive races and substantial unseating of incumbents must be attributed to campaign spending. Both halves of this equation are false.

First, wholly apart from their capacity to outspend their rivals, all candidates operate under numerous constraints that may in many circumstances drastically limit their ability to win election. The primary function of election campaigns is to mobilize supporters.¹⁷⁵ If a candidate lacks support in the electorate, spending is useless because there are no supporters to mobilize. A Democrat generally has no realistic chance of winning an overwhelmingly Republican district, or a liberal in a conservative district. Perhaps the best illustration of such constraints is the low success rate of self-financed candidates—rich individuals who, with no established electoral appeal, parachute into races to take on more established opponents.¹⁷⁶ Even in potentially competitive races,¹⁷⁷ the more challengers spend of their own money the worse they generally

¹⁷⁴ *Id.* at 76.

¹⁷⁵ GARDNER, *supra* note 66, at 170–71.

¹⁷⁶ See STEEN, *supra* note 154, at ch. 1.

¹⁷⁷ I.e. those that take place in districts in which the major parties are competitive over time, that do not involve an uncontested race, etc. See STEEN, *supra* note 154, at 12.

perform.¹⁷⁸ According to the author of the definitive study of self-financing candidates, these results have less to do with spending than with the simple fact that self-financing candidates, especially when they are challengers rather than incumbents, “tend to be inexperienced, low-quality candidates.”¹⁷⁹ As a result, “[i]n most cases, even extreme self-financing has little effect on who stands in the winner’s circle.”¹⁸⁰ To be sure, some rich, self-financing candidates do win their races, but it seems safe to conclude that those who do so win more on account of the degree to which they appeal to the preexisting preferences of voters than on account of their spending.¹⁸¹

Second, all slippery slope arguments depend on a firm linkage between asserted cause and feared effect, but here the connection between limiting campaign spending and entrenching incumbents is too speculative to support the argument in any kind of strong form. After decades of research, political scientists still cannot agree on whether the outspending of rivals by *candidates* has any significant, systematic impact on electoral outcomes.¹⁸² The slippery slope argument at issue here, however, is

¹⁷⁸ See *id.* at 15–16.

¹⁷⁹ *Id.* at 122.

¹⁸⁰ *Id.*

¹⁸¹ See *id.* I hasten to add that this data does not by any means show that money is irrelevant to the capacity to be elected. It shows only that money is not the only thing; even the richest candidate cannot be elected unless voters find him or her appealing. The signal advantage of money—and one that makes its role in electoral politics unfair—is that only those individuals with access to large amounts of it are in a position to discover and then to test their electoral appeal.

¹⁸² Although the empirical research on the relationship between campaign spending and electoral outcomes is voluminous and complex, its main contours can be summarized relatively briefly. Early studies produced bizarre and counterintuitive results—for example, that spending by incumbents is ineffective but spending by challengers is highly effective. Gary C. Jacobson, *The Effects of Campaign Spending in House Elections: New Evidence for Old Arguments*, 72 AM. J. POL. SCI. 334, 356–57 (1978). Some later studies reached opposite conclusions, attributing low levels of electoral competition—and slight, observed increases in incumbent reelection rates—to declines in spending by challengers. See, e.g., Alan I. Abramowitz, *Incumbency, Campaign Spending, and the Decline of Competition in U.S. House Elections*, 53 J. POL. 35, 53 (1991). The inconsistent results produced by many studies prompted a period of methodological criticism. See, e.g., Robert S. Erikson & Thomas R. Palfrey, *Equilibria in Campaign Spending Games: Theory and Evidence*, 94 AM. POL. SCI. REV. 595, 595 (2000). More recently, Alan Gerber has argued persuasively that one source of the difficulty is that incumbents engage in campaign spending strategically, in a way that makes their spending depend on many other factors, including the perceived strength of the likely challenge in the context of current political conditions, thus greatly complicating efforts to isolate the effect of spending in general, and spending by incumbents and challengers in particular, on electoral outcomes. Alan S. Gerber, *Does Campaign Spending Work?*, 47 AM. BEHAV. SCIENTIST 541 (2004). In sum, notwithstanding a great deal of research, “little can be said with certainty regarding the electoral consequences of campaign finance laws.” Donald A. Gross et al., *State Campaign Finance Regulations and Electoral Competition*, 30 AM. POL. RESEARCH 143, 143 (2002). Perhaps the only finding that has stood the test of time is that all candidate spending is of declining marginal utility—the more one spends the fewer votes one picks up with each additional dollar—and that challengers therefore enjoy more “effective”

several steps removed even from this contested proposition because it relies not on the contention that spending by candidates has a clear and decisive effect on electoral outcomes, but on the contention that *uncoordinated independent spending by supporters*¹⁸³ has such an impact. That limits on such spending might systematically advantage incumbents is far more speculative.

In the first place, it is highly speculative that, in any given race, a big-money opponent of the incumbent will be sitting on the sidelines, ready and willing to spend a decisive amount of money but for regulatory limitations on campaign expenditures.¹⁸⁴ Furthermore, it is highly speculative that *uncoordinated* independent expenditures will have any significant effect, and if they do, that the effect will be the one intended by the spender. Because independent campaign expenditures are by definition uncoordinated with a candidate's campaign, it is far from inevitable that such spending will turn out to provide useful support and reinforcement of the message the candidate needs to communicate in order to win.¹⁸⁵

spending than incumbents up until the point that they begin to become as well known as the incumbent. See Abramowitz, *supra* note 182, at 37.

My own view is that no study demonstrates persuasively that spending is capable systematically of *changing the results* of elections. Even studies that purport to demonstrate a relation between spending and *vote shares* are consistent with the more modest conclusion that spending is effective only in translating latent support in the electorate into actual support at the polls, although translating the last bit of latent support into actual support can be quite costly. Nothing, however, suggests that spending by incumbents or challengers is effective in converting latent *opposition* into actual support, and that heavy spending is consequently a potential vehicle by which challengers might dislodge incumbents *who are not already unpopular* with voters.

¹⁸³ The spending at issue must by definition be uncoordinated because independent expenditures coordinated with the candidate are considered contributions under campaign finance law, and are thus regulated not by spending limitations, but by contribution limitations. See 2 U.S.C. § 441a(a)(7)(B) (2006).

¹⁸⁴ This is especially the case where corporations are concerned. Apparently corporations have generally liked federal restrictions on corporate contributions because it provides them with a degree of protection against being shaken down by candidates and incumbent office holders trolling for funds. See, e.g., Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 853 (2004) (analogizing corporate contribution regimes not to bribery of candidates but to extortion of donors); Jeffrey Rosen, *The Right To Spend*, N.Y. TIMES, July 8, 2007, (Magazine), at 11 (“[T]he ban on corporate soft-money contributions to political parties has had some success. Candidates are relieved that they do not have to help solicit corporate soft money, as they did during the fund-raising scandals of the go-go ‘90s, and corporations are relieved at not being shaken down to contribute to both parties to hedge their bets.”).

¹⁸⁵ See, e.g., Stephen Engelberg, *Bush, His Disavowed Backers and a Very Potent Attack Ad*, N.Y. TIMES, Nov. 3, 1988, at A1; James O’Toole, *Bush, McCain Get Rough*, PITTSBURGH POST GAZETTE, Feb. 16, 2000, at A1; William Finn Bennett, *Mudslinging Ads Swamp the 50th District Race*, N. COUNTY TIMES (June 4, 2006, 12:00 AM), http://www.nctimes.com/news/local/govt-and-politics/article_53b2be75-a1cc-59e7-ada3-61263eee2f0f.html (all describing

In addition, to the extent that uncoordinated independent spending does help mobilize voters effectively, it is not clear why the lifting of spending restraints would not help incumbents as much as challengers, or even more so. There is often more to be gained from spending on behalf of an incumbent, thereby cultivating his or her favor, than on behalf of a challenger.¹⁸⁶ Nor is it clear that unlimited independent spending will not frequently cancel itself out. After all, if a race is one in which spending is even capable of being the decisive consideration, then the race is one that is, by hypothesis, capable of being close. This in turn means that there is significant exogenous support in the electorate for both the incumbent *and* the challenger, and if we are willing to speculate that spending limits would deprive the challenger of the benefits of spending by big-money supporters, there is no reason not to make the same assumption on behalf of the incumbent.

The slippery slope argument goes even further, however; it argues not merely that permitting any limitations on campaign spending will provide some kind of advantage to incumbents, but that doing so will precipitate a slide into a decisive and irreversible entrenchment of incumbents so severe as to destroy electoral accountability. This too is implausible. Provided votes are counted accurately and elections are honest, there is no defense in a democracy against a sea change in public opinion. Control of Congress and the presidency have changed hands many times, in many different electoral conditions.¹⁸⁷ One of the best examples of the limited capacity of incumbents to insure themselves against changes in public opinion is the overreaching gerrymander, a tactic that Grofman and Brunell evocatively term a “dummymander.”¹⁸⁸ Because gerrymandering controls the political inclinations of the relevant electorate directly, by selecting among voters rather than things they might

situations in which candidates for office felt it necessary to disavow advertisements attacking their opponents that had been produced without coordination by third parties).

¹⁸⁶ According to one pre-*Citizens United* study, “[i]ncumbent federal officeholders currently enjoy a nearly twenty-to-one advantage over challengers in the receipt of corporate PAC contributions. This advantage will only be magnified if corporations are able to reward their legislative allies with unlimited spending from corporate coffers.” Brief of Center for Political Accountability and the Carol and Lawrence Zicklin Center for Business Ethics Research at the Wharton School as Amici Curiae in Support of Appellee on Supplemental Question, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205), 2009 U.S. S. Ct. Briefs LEXIS 611 at **8.

¹⁸⁷ Just recently, for example, Republicans gained control of both houses of Congress in 1994, and Democrats regained control over both houses in 2006. Clerk of the House of Representatives, Statistics of the Congressional Election of November 8, 1994 (May 12, 1995), http://clerk.house.gov/member_info/electionInfo/1994/94Stat.htm; Clerk of the House of Representatives, Statistics of the Congressional Election of November 7, 2006 (Sept. 21, 2007), http://clerk.house.gov/member_info/electionInfo/2006election.pdf.

¹⁸⁸ Bernard Grofman & Thomas L. Brunell, *The Art of the Dummymander: The Impact of Recent Redistricting on the Partisan Makeup of Southern House Seats*, in REDISTRICTING IN THE NEW MILLENNIUM 183 (Peter F. Galderisi ed., 2005).

potentially say, it is potentially an effective method of insulating incumbents from defeat. Yet there is no complete safety for incumbents even in a deliberately gerrymandered district; large-scale changes in public political opinion are capable of overwhelming even the most direct attempts at incumbent self-entrenchment.¹⁸⁹

The possibility that incumbents might *permanently* insulate themselves from competition by manipulating campaign spending is even more attenuated. Unlike gerrymandering, regulation of campaign spending controls electoral outcomes, if it does so at all, only very indirectly by manipulating speech rather than voting predispositions. This kind of regulation is simply too blunt an instrument to do the difficult job of genuinely entrenching incumbents against electoral competition. Well-motivated regulation of campaign spending may have unforeseen and unintended consequences, to be sure, but it is extravagant to think that incumbents could control this tool with the necessary precision for any length of time.

CONCLUSION

I have argued that an absolutist stance against regulation of campaign spending rests on an implicit fear of a slide down a slippery slope to a loss of democratic self-rule, but that a close examination of the slippery slope argument reveals it to be too weak and speculative to support the Court's rigid, categorical opposition to all campaign spending regulation. Interestingly, however, the same arguments that demonstrate the weakness of the Court's anti-regulatory absolutism also tend to cast doubt on the urgency that reformers often seem to feel to impose limits on campaign spending. The same considerations that make the linkage between spending limits and incumbent entrenchment speculative and implausible also tend to show the speculativeness of the contention that failing to impose spending limitations will inevitably and irrevocably hand control of politics to the rich. Just as the regulation of spending is a blunt and limited tool for the purpose of manipulating electoral outcomes, so spending itself is a blunt instrument for the purpose of ensuring electoral success. The truth, therefore, most likely resides somewhere in the great middle area between the polar extremes of pro-regulatory enthusiasm and anti-regulatory absolutism. The stakes, at the end of the day, may be lower than either side is willing to concede.¹⁹⁰

¹⁸⁹ Samuel Issacharoff & Jonathan Nagler, *Protected from Politics: Diminishing Margins of Electoral Competition in US Congressional Elections*, 68 OHIO ST. L.J. 1121, 1121–22 (2007) (“Even uncompetitive districts are at some level subject to shifts in voter preference. . . . [S]o long as there are elections, the voters can always override the designed outcomes.”).

¹⁹⁰ For further discussion of this point, see GARDNER, *supra* note 66, at 174–77.

In light of these considerations, I believe the Court's campaign spending decisions are unnecessarily rigid, but not because spending limits are indispensable to a reasonably responsive, acceptably legitimate form of electoral democracy. In my view, spending limitations should be upheld for more symbolic reasons. Limitations on campaign spending express a society's normative commitments to several very important principles: the democratic equality of citizens; separation of the contingency of economic power from the contingency of political power; and subordination of economic status to democratic status. The value of a society's open expression of commitment to these principles is not to be minimized. Moreover, it is at least possible that some of the many benefits to campaign finance regulation that have been identified—political equality, better deliberation, and so forth—might actually be realized to some extent. Both the risks and potential benefits of campaign finance regulation seem, in the American context, remote. In these circumstances, the balance is better struck in favor of permitting some good to emerge. Thus, in my view, if there are some races in which campaign spending limits will promote equality of political influence by leveling a tilted playing field to the benefit of challengers, that is enough to justify sustaining them.

