ESSAY

CONTRACTING AROUND *CITIZENS UNITED*

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The Supreme Court's decision in Citizens United v. FEC *is widely considered a major roadblock for campaign finance reform, and particularly for limiting third party spending in federal elections. In response to the decision, commentators, scholars, and activists have outlined a wide range of legislative and regulatory proposals to limit the influence of third party spending, including constitutional amendments, public financing programs, and expanded disclosure rules. To date, however, they have not considered the possibility that third party spending can be restrained by a self-enforcing private contract between the opposing campaigns. This Essay argues that private ordering, rather than public action, is an additional approach for limiting third party campaign spending. It explains the design of a contract between opposing campaigns that is self-enforcing and restricts third party spending; identifies the conditions under which such a contract is likely to be offered and accepted; shows how political dynamics push third parties and campaigns to adhere to the contract's spending restrictions; and discusses possible loopholes and challenges. While private ordering through a self-enforcing contract might seem like wishful thinking, precisely this kind of contract, "The People's Pledge," succeeded in keeping out third party spending on television, radio, and internet advertising in the most expensive Senate race in history, the 2012 Brown-Warren race in Massachusetts. Since then, this kind of contract has been adopted in two other federal congressional races and debated and offered in a wide range of other races. In the context of political gridlock in Congress, the emergence of a private ordering option to achieve campaign finance reform goals is significant. This Essay analyzes the conditions under which private ordering, rather than public law reform, can limit third party spending in elections. It draws on examples, particularly that of the original "People's Pledge," to illustrate the general parameters of*

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these contracts, and it considers the implications of these contracts for election law and policy.

INTRODUCTION

The Supreme Court's decision in *Citizens United*[1] is widely considered a major roadblock to campaign finance reform. Critics have decried the decision's effect on the ability of third parties, namely corporations, to influence elections. In response to these concerns, scholars and activists have proposed a variety of public law reforms—constitutional, legislative, and regulatory—to limit the influence of third party spending in federal elections. Some argue for a constitutional amendment to overturn the case, others for a variety of public financing options, and still others for improved disclosure of corporate political spending.[2]

While these reformers have appropriately focused on public law options to address a public law problem, they have missed the possibility that private ordering could limit third party campaign spending in federal elections. This Essay argues that under certain conditions, private ordering can be effective at limiting or even eliminating third party spending. The private ordering option involves a self-enforcing contract between the opposing campaigns, in which each campaign agrees to be penalized from its own campaign treasury for any spending from an outside group that supports the candidate. In other words, if an outside group spends money on television advertisements supporting a candidate or attacking her opponent, the candidate that benefits from the advertisements must pay, as a penalty, a proportion of the value of the third party's advertising costs. Because the penalty reduces the candidate's own funds, outside supporters will restrain themselves from spending on the candidate's behalf.

While a contract structured in this manner might seem like a fanciful solution, precisely this kind of contract succeeded in keeping third parties from television, radio, and internet advertising in the most expensive Senate race in history, the 2012 Brown-Warren race in Massachusetts.[3] In that race, third party groups spent millions of dollars on advertisements until Senator Scott Brown and Elizabeth Warren

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1. Citizens United v. FEC, 130 S. Ct. 876 (2010).

2. See, e.g., infra Part I.A (discussing *Citizens United* and legal and policy responses in its wake).

3. Total spending in the Brown-Warren race amounted to $77 million, $17 million more than the second most expensive race in 2012, in which a total of $60 million was spent. Ctr. for Responsive Politics, Historical Elections: Most Expensive Races, OpenSecrets.org [hereinafter Responsive Politics, Historical Elections], http://www.opensecrets.org/bigpicture/topraces.php?cycle=2012&display=currcands (on file with the *Columbia Law Review*) (last visited Feb. 25, 2014) (listing most expensive congressional races of 2012 election cycle). The Brown-Warren race was also the most expensive Senate race in history. See, e.g., Chris Cillizza, The Most Expensive Senate Races Ever—and Where Kentucky Might Fit In, Wash. Post: The Fix (Aug. 12, 2013, 4:36 PM), http://www.washingtonpost.com/blogs/the-fix/wp/2013/08/12/the-most-expensive-senate-races-ever-and-where-kentucky-might-fit-in/ (on file with the *Columbia Law Review*) (observing Massachusetts 2012 Senate race was "[most] expensive race" ever).

signed what they called "The Peoples' Pledge"[4] in late January 2012.[5] The People's Pledge required each campaign to pay to charity the equivalent of 50% of any third party's advertising costs for advertisements that benefitted their candidacy.[6] In March, there were two minor incursions by third parties, but the pact remained intact, as the benefiting campaign paid the penalty for third party support.[7] The People's Pledge continued to hold until Election Day, with no other outside groups entering the race for fear of impeding their preferred candidate's campaign.[8] In an interesting twist, one of the candidates responsible for this innovation—Elizabeth Warren—was for many years a distinguished professor of contract law.[9]

Since the Brown-Warren race, there has been a small but emerging trend of other campaigns debating and in some cases adopting a variation on the People's Pledge. The private ordering approach was adopted in the 2013 Lynch-Markey Senate primary to fill Senator John Kerry's seat;[10] was adopted in the 2013 special election for the fifth congressional district in Massachusetts;[11] has been debated publicly in the Boston and

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4. Scott Brown & Elizabeth Warren, The Peoples' Pledge (Jan. 23, 2012) [hereinafter The People's Pledge], available at https://web.archive.org/web/20131231041530/http://www.scottbrown.com/wp-content/uploads/2012/03/signed-agreement.pdf (on file with the *Columbia Law Review*) (accessed through Internet Archive). This Essay will refer to the Pledge as the "People's Pledge," as that is how it has come to be known. It is reproduced in the Appendix, infra.

5. See, e.g., infra text accompanying note 58 (discussing third party spending in 2012 Brown-Warren Senate race).

6. Infra Appendix ("In the event that a third party organization airs any independent expenditure broadcast (including radio), cable, satellite, or online advertising in support of a named . . . Candidate, that Candidate's campaign shall . . . pay 50% of the cost of that advertising buy to a charity of the opposing Candidate's choice.").

7. See, e.g., infra notes 105–110 and accompanying text (noting outside groups purchased advertising in favor of Senator Brown's campaign in March 2012, forcing Brown to contribute 50% of cost of advertising to charity).

8. See, e.g., infra notes 98–104 and accompanying text (describing groups that considered entering race but ultimately did not).

9. E.g., Biography, Elizabeth Warren: U.S. Senator for Mass., http://www.warren.senate.gov/?p=about_senator (on file with the *Columbia Law Review*) (last visited Feb. 25, 2014).

10. Stephen F. Lynch & Edward Markey, The People's Pledge (Feb. 13, 2013) [hereinafter Lynch & Markey Pledge], available at https://s3.amazonaws.com/edmarkey/docs/PeoplesPledge2013.pdf (on file with the *Columbia Law Review*); see also Andy Metzger, Markey, Lynch Sign Primary Race 'People's Pledge,' 90.9 WBUR (Feb. 13, 2013), http://www.wbur.org/2013/02/13/markey-lynch-peoples-pledge (on file with the *Columbia Law Review*) ("Reusing a tactic employed in the last U.S. Senate election, the two Democratic congressmen running in the special election to replace John Kerry in the Senate have signed a 'people's pledge' to discourage outside spending in the race.").

11. William Brownsberger, Katherine Clark, Peter Koutoujian, Carl Sciortino & Karen Spilka, The People's Pledge (Aug. 16, 2013) [hereinafter Fifth Congressional District Pledge], available at http://www.massdems.org/wp-content/uploads/2013/08/PeoplesPledge5th.pdf (on file with the *Columbia Law Review*); see also 5 Democrats Running for Markey's House Seat Sign 'People's Pledge,' 90.9 WBUR (Aug. 20, 2013),

Los Angeles mayoral races,[12] the 2013 multicandidate Senate primary in New Jersey (that Newark Mayor Cory Booker won in August 2013),[13] the 2014 primary for California's seventeenth congressional district,[14] and the 2014 gubernatorial races in Rhode Island[15] and Maryland;[16] and has been discussed privately in other campaigns around the country.

Given the current context of political gridlock in implementing constitutional, legislative, and regulatory reforms to the campaign finance system, the possibility of a private ordering option is particularly important as an additional path forward for those interested in restricting third party spending in the short term. This Essay explains the design options for a contract between opposing campaigns that is self-enforcing

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http://www.wbur.org/2013/08/20/democrats-sign-peoples-pledge (on file with the *Columbia Law Review*) (reporting five Democrats "seeking . . . to fill U.S. Sen. Edward Markey's former House seat have signed a deal aimed at keeping outside advertising out of the race," which was "modeled after the 'People's Pledge'" used in 2012 Brown-Warren Senate race).

12. E.g., Dakota Smith, Eric Garcetti's SuperPAC Pledge Gets Turned Down by Other LA Mayoral Candidates, Huffington Post (Jan. 18, 2013, 4:00 PM), http://www.huffingtonpost.com/2013/01/18/eric-garcetti-superpac-pledge-candidates_n_2503641.html (on file with the *Columbia Law Review*) (describing refusal by other mayoral candidates to accept proposal prohibiting use of outside funds in campaign); Colin A. Young, Rob Consalvo Calls on Candidates to Pledge to Eliminate Outside Special Interest Funding from Mayoral Race, Boston.com (July 14, 2013, 5:31 PM), http://www.boston.com/politicalintelligence/2013/07/14/consalvo-calls-candidates-pledge-eliminate-outside-special-interest-funding-from-mayoral-race/yQohpS7zBhO2ZMv6hysSjN/story.html (on file with the *Columbia Law Review*) (describing proposed contract in Boston Mayoral election).

13. See, e.g., Darryl R. Isherwood, Pallone Finds No Takers for "People's Pledge," PolitickerNJ (June 27, 2013, 1:23 PM), http://www.politickernj.com/66921/pallone-finds-no-takers-peoples-pledge (on file with the *Columbia Law Review*) (describing proposed contract in New Jersey Senate special election and reporting none of Pallone's opponents were willing to sign "People's Pledge"); Press Release, Pallone for Congress, Pallone Calls on Opponents to Sign "People's Pledge," (June 25, 2013), http://www.pallonefornewjersey.com/content/pallone-calls-opponents-sign-peoples-pledge (on file with the *Columbia Law Review*) ("In signing this pledge, it is my hope that the other three Democratic candidates in the special election will also decide that it is in the best interests of New Jerseyans to bar special interest third party interference in the campaign in all forms . . . .").

14. Cameron Joseph, Honda, Opponent Spar over 'People's Pledge,' Hill (Jan. 24, 2014), http://thehill.com/blogs/ballot-box/house-races/196314-honda-opponent-spar-over-peoples-pledge (on file with the *Columbia Law Review*).

15. Dan McGowan, Taveras Asks Gubernatorial Candidates to Sign Pledge to Curb Outside Spending, WPRI.com (Oct. 23, 2013, 11:20 AM), http://blogs.wpri.com/2013/10/23/taveras-asks-gubernatorial-candidates-to-sign-pledge-to-curb-outside-spending/ (on file with the *Columbia Law Review*) (describing Rhode Island gubernatorial candidate Angel Taveras's proposal for adopting People's Pledge similar to one adopted in Massachusetts in 2012).

16. Editorial, A Worthy Campaign Pledge for Maryland, Wash. Post (Nov. 16, 2013), http://www.washingtonpost.com/opinions/a-worthy-campaign-pledge-for-maryland/2013/11/16/c24a1ef6-4cac-11e3-be6b-d3d28122e6d4_story.html (on file with the *Columbia Law Review*) (describing Maryland gubernatorial candidate Douglas Gansler's proposal for adopting people's pledge similar to one adopted in Massachusetts in 2012).

and restricts third party spending, identifies the conditions under which such a contract is likely to be offered and accepted, shows how political dynamics push third parties and campaigns to adhere to the contract's spending restrictions, and discusses possible loopholes and challenges. It also explores the implications for election law and policy.

This Essay proceeds in three Parts. Part I outlines the legal and policy suggestions that have emerged in the years after *Citizens United*. It then describes the design possibilities for a self-enforcing private contract between campaigns—from the scope of activities covered to the structure of the penalty mechanism—drawing on the People's Pledge as an illustration. Part II describes the political dynamics that make private ordering possible. It identifies the elements that campaigns will consider when determining whether to offer and accept these contracts and outlines the conditions under which it is likely or unlikely for candidates to agree. Part II also explores the reasons why third parties adhere to the candidates' wishes for their noninvolvement, despite their desire and ability to influence the race, and it identifies under what conditions the campaigns themselves will hold to the contract instead of breaching. In the process, it draws on contract theory to describe the limitations of formal enforcement and the workability of self-enforcement. Finally, it analyzes the loopholes in and challenges to these contracts—and under what conditions the loopholes might lead third parties to ignore the contract and candidates to breach it.

Part III considers the broader implications of taking a private ordering approach to this public law challenge, and it briefly describes ways in which these contracts could be expanded in future elections. For opponents of campaign finance restrictions, there is a paradox at the heart of the private ordering solution. The Supreme Court's theory of free speech in *Citizens United* seeks to limit *government* restrictions on private speech during campaigns. Yet, private actors can also shape the incentives for private speech during campaigns—and can do so in ways that restrict private speech. For supporters of campaign finance restrictions, the private ordering solution poses a different challenge. It is possible that private ordering is a temporary answer on the way to broader public law reforms. But it is also possible that success in implementing a private ordering solution would act as an argument *against* the need for broader reforms. After exploring these concerns, Part III identifies two ways to increase incentives for candidates to adopt a private ordering solution: public pressure and linking private ordering to public funding programs. A brief conclusion follows.

A final caveat: This Essay uses the example of the People's Pledge to illustrate design options, constraints, and challenges in implementation. However, the aim of this Essay is not to argue that the Massachusetts analogy holds in every situation, that the private ordering approach will be applicable to every campaign, or that self-enforcing contracts can resolve every issue with third party spending. These contracts will not be

suited to every campaign. Nonetheless, they are an important and significant development in campaign finance debates because they provide an option for reform that does not require congressional action, that does not run afoul of the Supreme Court's restrictions on government regulation of speech, and that is being debated and discussed in an emerging set of races. The goal of this Essay is to explore the contours of these contracts so scholars, reformers, and practitioners have a better understanding of their applicability and operation.

I. CONTRACTING AROUND *CITIZENS UNITED*

Since *Citizens United*, scholars and activists alike have increasingly focused on the issue of third party spending during elections. This Part outlines the legal and policy suggestions that have emerged in the years after *Citizens United* and argues that they are either unlikely to be implemented in the short term or are insufficiently narrow in scope to restrain third party spending. It then describes a new alternative to the existing strategies—a self-enforcing private contract between campaigns. Drawing on the example of the People's Pledge in Massachusetts, it identifies the elements of such a contract.

A. *The Legal and Policy Responses to* Citizens United

In *Citizens United v. FEC*, the Supreme Court considered the constitutionality of federal restrictions on corporate independent expenditures.[17] Under federal law, corporations were prohibited from, among other things, distributing documentaries or advertisements within thirty days of a primary election.[18] In 2008, the corporation Citizens United produced a documentary about Democratic presidential candidate Hillary Clinton and sought to release the video through cable on-demand, with promotional advertising on broadcast television.[19] After two arguments and briefings, the Supreme Court determined that the restrictions on corporate expenditures were unconstitutional.[20] As Justice Kennedy wrote, "political speech must prevail against laws that would suppress it, whether by design or inadvertence."[21]

While the Court's decision had prominent supporters,[22] criticism was widespread. President Obama said that the Court had given a "green

17. 130 S. Ct. 876 (2010).

18. 11 C.F.R. § 100.29(b)(3) (2013).

19. *Citizens United*, 130 S. Ct. at 887.

20. Id. at 913.

21. Id. at 898.

22. See, e.g., Greg Stohr, Corporate Campaign Spending Backed by U.S. High Court (Update4), Bloomberg (Jan. 21, 2010, 1:37 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aU.fsorJbt3E (on file with the *Columbia Law Review*) (quoting Senate Republican Leader Mitch McConnell saying Court "struck a blow for the First Amendment" (internal quotation marks omitted)).

light to a new stampede of special interest money in our politics"[23] and a week later referenced the decision in his State of the Union address.[24] Senator John McCain, the Republican presidential candidate in 2008 and cosponsor of the Bipartisan Campaign Reform Act of 2002 (portions of which were struck down in the case),[25] was "disappointed"[26] and suspected that there would be, "over time, a backlash" to the decision.[27] Polling from the weeks after the decision indicates that 80% of Americans opposed the Court's ruling.[28] Academics and campaign finance experts took to debating the decision in the press.[29]

Doctrinally, *Citizens United* focused on government restrictions on corporate independent expenditures. But politically, as Professor Samuel Issacharoff has argued, "the opinion has come to serve as a popular shorthand for all that is wrong with the campaign finance system."[30] In addition to raising issues about unlimited corporate spending in federal elections, the decision sparked debates about the possibility of foreign corporations influencing American elections,[31] corporations' rights as

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23. Obama Criticizes Campaign Finance Ruling, CNN: Political Ticker (Jan. 21, 2010, 1:52 PM), http://politicalticker.blogs.cnn.com/2010/01/21/obama-criticizes-campaign-finance-ruling/ (on file with the *Columbia Law Review*) (internal quotation marks omitted).

24. Address Before a Joint Session of the Congress on the State of the Union, 2010 Daily Comp. Pres. Doc. 55 (Jan. 27, 2010) ("With all due deference to separation of powers, last week, the Supreme Court reversed a century of law that I believe will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections.").

25. Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered titles of U.S.C.), invalidated in part by *Citizens United*, 130 S. Ct. 876.

26. Kasie Hunt, John McCain, Russ Feingold Diverge on Court Ruling, Politico (Jan. 21, 2010, 12:45 PM) (quoting Senator John McCain) (internal quotation marks omitted), http://www.politico.com/news/stories/0110/31810.html (on file with the *Columbia Law Review*) (last updated Jan. 21, 2010, 6:04 PM).

27. John Amick, McCain Skeptical Supreme Court Decision Can Be Countered, Wash. Post: Post Politics (Jan. 24, 2010, 1:02 PM) (internal quotation marks omitted), http://voices.washingtonpost.com/44/2010/01/mccain-skeptical-supreme-court.html?wprss=44 (on file with the *Columbia Law Review*).

28. Washington Post-ABC News Poll, Wash. Post, http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_021010.html (on file with the *Columbia Law Review*) (last visited Feb. 25, 2014).

29. See, e.g., Editorial, How Corporate Money Will Reshape Politics, N.Y. Times: Room for Debate (Jan. 21, 2010, 12:45 PM), http://roomfordebate.blogs.nytimes.com/2010/01/21/how-corporate-money-will-reshape-politics/ (on file with the *Columbia Law Review*) (featuring commentary from Christopher Cotton, Heather K. Gerken, Eugene Volokh, Richard L. Hasen, Joel M. Gora, Michael Waldman, and Fred Wertheimer).

30. Rick Hasen, Issacharoff: Clarity About Super PACs, Independent Money and *Citizens United*, Election Law Blog (Jan. 10, 2012, 8:51 AM) [hereinafter Hasen, Issacharoff], http://electionlawblog.org/?p=27675 (on file with the *Columbia Law Review*).

31. See, e.g., Richard L. Hasen, *Citizens United* and the Illusion of Coherence, 109 Mich. L. Rev. 581, 605–11 (2011) ("There is at least the potential that foreign spending on U.S. elections could undermine the integrity of the electoral process.").

persons,[32] and the definition of corruption in election funding.[33] Although the rise of Super PACs is not connected directly to the holding of *Citizens United*, Super PAC influence and the influence of a variety of other institutional forms for third party campaign spending—such as 501(c)(4)s and 527s—have also been incorporated into the debate and rhetoric around *Citizens United*.[34] Indeed, the reasoning of the decision has led scholars to announce that *Citizens United* is the "end of campaign finance law" and that it "may well kill off meaningful campaign finance regulation of anything beyond contributions to candidates and certain forms of disclosure."[35] Others have argued that it "has cut off most of the traditional pathways for campaign finance reform."[36]

In response to the *Citizens United* decision and to the broader debate on the influence of third party groups in campaigns, scholars, commentators, and activists have suggested a variety of constitutional, legislative, and regulatory reforms. At the constitutional level, members of Congress have introduced constitutional amendments—some that directly overturn the holding in *Citizens United*,[37] and others that more broadly empower Congress to regulate campaign financing.[38] Legislatively, some scholars and activists have focused on improving the system of public financing by increasing the amount of money and speech in the system—

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32. See, e.g., Pamela S. Karlan, Foreword: Democracy and Disdain, 126 Harv. L. Rev. 1, 31 & n.167 (2012) (discussing "swift and overwhelmingly negative" popular reaction to *Citizens United* ruling suggesting "'corporations are people'"). For discussions of corporate personhood since *Citizens United*, see generally José E. Alvarez, Are Corporations "Subjects" of International Law?, 9 Santa Clara J. Int'l L. 1 (2011); Margaret M. Blair, Corporate Personhood and the Corporate Persona, 2013 U. Ill. L. Rev. 785; Julian G. Ku, The Limits of Corporate Rights Under International Law, 12 Chi. J. Int'l L. 729 (2012); Michael Stokes Paulsen, The Plausibility of Personhood, 74 Ohio St. L.J. 13 (2013).

33. See, e.g., Michael S. Kang, The End of Campaign Finance Law, 98 Va. L. Rev. 1, 4 (2012) [hereinafter Kang, The End] ("*Citizen United*'s lasting significance . . . is its doctrinal consequences for the definition of corruption as a basis for campaign finance regulation."); see also Heather K. Gerken, The Real Problem with *Citizens United*, Am. Prospect (Jan. 22, 2010), http://prospect.org/article/real-problem-citizens-united (on file with the *Columbia Law Review*) ("[*Citizens United*] changed the rules about what corruption means in election funding.").

34. See, e.g., Hasen, Issacharoff, supra note 30 (noting *Citizens United* backlash has encompassed Super PAC debate).

35. Kang, The End, supra note 33, at 4, 6.

36. Heather Gerken, Keynote Address: Lobbying as the New Campaign Finance, 27 Ga. St. U. L. Rev. 1155, 1155 (2011) [hereinafter Gerken, Keynote].

37. See, e.g., Press Release, Jon Tester, Tester's Constitutional Amendment: Corporations Are Not 'People' (June 18, 2013) [hereinafter Tester Amendment], http://www.tester.senate.gov/?p=press_release&id=2970 (on file with the *Columbia Law Review*) (describing proposed constitutional amendment overturning *Citizens United*).

38. See, e.g., Press Release, Tom Udall, Udall Introduces Constitutional Amendment on Campaign Finance Reform (June 18, 2013) [hereinafter Udall Amendment], http://www.tomudall.senate.gov/?p=press_release&id=1329 (on file with the *Columbia Law Review*) (describing proposed constitutional amendment overturning Buckley v. Valeo, 424 U.S. 1 (1976), and *Citizens United*).

either through granting individuals "democracy vouchers" that individuals can spend in a campaign[39] or through voluntary public funding systems that would free candidates from reliance on large contributions or lobbyists.[40] Congress has also debated the Disclosure of Information on Spending on Campaigns Leads to Open and Secure Elections Act of 2013 ("DISCLOSE Act"), legislation requiring greater disclosure of campaign spending.[41] And scholars have argued for shifting attention from ex ante controls to ex post controls such as bribery laws and lobbying reform.[42]

One group of scholars has focused specifically on corporate spending, suggesting a variety of reforms to corporate and securities regulations. Professors Bebchuk and Jackson have argued that political spending decisions should not be made under the same corporate governance rules as ordinary business decisions. They believe that lawmakers should empower shareholders with greater control over political spending[43] and that regulators at the Securities and Exchange Commission (SEC) should require disclosure of corporate political spending.[44] Others have proposed that shareholders should have the right to opt-out from political activities when general treasury funds are at issue, just as union members do.[45] And still others have suggested distinguishing between for-profit and nonprofit entities in campaign finance law or conditioning government benefits, such as contracts, on following political spending restrictions.[46]

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39. E.g., Lawrence Lessig, Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It 266–70 (2011).

40. See, e.g., Fair Elections Now Act, S. 750, 112th Cong. § 101(b)(1) (2011) (finding replacement of private contributions with Fair Elections Fund would "reduc[e] . . . actual or perceived conflicts of interest").

41. The House version is called the Disclosure of Information on Spending in Campaigns Leads to Open and Secure Elections Act of 2013, H.R. 148, 113th Cong. (2013). The Senate version is called the Democracy is Strengthened by Casting Light on Spending in Elections Act of 2012, S. 3369, 112th Cong. (2012).

42. E.g., Kang, The End, supra note 33, at 56–63 ("Officeholders who are willing to participate in outright bribery are unlikely to be deterred ex ante by, or comply fully with, campaign finance limitations."). For longer discussions of lobbying reform, see generally Richard Briffault, Lobbying and Campaign Finance: Separate and Together, 19 Stan. L. & Pol'y Rev. 105 (2008); Gerken, Keynote, supra note 36; Richard L. Hasen, Lobbying, Rent-Seeking, and the Constitution, 64 Stan. L. Rev. 191 (2012).

43. Lucian A. Bebchuk & Robert J. Jackson, Jr., Corporate Political Speech: Who Decides?, 124 Harv. L. Rev. 83, 83–84 (2010) ("[L]awmakers should develop special rules to govern who may make political speech decisions on behalf of corporations.").

44. Lucian A. Bebchuk & Robert J. Jackson, Jr., Shining Light on Corporate Political Spending, 101 Geo. L.J. 923, 925 (2013).

45. E.g., Benjamin I. Sachs, Unions, Corporations, and Political Opt-Out Rights After *Citizens United*, 112 Colum. L. Rev. 800, 862 (2012) (arguing Congress is justified in providing same opt-out right to shareholders as union members).

46. See, e.g., Kathleen M. Sullivan, Two Concepts of Freedom of Speech, 124 Harv. L. Rev. 143, 170, 174 (2010) (suggesting for-profit/nonprofit distinction and restriction of electoral speech for government beneficiaries as ways to improve campaign finance).

In a final category are suggestions that reshape existing campaign finance rules. For example, Professor Sullivan has suggested revising contribution rules by allowing "unfettered contributions directly to candidates."[47] "If the dirty work of negative advertising is left to corporate sponsors running independent ads," she argues, "then redirecting political money to candidates will also tend to elevate the tenor of political campaigns."[48] In other words, enabling more money to go to candidates directly would flood the airwaves with their presumably "cleaner" television advertisements, changing the debate and empowering candidates instead of third parties.

Despite their creativity, these solutions suffer from some consistent problems. First, despite the initial public outcry, Congress is fiercely divided on campaign finance issues, largely on partisan lines, rendering many of these options unlikely to succeed in the short term. The constitutional amendments have limited support in Congress.[49] The public financing options, to the extent they are not foreclosed by the Supreme Court's decision in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,[50] have not yet found their way to a vote in Congress. And the DISCLOSE Act, which had far greater support in Congress than either public financing or constitutional amendment, failed four times to gain the necessary sixty votes for cloture in the Senate.[51] In short, relying on a public law solution to third party spending seems unlikely to succeed as a reform strategy in the short run.

Second, to the extent that public law solutions (short of constitutional amendment) are challenged in court, they run the risk of being overturned by the Supreme Court under Justice Kennedy's theory of the

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47. Id. at 170.

48. Id.

49. The Udall Amendment had thirteen original cosponsors. Udall Amendment, supra note 38. The Tester Amendment had one additional cosponsor. Tester Amendment, supra note 37; see also Michael Kazin, A Constitutional Amendment to Fix Campaign Finance Can't Pass Congress. But It Could Start a Movement, New Republic (June 25, 2012), http://www.newrepublic.com/article/104268/michael-kazin-constitutional-amendment-fix-campaign-finance-cant-pass-congress-it (on file with the *Columbia Law Review*) (arguing "Congress, in its current composition," would not pass constitutional amendments overturning *Citizens United*, despite strong public support).

50. 131 S. Ct. 2806 (2011) (striking down Arizona's system of matching funds); see also Richard L. Hasen, Fixing Washington, 126 Harv. L. Rev. 550, 575 (2012) [hereinafter Hasen, Fixing Washington] (reviewing Lessig, supra note 39, and Jack Abramoff, Capitol Punishment: The Hard Truth About Washington Corruption from America's Most Notorious Lobbyist (2011)) (explaining limits imposed by *Arizona Free Enterprise Club* particularly with respect to "voluntary voucher public financing plan[s]").

51. 158 Cong. Rec. S5072 (daily ed. July 17, 2012) (Rollcall Vote No. 180) (showing fifty-three votes for cloture, forty-five against); 158 Cong. Rec. S5008 (daily ed. July 16, 2012) (Rollcall Vote No. 179) (showing fifty-one votes for cloture, forty-four against); 156 Cong. Rec. S7388 (daily ed. Sept. 23, 2010) (Rollcall Vote No. 240) (showing fifty-nine votes for cloture, thirty-nine against); 156 Cong. Rec. S6285 (daily ed. July 27, 2010) (Rollcall Vote No. 220) (showing fifty-seven votes for cloture, forty-one against).

First Amendment. The Court has held, in *Citizens United* and in *Arizona Free Enterprise Club*, that the First Amendment prohibits laws that seek to limit speech or assist one party by leveling the playing field of speech.[52] Although the *Citizens United* Court indicated that disclosure rules would be constitutional,[53] any public law option is nonetheless at greater risk of being overturned under *Citizens United*'s theory of free speech.

Finally, many of these options do not address the issue of third party spending writ large; they have more limited aims. Consider SEC rulemaking to require disclosure of corporate political spending.[54] Even if rules are implemented, they would not prevent or limit corporate spending—they would only require greater transparency. Indirectly, some shareholders may work to restrain firms from political spending, but these regulations would not eliminate corporate spending in any given election. Indeed, all of the corporate governance options—shareholder opt-outs, nonprofit/for-profit distinctions, or restrictions on government benefits—suffer from the narrower scope of only addressing corporate spending. While they are therefore more responsive to the precise holding of *Citizens United*, they are less attentive to the broader debate on third party spending from PACs, Super PACs, 527s, 501(c)(4)s, and individuals.

B. *Self-Enforcing Contracts to Limit Third Party Spending*

There is another option for limiting third party spending: a self-enforcing contract. In short, the private ordering option requires the opposing campaigns to agree to a contract that would penalize each campaign for any spending from an outside group that supports the candidate. For example, if an outside group spends money on television advertisements supporting a candidate or attacking her opponent, the candidate that benefits from the advertisements must pay, as a penalty,[55] a proportion of the value of the third party's advertising costs. Largely because the penalty reduces the candidate's funds, outside supporters will restrain themselves from spending on the candidate's behalf. Even if

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52. *Ariz. Free Enter. Club*, 131 S. Ct. at 2824–26; Citizens United v. FEC, 130 S. Ct. 876, 904 (2010); see also Hasen, Fixing Washington, supra note 50, at 575 (discussing implications of *Citizens United* for limiting individual spending on campaigns); cf. Michael S. Kang, After *Citizens United*, 44 Ind. L. Rev. 243, 244–48 (2010) (explaining and criticizing Court's reasoning in *Citizens United*).

53. 130 S. Ct. at 886.

54. See Letter from Comm. on Disclosure of Corporate Political Spending to Elizabeth M. Murphy, Sec'y, Sec. & Exch. Comm'n (Aug. 3, 2011), available at http://www.sec.gov/rules/petitions/2011/petn4-637.pdf (on file with the *Columbia Law Review*) (petitioning SEC to develop rules requiring public companies disclose corporate political-purpose spending to shareholders).

55. This Essay uses the term "penalty" in the general sense of a remedy that has negative consequences for a party, not as a term of art in contract law to indicate a penalty term in the contract with punitive connotations. For a broader discussion of penalties and liquidated damages, see infra Part II.B.

third parties spend on a candidate's behalf, the candidate will not breach the agreement for fear of significant reputational costs with voters, in the form of negative news stories in the media.

The private ordering approach has important benefits. First, because the contract is private, it does not need to go through the political process. Agreement on the terms of the contract is only needed between the two candidates and their campaigns. It requires no congressional involvement. Second, because the private contract does not rely on or require any form of public law to enforce it or to restrict third parties, it does not run afoul of constitutional limitations on the government restricting speech. Finally, because the contract's scope can be defined broadly, it goes further than pure disclosure options—it can incorporate all third party election spending, not just spending by corporations. Despite these benefits, the private ordering approach will not apply in every election. In some cases, these contracts will be adopted, in others offered but rejected, and in still others not even considered. But in general, these contracts provide a new option for campaign finance reformers to consider.[56]

Far from wishful thinking, this kind of self-enforcing contract succeeded in keeping third party spending out of television, radio, and internet advertising in the most expensive Senate race in history, the 2012 Brown-Warren Senate race in Massachusetts.[57] In that race, third party groups including the League of Conservation Voters and Crossroads GPS spent millions of dollars on issue advertisements[58] until

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56. These self-enforcing contracts differ from earlier instances of purely voluntary campaign finance disarmament by candidates, even when both candidates have jointly agreed to self-imposed restrictions, precisely because they have a built-in enforcement mechanism that penalizes action. For a discussion of cases in which candidates have voluntarily limited their spending levels, see John Copeland Nagle, Voluntary Campaign Finance Reform, 85 Minn. L. Rev. 1809, 1831–38 (2001), which describes the 1996 Kerry-Weld agreement, 1998 Feingold-Neumann agreement, 2000 Clinton-Lazio agreement, and 1996 Minnesota Compact, and Joshua A. Douglas, Election Law and Civil Discourse: The Promise of ADR, 27 Ohio St. J. on Disp. Resol. 291, 310–12 (2012), which characterizes agreements as akin to alternative dispute resolution (ADR). Note also that self-enforcing contracts like the People's Pledge are focused primarily on third party spending, rather than campaign spending. E.g., infra Appendix (indicating "outside third party organizations . . . function as independent expenditure organizations," and Brown and Warren "agree that they do not approve of such independent expenditure advertisements").

57. E.g., Responsive Politics, Historical Elections, supra note 3 (showing spending between campaigns amounted to $77 million, $17 million more than second most expensive Senate race that year).

58. E.g., Press Release, League of Conservation Voters, LCV Launches Major Ad Buy Showing Scott Brown Has Gone Washington (Oct. 25, 2011) [hereinafter LCV Press Release], http://www.lcv.org/media/press-releases/LCV-Launches-Major-Ad-Buy-Showing-Scott-Brown-Has-Gone-Washington.html (on file with the *Columbia Law Review*); Robert Rizzuto, Super PAC Crossroads GPS Takes Swipe at Elizabeth Warren's Response to Latest Ad, MassLive (Dec. 9, 2011, 2:41 PM) [hereinafter Rizzuto, Crossroads GPS], http://www.

the two candidates signed the People's Pledge in late January 2012. The Pledge was widely considered the first major attempt to restrict third party groups since *Citizens United*.[59] Under the Pledge, each campaign had to pay to charity the equivalent of 50% of any third party's advertising costs for advertisements that supported their candidates.[60] On two occasions in March 2012, outside groups spent relatively small amounts of money in support of Senator Brown, and Brown's campaign paid the penalty to charity.[61] After that point, the Pledge held until Election Day,

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masslive.com/politics/index.ssf/2011/12/super_pac_crossroads_gps_takes.html (on file with the *Columbia Law Review*).

59. See, e.g., Adam Sorensen, Can a Bipartisan Pact Really Disarm the Super PAC Arsenal in Massachusetts?, Time: Swampland (Jan. 24, 2012), http://swampland.time. com /2012/01/24/can-a-bipartisan-pact-disarm-the-super-pac-arsenal-in-massachusetts/ (on file with the *Columbia Law Review*) (calling Pledge "first attempt at an explicit multilateral disarmament of super PACs and their ilk" since *Citizens United*). The Pledge also echoed back to an earlier—but ultimately failed—attempt to restrict campaign spending in Massachusetts. In 1996, Senator John Kerry and Governor William Weld agreed to restrict campaign expenditures to $6.9 million each, including a $5 million cap on advertisements—with spending by outside groups deducted from the campaigns' limits. E.g., Weld, Kerry Cap Spending, Harvard Crimson (Aug. 9, 1996), http://www.the crimson.com/article/1996/8/9/weld-kerry-cap-spending-pin-an/?print=1 (on file with the *Columbia Law Review*) ("The novel arrangement limits both candidates to $6.9 million in overall spending and $5 million in electronic and newspaper advertising . . . . [It] also caps spending from personal funds (contributions or loans) at $500,000 and prohibits third-party expenditures seeking to influence the election."). Weeks before the 1996 election, however, the agreement failed, as both sides accused the other of violating the limits. E.g., Weld, Kerry Accuse Each Other of Breaking Agreement, CNN: AllPolitics (Oct. 24, 1996), http://cgi.cnn.com/ALLPOLITICS/1996/news/9610/24/spending.cap/ (on file with the *Columbia Law Review*) ("Massachusetts' nasty Senate race is getting nastier with both sides accusing the other of violating a voluntary spending limit."). Unlike the Kerry-Weld pact, the People's Pledge did not put a cap on spending and the People's Pledge did create a penalty mechanism. For other similar examples of voluntary approaches to limiting spending without an enforcement mechanism, see Nagle, supra note 56, at 1831–38.

60. Infra Appendix ("In the event that a third party organization airs any independent expenditure broadcast . . . in support of a named . . . Candidate, that Candidate's campaign shall . . . pay 50% of the cost of that advertising buy to a charity of the opposing Candidate's choice.").

61. E.g., Patrick Johnson, Scott Brown Agrees to Make Charitable Donation for 'People's Pledge' Infraction After Elizabeth Warren Calls Foul over Oil Lobbying Group's Pro-Brown Ads, MassLive (Mar. 26, 2012, 7:08 PM), http://www.masslive.com/politics/ index.ssf/2012/03/scott_brown_agrees_to_2nd_dona.html (on file with the *Columbia Law Review*) ("The Scott Brown campaign will write a check to charity . . . after the Elizabeth Warren campaign protested that ads from a petrolium [sic] lobbying group supporting Brown violate the 'People's Pledge' that both candidates agreed to in February."); Steve Leblanc, Warren Picks Charity for Ad Deal with Sen. Brown, Real Clear Politics (Mar. 9, 2012), http://www.realclearpolitics.com/news/ap/politics/2012/Mar/09/warren_picks_ charity_for_ad_deal_with_sen__brown.html (on file with the *Columbia Law Review*) (reporting Warren "chose the Autism Consortium to receive a donation from Brown" under People's Pledge after "Coalition of Americans for Political Equality, a [PAC] that supports Brown, violated the terms of the agreement between the two candidates").

with outside groups staying out of the race for fear of impeding their preferred candidate's campaign.[62]

The differences in the Brown-Warren race were striking. Outside spending made up only 9% of total spending in Massachusetts, compared to 62%, 47%, and 64% of total spending in Senate races in Virginia, Ohio, and Wisconsin respectively (the second, third, and fifth most expensive races of 2012).[63] Small donors (giving less than $200) had more influence than big donors in Massachusetts, contributing $23.5 million to the big donors' $8 million; in Virginia, Wisconsin, and Ohio combined, the big donors dominated the small donors, $135 million to $23.8 million.[64] Compared to those in Massachusetts, television advertisements in Virginia, Wisconsin, and Ohio were, on average, more than twice as likely to be negative advertisements—36% in Massachusetts, compared to 84% in the other states.[65]

Since the Brown-Warren race, other campaigns, such as the Lynch-Markey Senate primary and the multicandidate fifth federal congressional district primary in Massachusetts in 2013, have adopted the People's Pledge.[66] Still others have offered the Pledge and seen their opponents reject the offer.[67]

Self-enforcing contracts like the People's Pledge have a number of elements, each of which can be customized by the campaigns during contract negotiations.

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62. Cf. Dan Eggen, Pact on Third-Party Ads Seems to Be Working in Massachusetts, Wash. Post (Mar. 28, 2012), http://articles.washingtonpost.com/2012-03-28/politics/35450339_1_issue-ads-massachusetts-senate-race-senator-brown (on file with the *Columbia Law Review*) (observing "financial penalty incurred by the very candidate you intended to support through an ad buy seems to be functioning as an effective deterrent in" Brown-Warren Senate race (quoting Lisa Gilbert, Deputy Dir. of Cong. Watch Program) (internal quotation marks omitted)).

63. Tyler Creighton, Common Cause Mass., A Plea for a Pledge: Outside Spending in Competitive 2012 US Senate Races 4 (2013), available at http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/Plea%20for%20a%20Pledge%20Final.pdf (on file with the *Columbia Law Review*).

64. Id. at 5.

65. Id. In the other competitive states, 97% of advertisements paid for by outside groups were negative. Id.

66. Fifth Congressional District Pledge, supra note 11 (containing signed agreement among candidates similar to that used in 2012 Brown-Warren Senate race); see also Press Release, Mass. Democratic Party, Democratic Congressional Candidates Sign People's Pledge (Aug. 20, 2013), http://us2.campaign-archive1.com/?u=c0111be598bdb0643a7e09c73&id=ab70ccdf63 (on file with the *Columbia Law Review*) ("The five Democratic candidates for Congress in the 5th Congressional District today jointly announced the signing of an agreement to prevent outside, unregulated groups from spending unlimited, undisclosed sums to influence this election.").

67. See, e.g., sources cited supra note 13 (observing candidates in New Jersey special election were unwilling to agree to "People's Pledge").

1. *The Trigger and the Penalty.* — In order to create the necessary incentives for third parties to stay out of the election, the contract's central provisions are the triggering and penalty provisions. The basic structure is simple: In the event that a third party organization engages in specified election activities, the candidate that benefits from those activities shall pay a penalty. The trigger for the penalty is the third party campaign spending, which will be readily visible to the campaigns, press, and public at large. The public nature of the trigger ensures that the campaigns will have to respond to the third party advertising with either compliance (and payment of penalty) or breach of the contract. The penalty harms the campaign that is benefitted by the third party's spending, thereby undermining the third party's goal to help its preferred candidate. This self-inflicted punishment is what creates the incentive for the third party to refrain from election-related advertising. In the Brown-Warren campaign, for example, the People's Pledge established a penalty of 50% of the cost of the third party's advertising buy, and it required that the candidate benefiting from the third party advertising pay the penalty to a charity of the opposing candidate's choice.[68] Of course, the amount of the penalty can be varied based on the candidates' preferences. Part II.C.1 considers the risks of instituting a penalty that is less than 100% of the third party advertising buy.

2. *Covered Organizations.* — The contract can also vary in scope with respect to the covered organizations—that is, the organizations whose activities trigger the penalty. A broader scope that includes more organizations is likely to keep out more and different types of third parties and limit election spending to the candidates themselves. A narrower scope would allow for only certain kinds of third parties to spend funds during the campaign. The People's Pledge, for example, took a broad scope defining third party organizations as "including but not limited to individuals, corporations, 527 organizations, 501(c) organizations, Super PACs, and national and state party committees."[69]

Of particular note is the inclusion of national and state party committees, such as the Democratic Senatorial Campaign Committee and the National Republican Senatorial Committee. Under Federal Election Commission (FEC) rules for 2013–2014, individuals may give to a particular candidate, per election (i.e., for a primary and a general election separately), up to $2,600. But the same individual can also give up to $32,400 to a national party committee in a calendar year and up to $10,000 combined to state, district, and local party committees.[70] The

68. Infra Appendix ("In the event that a third party organization airs any independent expenditure broadcast . . . in support of a named . . . Candidate, that Candidate's campaign shall . . . pay 50% of the cost of that advertising buy to a charity of the opposing Candidate's choice.").

69. Infra Appendix.

70. Contribution Limits 2013–14, FEC, http://www.fec.gov/pages/brochures/contriblimits.shtml (on file with the *Columbia Law Review*) (last visited Feb. 25, 2014). Note

party committees are permitted to use those funds for advertisements in campaigns, and they are allowed to coordinate with the campaigns, up to a set amount.[71] Including the party committees in addition to other third party groups as covered organizations serves two functions. First, it ensures that only the candidates themselves are running advertisements on their behalf. Second, it closes a loophole that would allow individuals and PACs to donate to party committees, and then enable the party committees to advertise during the election season, while coordinating those advertisements with the campaign.

There is also a case *against* including party committees as a covered organization in the contract. Most candidates running for federal office face severe financial constraints. They need—and work hard to get—enough funding to spend on television advertisements so they can get their story and message to the public. Party committees, particularly in congressional races, often serve as the cavalry, providing essential support to help candidates get even their basic story and message out to the people when they are short of funds. Campaigns that are unable (or think they are likely unable) to raise even the minimum necessary to purchase serious advertising time in their district or state may want to exclude party committees from the terms of the contract. Note also how narrow the loophole is that allows individuals and organizations to donate to party committees and the committees to coordinate with campaigns.[72] Donations to the party committee go to the committee's general funds for campaign activity—they are not earmarked for specific races. As a result, outside groups seeking to influence a particular race through the party committee cannot predict with certainty that their donations will be directed toward that race.

3. *Covered Activities.* — In addition to defining the scope of covered organizations, the contract must also consider the scope of covered activities. Third parties can engage in a wide range of election-related activities: broadcast-television, radio, cable, satellite, and internet advertising; direct mail to voters; robocalls; billboards; leaflets; organizing drives for voters and volunteers; and communications with an organization's own members. A broader scope, including more activities, will again give more power to and place more emphasis on the campaigns themselves. A narrower scope enables third parties to play a role, albeit a limited one. Perhaps the clearest line to draw is between broadcast-television, radio, cable, satellite, and internet advertising, and other activities. These activities share a common core: paid advertising distributed via a private communications channel to a wide audience. They are also the most salient—and in the case of television, the most expensive.

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that there is an individual limit of $123,200 biennially, with a $48,000 limit to candidates and $74,000 limit to PACs and parties. Id.

71. See 11 C.F.R. § 109.21 (2013) (outlining parameters for permissible coordinated communication); Contribution Limits 2013–14, supra note 70.

72. See 11 C.F.R. § 109.21 (restricting campaign-committee coordination).

A slightly broader category would include direct mail to voters. Direct mail involves campaigns or third parties sending electioneering materials directly to voters via the U.S. Postal Service. Like the items in the advertising category, direct mail is a distribution channel for third party groups to convey their message. Unlike the advertising items, however, direct mail is targeted to individuals, rather than widely distributed.[73] As an example, in the 2013 Lynch-Markey Senate primary race in Massachusetts, the candidates adopted a variation on the original People's Pledge that covered direct mail independent expenditures (i.e., direct mail by outside groups to voters) but not direct mail from membership organizations to their own members (e.g., unions sending information to their members).[74]

Limiting a third party's organizing activities and within-organization communications raises concerns. In the case of advertising and mail, campaigns signing a contract would be explicitly condemning outside groups for spending funds on activities that many voters find overwhelming. In contrast, by limiting organizing activities and within-organization communications, candidates would in effect be condemning grassroots democratic activities—by citizens groups that spring up or even volunteers who spend money to persuade their friends and neighbors.

4. *Identifying the Value of Covered Activities.* — Deciding which activities should be covered depends in part on whether it is possible to identify the cash value of those activities. Without knowing the cash value, it is impossible to determine the amount of the penalty. Here too, certain advertising activities have an advantage over mail and other organizational activities.

First, some advertising activities are readily discernible to the public. Because television, radio, cable, and satellite advertising are broadcast to a wide audience, third party activity can be easily identified. Internet and direct mail violations, in contrast, are harder to discover because they are targeted directly at a narrow group of individuals who may not report the activity. Second, the value of these advertising activities (generally called "advertising buys," "advertisement buys," or "ad buys") is readily discoverable. Television stations make logs of their advertising open to the public, so any member of the public can go to the station and see the amount of the ad buy and the group that purchased the airtime.[75] Additionally, most campaign ad buys go through sales representatives, who

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73. Internet advertising is similar. For a discussion of targeted advertising, including direct mail and the Internet, see generally Michael S. Kang, From Broadcasting to Narrowcasting: The Emerging Challenge for Campaign Finance Law, 73 Geo. Wash. L. Rev. 1070 (2005).

74. Lynch & Markey Pledge, supra note 10 (committing candidates to charitable contributions based on third party activity, but not internal membership activity).

75. TV Station Profiles and Public Inspection Files, FCC, https://stations.fcc.gov/about-station-profiles/ (on file with the *Columbia Law Review*) (last visited Feb. 9, 2014) (describing publicly available information at television stations).

are often grouped by television affiliate or cable system (e.g., the ABC affiliates in greater Boston). These sales representatives will usually tell campaigns what the extent of ad buys are from outside groups or their opponents—and they can usually do so with greater speed than the campaign sending a representative to the station to check the logs. Discovering the value of these ad buys is becoming increasingly easier, as more and more third party groups send out press releases describing their advertising activities. These groups seek to take credit for their efforts to further their candidate's cause. This desire for credit enables identification of the value of the advertising buys. For example, in the Brown-Warren race, the American Petroleum Institute announced publicly that they would run advertisements in Massachusetts.[76]

Legally, FEC disclosure rules also make it possible to identify third party intervention in certain situations. FEC regulations distinguish between "electioneering communications" and "independent expenditures." Electioneering communications include "any broadcast, cable, or satellite communications" that refer to an identified candidate for federal office and are distributed within sixty days of a general election or thirty days of a primary or convention.[77] Independent expenditures are communications that "expressly advocat[e] the election or defeat" of an identified candidate.[78] If the costs of producing or airing an electioneering communication, such as television advertising, are above $10,000, or the person making the advertisement will spend $10,000 during the calendar year, then the advertising has to be reported to the FEC by 11:59 PM on the day after the electronic communication is publicly distributed.[79] For independent expenditures, where the costs are above $10,000 during the calendar year, the advertising must be reported to the FEC within forty-eight hours.[80] If the expense is below $10,000 and twenty days before the election, reports are filed through the normal, quarterly FEC filing process; within twenty days of the election, reports must be filed within twenty-four hours if the expenditure (or an aggregate of expenditures) exceeds $1,000.[81]

Note that the FEC disclosure regime does not include disclosure of spending on "issue advertisements"—advertisements that might mention a candidate but do not advocate for her election or defeat—prior to the thirty- and sixty-day timelines that govern electioneering communica-

76. Press Release, Am. Petroleum Inst., New API Ad Campaign Stresses Energy Tax Hikes Could Increase Pain at the Pump (Mar. 26, 2012) [hereinafter API Press Release], http://www.api.org/news-and-media/news/newsitems/2012/mar-2012/api-ad-campaign-stresses-energy-tax-hikes-could-increase-pain-at-the-pump.aspx (on file with the *Columbia Law Review*).

77. 11 C.F.R. § 100.29(a) (2013).

78. Id. § 100.16(a).

79. Id. § 104.20.

80. Id. § 104.4(b)(2).

81. Id. § 104.4(b)–(c).

tions.[82] Prior to those dates, third parties can run issue advertisements without disclosure to the FEC—and they can even coordinate with the campaigns up to ninety days before the election.[83] As a result of these rules, any significant intervention in the election will be reported to the FEC within forty-eight hours if it is an electioneering communication or an independent expenditure, but identifying spending on issue advertisements early in an election cycle will depend on television logs, advertising representatives, press releases, or other informal mechanisms.

Despite these legal rules, determining the value of internet, direct mail, organizing, and membership communications is more difficult. Direct mail is targeted to narrow groups of individuals, so identifying direct mail activities may be more difficult than identifying widely distributed advertising. As a result, identifying third party interventions will rely more on FEC disclosure of independent expenditures rather than on widespread public notice. Internet communications are even more challenging, as they can be targeted at certain websites or even at individuals by their geography—whether in the electoral constituency or outside it. Similarly, internal communications within a membership organization are difficult for outsiders to discern. Additionally, membership organizations only disclose their membership activities to the FEC on a quarterly basis,[84] making timely identification more difficult. In sum, the disclosure regime—both legally and practically—makes it easier to identify advertisements than to identify other third party activities.

The political dynamics of identifying outside activities are also central to deciding the scope of covered activities. Upon identifying third party activities, the press and public at large can immediately seek to determine the value of the activities and the amount of the penalty to be paid. This places immediate pressure on the campaign to determine whether it will admit that there was third party intervention in violation of the contract and whether it will comply with the terms of the contract or breach. In addition, the contract itself can add pressure to ensure timely decisions. For example, the People's Pledge institutes a time frame for campaigns to pay their penalties—within three days of discovery of the advertisement buy's total cost, duration, and source.[85] Failure to act within three days triggers breach—and, more importantly, the attendant negative press treatment that would accompany a delay or breach. Once again, these practical realities cut in favor of advertising and against organizational activities.

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82. Id. § 109.21(f) (providing safe harbor for issue advertisements).

83. Id. § 109.21 (outlining parameters for permissible coordinated communication).

84. Id. § 104.6(b).

85. Infra Appendix ("In the event that a third party organization airs any independent expenditure broadcast . . . in support of a named . . . Candidate, that Candidate's campaign shall, within three (3) days of discovery of the advertisement . . . pay 50% of the cost . . . to a charity of the opposing Candidate's choice.").

5. *Additional Political Considerations.* — The People's Pledge includes three other features that can best be understood as serving important public and political functions. First, the Pledge includes a statement that both campaigns would not coordinate with any third party for the duration of the election cycle.[86] Such coordination is already highly regulated under election law and FEC rules.[87] Including this commitment in the document, however redundant, acts as a public signal of the campaigns' commitment to keep third party groups out of the race.

Second, the People's Pledge includes a provision stating that the campaigns would "agree to continue to work together to limit the influence of third party advertisements and to close any loopholes (including coverage of sham ads) that arise in this agreement during the course of the campaign."[88] As a matter of politics, the provision serves two functions. Most importantly, it flags for the press and public at large that there are loopholes in the agreement, in particular the "sham ad" loophole, under which a third party group can run an advertisement that appears to benefit one candidate but in fact harms that candidate. These sham ads would mean the candidate would have to pay the penalty for advertisements that harm her candidacy. Sham ads are discussed at length in Part II.C.2. Preemptively identifying the most concerning loophole in the contract puts the press on notice that such a loophole might be employed in the future, enabling the press, as arbiter and referee, to identify and potentially chastise these sham ads. In addition, the provision commits both candidates to continued cooperation. In other words, if a third party employs one of the loopholes, the contract terms provide the political and rhetorical foundation for the candidate that objects to the third party action to suggest reworking the agreement, rather than requiring the nonobjecting candidate to breach the agreement.

Finally, the People's Pledge is only a page and a half long. Keeping the People's Pledge short and readable serves an important political function: The press and public can read it in its entirety without legal counsel to interpret or navigate the terms, and neither party can be criticized for being overly complex and technical.[89] But there is a serious tradeoff in making the contract short: As a legal document, the contract is often unclear. For example, a longer, more legalistic document could

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86. Infra Appendix ("The Candidates and their campaigns agree that neither they nor anyone acting on their behalf shall coordinate with any third party on any paid advertising for the duration of the 2012 election cycle.").

87. See, e.g., 2 U.S.C. §§ 431(17), 434(c), 438(a), 441a, 441d (2012) (outlining detailed donation limitations and disclosure and recordkeeping requirements for third party and candidate expenditures); see also 11 C.F.R. § 100.16 (discussing independent expenditures); id. § 109.21 (defining coordinated communications).

88. Infra Appendix.

89. To be sure, the press and public are not going to interpret even a short and readable contract in the same way that a trained election or contract lawyer would. The legal technicalities might therefore be trumped by political perceptions.

provide an extensive definitions section to help clarify the scope of covered activities with more granularity, and it could include provisions addressing identification of internet advertising costs. The choice of a shorter, more public-oriented document underscores not only the self-enforcing nature of these contracts but also the costs of specificity and the benefits of vagueness in contract terms. Indeed, contract theorists have identified the tradeoffs that parties consider when designing incomplete contracts: Vague terms might be justified in some situations, based on the parties' anticipation of the costs and benefits of making ex ante and ex post decisions.[90] In other words, political dynamics—not litigation or arbitration—are the central factor driving design.

II. THE POLITICAL DYNAMICS OF PRIVATE ORDERING

This Part considers the conditions under which a self-enforcing contract is possible, the reasons it survives, and the possible challenges campaigns will face in negotiation and implementation. It first outlines the factors campaigns will consider in offering and accepting a contract. It then discusses why third parties follow the wishes of the campaigns and stay out of the race, and it explains why candidates prefer compliance with the agreement to breach. Finally, it addresses some loopholes and challenges the agreement poses.

A. *Offer, Acceptance, and the Conditions for a Deal*

Campaigns seeking to limit third party spending have to consider a variety of factors when determining whether to offer the contract to their opponent or, if offered a contract by the opponent, whether to accept. In different races, these factors may have different weights, and they may interact in complex and unpredictable ways. As a result, it is difficult, if not impossible, to outline a universal formula for when campaigns should come to an agreement. But it is possible to identify the factors that campaigns will consider and whether those factors push toward or against creating a contract.

1. *Fundamentals of the Race.* — Campaigns analyze the fundamentals of the race by relying on polling, experience, history, and perceived strengths and weaknesses of candidates. If one side thinks it will easily win the election, that counsels in favor of offering the contract to the weaker opponent. The weaker opponent, already unlikely to succeed, would then be denied the additional support that could come from third party advertising (supportive advertising and attacks on the opponent), while the likely winner would maintain the status quo of her lead. The stronger candidate could make an offer, thereby taking the moral high

90. See, e.g., Robert E. Scott & George G. Triantis, Anticipating Litigation in Contract Design, 115 Yale L.J. 814, 822–39 (2006) (analyzing front- and back-end costs of contracting and tradeoffs made in selecting between vague and concrete terms).

ground of clean elections and forcing the weaker candidate either to suffer the negative press accompanying rejection of the deal or to accept the deal and forgo support from outside groups. The weaker candidate should reject the offer, in case third party spending might enter and give the weaker candidate additional support. Note also that these lopsided elections are likely to manifest more frequently with incumbents, and to favor incumbency. In addition, in these lopsided elections, third parties are less likely to enter on either side because of the low probability of their intervention making a difference. In contrast, in situations where it is clear the race will be tight or there is uncertainty as to who is the favorite to win, the dynamics of offer and acceptance are less likely to depend on the chance of victory and more likely to depend on each campaign's access to money and on other political factors.

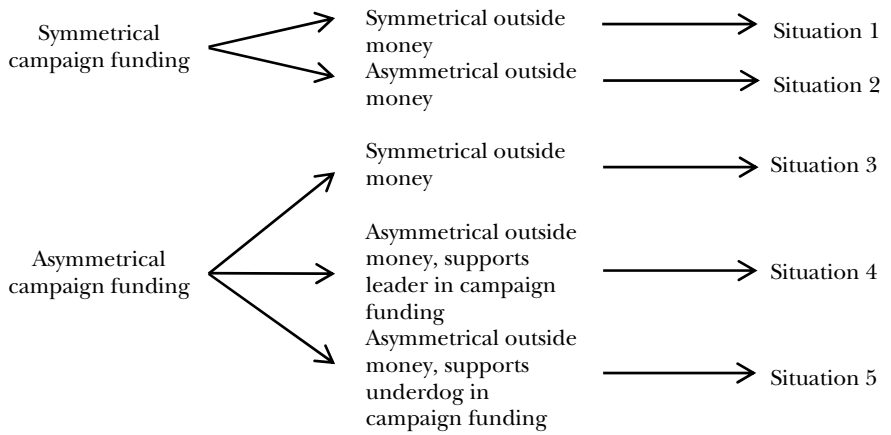
There still might be situations, however, in which candidates who believe they are likely to win an election easily do not want to sign such a contract, based on the fundamentals of the race. For example, if the year's electoral climate is opposed to a strong candidate's party—because it is an off-year from the presidential election, there are no strong statewide candidates of the same party running in the state to help energize party supporters, or the general climate in the country is opposed to the candidate's party, leadership, or views—the candidate might think there is a higher risk to signing a contract. If the candidate's race starts to tighten (even if, for example, that tightening reduces the likelihood of victory from 90% to 65%), the candidate will want third party spending to provide support. Third parties, who may want to support a likely winner in a tighter-than-normal race, could then intervene on the candidate's side.

2. *Availability of Money*. — Perhaps the most important factor is the campaigns' perceptions of the amount of money they will have available to them in their race. It is worth distinguishing between money the campaigns raise themselves ("campaign funds") and the money outside groups could spend ("outside money"). One of the most important factors in determining whether a campaign will sign a self-enforcing contract is whether they have sufficient campaign funds to communicate with voters. Television advertising is the easiest way to increase name identification and shape the campaign's narrative, but it is also expensive. If campaigns do not have sufficient funds to run enough television advertisements to articulate that narrative to voters, they will likely not want to exclude outside groups. In other words, there is a basic threshold of campaign funds necessary to communicate with voters, and, in absence of that level of funding, outside money is generally considered a necessary supplement. Outside money may be essential to introduce the candidate to voters, to defend against attacks, or to launch attacks. On the other hand, in some cases, there might be campaigns that do not have enough funding but nonetheless offer or accept these contracts: some candidates run on principle, even if it might be detrimental to

their electability; others might think the contract will be effective at getting them positive press coverage that could help their candidacy; still others might believe they could never get outside funds even if they tried. For mainstream, competitive campaigns worried about having enough basic funding and simultaneously concerned about outside money, there may be a possible compromise: Exclude outside groups, except for party committees. Allowing party committees would enable the campaign to have additional support that is coordinated with the campaign's strategy, but would still exclude more independent third parties. Of course, allowing party committees would slightly reduce the benefits of the contract in terms of public perceptions.

If the campaigns have or expect to have sufficient campaign funds, then the next question is whether there is symmetry or asymmetry in the expected funding levels between campaigns—that is, whether one campaign has or is expected to have substantially more campaign funds than the other. For example, at the start of the Brown-Warren race in 2011, Senator Brown had $10 million in campaign funds.[91] Although the two campaigns equalized funding by the end of the race, a $10 million advantage is substantial and something that most campaigns are unlikely to erase. Campaigns must also consider whether there is symmetry or asymmetry in the expected funding levels of outside money. Considering symmetry and asymmetry in expected campaign funding and outside money leads to five different scenarios for candidates:

FIGURE 1: AVAILABILITY OF MONEY TO CAMPAIGNS



91. E.g., David Catanese, Scott Brown's Fundraising Approaches $10 Million, Politico: David Catanese Blog (July 6, 2011, 10:17 AM), http://www.politico.com/blogs/davidcatanese/0711/Scott_Brown_approaching_10_million_.html (on file with the *Columbia Law Review*).

Situation 1: Campaign funds are expected to be symmetrical, and outside money is also expected to be symmetrical. In this case, money will not be the deciding factor for whether the campaign wants to offer or accept the contract. With expected resources being roughly equivalent, campaigns will make decisions based on other political factors.

Situation 2: Campaign funds are expected to be symmetrical, and outside money is expected to be asymmetrical. In this situation, the side that anticipates having less outside money would be expected to offer the contract to the side with more outside money. Because both sides have equivalent campaign funds, the two sides would start on a level playing field. The introduction of outside money will disadvantage one side, and that makes it rational for the disadvantaged side to suggest eliminating outside funding. In these situations, acceptance depends on a peculiar feature: both sides feeling as if they are at a disadvantage. If the side advantaged by outside money *knows* it has a significant advantage, it will reject the disadvantaged side's offer, seeking to preserve its advantage in outside funding. But if both sides believe that the other has the outside-money advantage, then it is rational for each to cooperate. This may in fact be what happened in the Brown-Warren race. As a Republican in generally Democratic Massachusetts, Brown could expect liberal groups to target his reelection. Indeed, by the time of the People's Pledge in January 2012, the League of Conservation Voters had already invested in attack advertisements against Senator Brown, and a Super PAC called Rethink PAC had prominently announced its intention to be involved in the race.[92] Likewise, as a fierce critic of Wall Street banks, Warren could expect substantial outside money entering the race on behalf of Brown. And, in fact, by December 2011, Crossroads GPS, the Super PAC aligned with former George W. Bush political strategist Karl Rove, had already spent $1.12 million on attack ads targeting Warren.[93] Given the substantial amounts already spent and their own unique positions, each side could have thought that the other might end up with substantially more outside money—and that thinking on both sides would make agreement possible.

Situation 3: Campaign funds are expected to be asymmetrical and outside money is expected to be symmetrical. In this situation, the likelihood of a deal is uncertain. On the one hand, for the leader in campaign funds, outside money opens the possibility of additional pressure on her candidacy—and an additional actor without any constraints on negative advertising. Limiting outside funds maintains the candidate's lead in campaign funds and allows her to have more influence than her opponent in shaping the race. On the other hand, for the leader in campaign

92. E.g., Paul Blumenthal, Rethink PAC, Anti-Scott Brown Super PAC, Launches First Attack Ads, Huffington Post (Nov. 15, 2011, 10:11 AM), http://www.huffingtonpost.com/2011/11/15/rethink-pac-anti-scott-brown-super-pac_n_1094869.html (on file with the *Columbia Law Review*); LCV Press Release, supra note 58.

93. Rizzuto, Crossroads GPS, supra note 58.

funds, outside support might bring in more funding more quickly, crushing the opponent before she has an opportunity to gain strength. For the candidate with a disadvantage in campaign funds, the analysis is reversed: She might want outside support to place additional pressure on her opponent, or prefer limiting outside money for fear of being overwhelmed.

Situation 4: Campaign funds are expected to be asymmetrical and outside money is expected to be asymmetrical, supporting the candidate with an advantage in campaign funds. In this case, the likelihood of a deal is also uncertain. On the one hand, the advantaged candidate can offer a deal, knowing that if it is accepted, she will still have an advantage in campaign funds, and that if it is rejected, she will have an advantage in campaign funds and outside money. On the other hand, the advantaged candidate may not offer a deal and instead seek to retain the added advantage. The benefits to the advantaged candidate of making an offer are primarily political. Similarly, the strategy of the disadvantaged candidate will rely on other factors. The disadvantaged candidate may prefer a deal in order to limit the scope of her disadvantage to only campaign funding. At the same time, the disadvantaged candidate may prefer no deal, in the hope that the outside money in her favor will prove useful in correcting the imbalance, even though she will be outspent.

Situation 5: Campaign funds are expected to be asymmetrical and outside money is expected to be asymmetrical, supporting the candidate who is disadvantaged in campaign funds. In this case, the candidate with fewer campaign funds has greater outside money support. Here, the candidate with the advantage in campaign funds should offer a deal to the disadvantaged candidate in order to prevent the opponent from gaining extra resources. The candidate disadvantaged in campaign funds should reject the offer, seeking to erase the campaign funding differential with support from outside.

Two features are worth noting from this breakdown of the different financial postures of candidates. First, the likelihood of a contract depends on the *expected* funding levels on both sides. Because the contract will be concluded with comparatively little information about the overall funding levels that each candidate will have by the end of the race, each candidate will have to make assumptions about the other candidate's campaign funds and support from outside money. This information is often uncertain, making it rational for campaigns to be risk-averse and act as if there will be an asymmetry favoring the opponent. This should push campaigns generally to think more seriously about agreeing to a self-enforcing contract.

Second, it is worth noting that the most fiercely contested elections are likely to be the best suited to a self-enforcing contract. In a hotly contested election, both candidates will have enough campaign funding to meet the basic threshold at which they can even consider a contract. In addition, in a hotly contested election, third parties, and particularly

third parties willing to run the most damaging attack advertisements, will be more interested in participating. As a result, restricting outside spending makes sense because the campaigns should be able to get sufficient resources to run their races and would likely be worried about the potentially significant harm from outside groups.

3. *Political Factors: Branding, Narrative, Timing, and Press.* — A third set of factors shares as its common concern the effect the contract will have on the short- and long-term narratives in the race. Start with branding. Some candidates are tied to particular brands that might complicate their decision to agree to a contract. For example, a candidate that has robust brand identification around supporting clean government, ending corruption, and removing conflicts of interest would have a harder time refusing to sign a contract. More interestingly, a candidate who is seen as a moderate or independent might be inclined to sign a contract to avoid affiliation with extremist elements seeking to spend money in the race, for fear of being attacked for having links to these extremist elements. Indeed, Senator Brown's joining of the People's Pledge helped sustain his independent and moderate image, precisely because the Pledge meant that Karl Rove, well known as a leader in the Republican Party, did not spend money on his behalf. Had Rove's group entered the race, Brown would have had a harder time distancing himself from the national Republican Party, which appeared to be an important element of his brand as an independent and moderate. Note that the candidate's brand is closely linked to the broader ideology of the candidate's constituency. For Brown, being an independent and moderate was important to his chances of victory in progressive-leaning Massachusetts. In states with strong libertarian sentiments, in contrast, Republicans worried about maintaining support in that wing of their party might be concerned that supporting an agreement and thus restricting free speech, even via private contract, might be seen as a violation of firmly held libertarian values.

A second issue is the candidate's narrative. Candidates who are relatively or even comparatively unknown might want to have time to introduce themselves to the public in a positive way, without being bombarded by negative attack advertisements from third parties. Particularly in the early stages of the campaign, a candidate seeks to inform voters of who she is and what her story is. When third parties buy advertising, they can often define the candidate before the candidate herself has an opportunity to do so. Many candidates—particularly first-time candidates with low name recognition—might therefore lean toward supporting a contract if they feel that outside money will enter the race before they have a chance to introduce themselves.

A related issue is the timing of negative advertising by campaigns and third parties. Candidates attacking each other with negative advertisements do not usually "go negative" early in the race. In part, this is because they are introducing themselves and trying to build a positive

narrative, and partly this is because candidates have limited resources and want to save their funds for the end of the race. But campaigns also pay a cost for going negative, in the form of press coverage of their negative advertisement and the turn from positive to negative in the race. Third parties, however, can enter the race early with negative advertisements. Although the candidate that benefits might be blamed for the negative tone of the campaign, disclosure requirements indicate clearly which advertisements the candidates approve themselves. As a result, a candidate can condemn third party negative advertisements as destructive to the spirit of the race while still benefiting from them. The consequence is that candidates who want to be protected from negative advertising for a longer period of time may be more inclined to offer and sign a contract to keep out third parties.

The other political factor that candidates must consider is how the press will interpret their actions. In an environment with an active press corps, the candidates will face extra scrutiny and pressure. First, once the offer is made, the offeree will face immediate pressure from the media to decide whether or not to accept the offer. Failure to accept, in an environment with an entrepreneurial press corps, could lead to negative news stories in the short run, particularly if the candidate has historically supported clean government and campaign finance reform initiatives.[94] Second, if the offeree rejects the contract, then in the long run the offeree is likely to face pressure every time outside money funds a new advertisement, because the opposing candidate can decry the advertisement and the press can blame the offeree for rejecting the contract. Additionally, the offeree will likely face pressure in a debate or in a candidate forum, in which the offeror can criticize the offeree for rejecting the contract.

4. *The Possibility of Breach.* — A final consideration is to what extent the candidates believe their opponents are good faith actors. On the one hand, if a candidate believes that his opponent or her third party allies are bad faith actors who will breach the agreement, he may still want to sign the contract. Even with future breach, the candidate would gain time without outside money being spent (particularly important if the candidate is introducing himself to the voters), and when his opponent or her third party allies breach, the candidate will have a campaign issue to exploit. On the other hand, if a candidate believes that his opponent's third party allies will exploit the sham advertisement loophole, the candidate might think twice about signing the contract. Under that loophole, discussed in detail below,[95] advertisements would appear to benefit one candidate, causing him to have to pay the penalty, but would in fact

94. A candidate rejecting the offer will of course attempt to convince the press corps that the contract would have disproportionately harmed her candidacy. It is impossible to predict in advance whether the attempt to influence the media's coverage of the contract offer and rejection will be successful.

95. Infra Part II.C.2.

benefit the other candidate. This situation could lead the candidate who is truly harmed (rather than appears to be harmed) to be forced into breaching the contract, thereby creating a campaign issue for the bad faith candidate whose third party allies ran the sham advertisements.

B. *Why the Deal Holds: The Dynamics of Self-Enforcement*

Assuming the two campaigns come to an agreement, the critical questions are whether third parties will respect their wishes and refrain from spending money on behalf of the candidates—and if not, whether the campaigns will respond by fulfilling the contract's penalty terms or will refuse to pay and breach.

1. *Why Outside Groups Respect the Contract Terms.* — There are three main reasons why outside groups will respect the wishes of the campaigns and restrict their activities. Foremost is the preference for campaign control over third party control. Dollar for dollar, money spent by the campaign itself is generally understood to be more valuable than money spent by third parties. The reason is simple: Third parties do not know as much as the campaign about the campaign's strategy and plans, and because campaign and third party coordination is highly regulated,[96] third parties cannot integrate their advertising and messages into the campaign's overall strategy. Third parties understand that their dollars, while helpful, might be disconnected from the campaign's strategy, and they do not want to penalize the campaign while substituting their judgment for that of the campaign. To be sure, in a campaign that is truly disastrous, third parties might be willing to substitute their judgment for that of the campaign leadership. But at the same time, it is not uncommon for truly dysfunctional campaigns to replace their leadership.

The second reason third parties might adhere to the campaigns' wishes for them to stay out of the race is that the race remains tight or their preferred candidate leads. In cases where their preferred candidate has a big lead, the third party has no need to enter the race. In situations where the race is tight, the third party will likely not want to enter the race. Although the third party's additional dollars might give a boost to its candidate, the candidate's own coffers will be depleted by the penalty, and the candidate will face a series of negative news stories. These costs to entry are serious and caution against intervention when the race is close. When the third party's candidate is losing by a significant margin, the third party might be willing to enter the race, thinking its judgment might improve the race's dynamics, even with bad news stories and losses to the campaign's treasury. More plausibly, however, the third party might hope that the candidate will breach the agreement. A desperate

96. See, e.g., Coordinated Communications and Independent Expenditures, FEC (June 2007), http://www.fec.gov/pages/brochures/indexp.shtml (on file with the *Columbia Law Review*) (last updated Jan. 2013) (describing rules governing coordinated communications and independent expenditures).

candidate could think that opening the floodgates of third party spending might give her a chance to become competitive once again.

Finally, third parties might stay out of the race because it is simply infeasible to enter the race with advertising. Toward the end of a campaign, advertising time becomes increasingly unavailable, particularly in years and jurisdictions in which there are multiple competitive races. As a result, what little advertising time remains becomes extremely expensive. In effect, there is a point of no return, after which it is simply too expensive to enter the race with advertisements that will saturate the airwaves significantly enough to make a difference.

2. *Why Campaigns Fulfill the Contract.* — If a third party did enter the race, the campaign that benefitted from its entry would have a choice: whether to adhere to the contract and pay the penalty or to breach the contract and refuse to pay the penalty. Campaigns that are considering whether to breach the contract would weigh a number of factors to determine whether the costs of breach outweigh the benefits. One factor is the cost of the advertising buy. It is possible that the entry of third parties would be of such a magnitude that it could deplete and even bankrupt the campaign to pay the penalty. A candidate that wanted to continue in the race without going into significant debt might prefer to breach the contract and continue paying her staff and executing her plans. In this case, the costs of breach (in terms of public outcry and negative press) are relatively minor compared to the magnitude of the benefits of breach (continuing the race while not in debt).

A campaign might also think seriously about breach if the campaign feels that the third party advertisements are "sham ads," advertisements that appear on the surface to benefit one candidate but in fact benefit the opponent. This loophole will be addressed in the next section,[97] but in this situation, the costs of breach may be mitigated if the candidate can argue that the third party is exploiting a loophole or if the candidate can seek to renegotiate the contract, relying on the provision that both campaigns agree to address the problem of sham ads if it arises. The benefits of breach would be significant, as the campaign that pays the penalty would be depleting its treasury for advertisements that harm it.

The central reason for campaigns to adhere to the contract is the possible political costs of breach—damage to their brand and narrative, and negative press in the short and long run. Unlike the decision to agree to the contract in the first place, breach provides evidence of a serious character flaw. The candidate promised, during the campaign, to adhere to the contract, and in a matter of months broke that promise because it was politically expedient. That kind of behavior, while perhaps all too common in politics, is more significant when it takes place in the course of such a short period of time and under the spotlight of the campaign. The press and the opponent may be able to attack the breach-

97. Infra Part II.C.2.

ing candidate as untrustworthy or lacking in character. Note also that a candidate can benefit politically from adhering to the contract. By paying a penalty, the candidate signals his character and integrity—and commitment to clean elections.

The campaign will also consider how tight the race is and the timing of the breach. A desperate, losing campaign will be more likely to breach than a winning campaign or a campaign in a tight race. The timing of the breach might affect the candidate as well. Although some might think that breach at the end of the race would be viable because of the limited time between the breach and Election Day, the decision is more complex. On the one hand, a desperate campaign might try anything to gain advantage. On the other hand, breaching toward the end of the race, when voters and the press are paying close attention to the campaign, is more likely to focus attention on the fact of breach and the candidate's broken promise when faced with the choice of principle versus expedience. Breaching earlier in the race is more likely to draw immediate attention, which could potentially dissipate before Election Day.

As an example of the contract holding, consider some examples from the Brown-Warren race. On a few occasions, news reports indicated that outside groups were thinking about entering the race. Pressure from the campaigns and notice in the press helped keep these outside groups from entering the race. For example, in late August 2012, a Super PAC calling itself the Friends of Traditional Banking announced that it was considering entering the Massachusetts Senate race to run advertisements against Warren.[98] Warren sent a letter to the Super PAC informing it of the People's Pledge and requesting it refrain from entering, and at the same time called on Brown to request the group remain out of the race.[99] The Super PAC complied with the Pledge and did not enter the race.

Around that same time, reports also surfaced that Karl Rove had briefed conservative donors on American Crossroads's plans in battleground states, including television advertisements in Massachusetts.[100] The Warren campaign responded by calling on Senator Brown to remind

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98. E.g., Barbara A. Rehm, Bank SuperPac Considers Targeting Elizabeth Warren, Am. Banker (Aug. 22, 2012, 1:14 PM), http://www.americanbanker.com/issues/177_163/next-step-for-bank-superpac-where-to-put-the-money-1052039-1.html (on file with the *Columbia Law Review*).

99. E.g., Adam Joseph Drici, Warren Calls on Brown to Send Banking SuperPAC Packing, GoLocalWorcester.com (Aug. 27, 2012), http://www.golocalworcester.com/politics/warren-calls-on-brown-to-send-banking-superpac-packing/ (on file with the *Columbia Law Review*).

100. E.g., Sheelah Kolhatkar, Exclusive: Inside Karl Rove's Billionaire Fundraiser, Bloomberg Businessweek (Aug. 31, 2012), http://www.businessweek.com/articles/2012-08-31/exclusive-inside-karl-roves-billionaire-fundraiser (on file with the *Columbia Law Review*).

Karl Rove of the terms of the People's Pledge.[101] Rove's group decided not to air television advertisements in Massachusetts. Instead, a few months later, Crossroads GPS—a group related to American Crossroads[102]—started funding robocalls—phone calls with recorded messages targeted at voters.[103] Robocalls were not included in the initial scope of the People's Pledge, and despite the media characterizing the robocalls as violating the spirit of the People's Pledge,[104] the Warren campaign did not call for Brown to pay the penalty.

On two occasions, outside groups did enter the Brown-Warren race, spending limited amounts, seemingly because they did not know about the People's Pledge. First, in early March 2012, a small organization called the Coalition of Americans for Political Equality started running online advertisements in support of Brown. Brown's campaign immediately requested that the PAC halt its advertisements and agreed to pay the penalty of $327.[105] The incident showed that the Pledge could in theory achieve compliance, at least at low dollar amounts. But it also demonstrated a powerful political benefit from adherence to the Pledge. The incident "help[ed] burnish [Brown's] image" according to one

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101. Press Release, Elizabeth Warren for Senate, Warren Campaign to Brown: Tell Karl Rove to Respect the People's Pledge (Aug. 31, 2012), http://elizabethwarren.com/news/press-releases/warren-campaign-to-brown-tell-karl-rove-to-respect-the-peoples-pledge (on file with the *Columbia Law Review*).

102. American Crossroads and Crossroads GPS are a Super PAC and 501(c)(4) organization, respectively. They are run by the same person, Steven Law, and operate with direction from Karl Rove and Ed Gillespie. E.g., Ctr. for Responsive Politics, Crossroads GPS, OpenSecrets.org, http://www.opensecrets.org/outsidespending/detail.php?cycle=2012&cmte=C30001655 (on file with the *Columbia Law Review*) (last visited Jan. 28, 2014).

103. E.g., Noah Bierman, Karl Rove's Political Group Making Robocalls Targeting Elizabeth Warren in Senate Race, Boston.com: Political Intelligence (Sept. 27, 2012), http://www.boston.com/politicalintelligence/2012/09/27/karl-rove-political-group-making-robocalls-targeting-elizabeth-warren-senate-race/K0Bp9T11vtP9fca1EizewJ/story.html (on file with the *Columbia Law Review*).

104. E.g., Editorial, Robocalls Aren't TV Ads, but Still Violate Spirit of Pledge, Bos. Globe (Oct. 8, 2012), http://www.bostonglobe.com/opinion/editorials/2012/10/07/karl-rove-robocalls-violate-spirit-brown-warren-people-pledge/cauL8G87RgPI6sDWnsqTsJ/story.html (on file with the *Columbia Law Review*).

105. E.g., Robert Rizzuto, Autism Consortium to Receive Bonus Donation from Scott Brown Campaign Following PAC Violation of 'People's Pledge,' MassLive (Mar. 9, 2012, 1:50 PM), http://www.masslive.com/politics/index.ssf/2012/03/autism_consortium_to_recieve_d.html (on file with the *Columbia Law Review*) (discussing Brown's decision to enforce campaign spending pledge against PAC advertising benefiting him); accord Mass. Sen. Brown Asks PAC to Pull Online Ads, Daily Caller (Mar. 6, 2012, 4:45 PM), http://dailycaller.com/2012/03/06/mass-sen-brown-asks-pac-to-pull-online-ads-2/ (on file with the *Columbia Law Review*) (noting Brown asked PAC to stop advertising); Patrick Tracey, Scott Brown's Triumphant Makeover: The Massachusetts Senator Has Pulled Ahead of Elizabeth Warren in the Polls by Running Away from the Tea Party, Salon (Mar. 8, 2012, 5:42 PM), http://www.salon.com/2012/03/08/scott_browns_mainstream_move/ (on file with the *Columbia Law Review*) (discussing Brown's decision to enforce campaign spending pledge against PAC advertising benefiting him).

commentator,[106] and Brown's campaign even ran a radio advertisement taking credit for the historic pledge.[107]

A few weeks later, Brown's political use of the Pledge may have limited his flexibility when another group intervened in the race. In late March of 2012, the American Petroleum Institute (API) ran issue advertisements supporting Senator Brown's position on tax benefits for the oil industry, announcing its activities via press release.[108] The Warren campaign immediately called on Senator Brown's campaign to pay the costs of the advertisements.[109] Brown's campaign responded by agreeing to pay almost $35,000 to charity, while simultaneously trying to dispute the scope of covered activities in the contract.[110] Brown's campaign argued that issue advertisements were not covered under the Pledge, but that after public pressure from the Warren campaign, Brown would pay the penalty for the API ads and henceforth consider issue advertisements as included within the covered activities of the Pledge.[111] As a matter of the Pledge itself, the Brown campaign's interpretation of the contract terms was probably inaccurate. The People's Pledge deliberately included advertisements that "promote[] or support[] a named, referenced (including by title) or otherwise identified Candidate."[112] This language is broader than the legal language used to describe independent expenditures, "expressly advocating the election or defeat" of a candidate,[113] in order to include issue advertisements within the scope of the contract's covered activities. In addition, the preamble to the Pledge specifically references issue advertisements as one of the ills that the Pledge seeks to

106. Tracey, supra note 105.

107. Scott Brown for US Senate, Scott Brown Radio Report: The People's Pledge, YouTube (Mar. 9, 2012), http://www.youtube.com/watch?v=–pN5zqrskY (on file with the *Columbia Law Review*) (taking credit for signing "People's Pledge" in U.S. Senate race); see also Noah Bierman, In Ad, Scott Brown Takes Credit for Spending Pledge, Bos. Globe (Mar. 9, 2012), http://www.bostonglobe.com/metro/2012/03/09/scott-brown-new-radio-praises-elizabeth-warren-takes-credit-for-people-pledge/5ghLX85EN3o9SdzULuqINN/story.html (on file with the *Columbia Law Review*) (same).

108. API Press Release, supra note 76 (announcing nationwide advertising campaign targeting Senate candidate positions on energy industry taxes).

109. Press Release, Elizabeth Warren for Senate, Statement from Elizabeth Warren Campaign Regarding American Petroleum Institute Ads (Mar. 26, 2012), http://elizabethwarren.com/news/press-releases/statement-from-elizabeth-warren-campaign-regarding-american-petroleum-institute-ads (on file with the *Columbia Law Review*) (criticizing API advertising campaign as "clearly support[ing] Brown's position" and calling on Brown to demand takedown of advertisements (quoting Mindy Myers, Campaign Manager for Elizabeth Warren) (internal quotation marks omitted)).

110. E.g., Noah Bierman, Scott Brown's Campaign Says It Will Pay $35,000 to Comply with 'People's Pledge' Violation, Boston.com: Political Intelligence, (Mar. 29, 2012, 5:23 PM) http://www.boston.com/2012/03/29/pledge/U991vVVZF1b2Ww2YrG3iVP/story.html (on file with the *Columbia Law Review*).

111. Id.

112. Infra Appendix.

113. 11 C.F.R. § 100.16 (2013).

combat.[114] As a matter of politics, the Pledge operated exactly as it should have. The spending was quickly identified. The harmed campaign called attention to it in the media to put pressure on the benefiting campaign to adhere to the contract and pay the penalty. The benefiting campaign agreed to pay the penalty, even while acknowledging that pressure from the harmed campaign pushed them to do so. And at the same time, they also attempted a face-saving maneuver to show they were so committed to the agreement they were expanding its scope. The entire episode resolved itself in a matter of days, and Brown was seen as a good faith political actor who had upheld the historic bargain.[115]

3. *Why Informal Enforcement Predominates over Formal Enforcement.* — Scholars who study private ordering have distinguished between agreements that take place in the "shadow of the law" and those that utilize nonstate coercion to create "order without law."[116] Contracts like the People's Pledge are best understood as fitting in the second category, as their primary means of enforcement is not formal legal enforcement—or even the possibility of formal enforcement. In fact, the preamble to the People's Pledge specifically mentions the need for an enforcement mechanism, but it does not reference courts, litigation, or formal enforcement in any way. Rather, it describes the need for an "enforcement mechanism" that "runs . . . to the Candidates' own campaigns."[117]

The primary reason that formal enforcement is less relevant is the timing of the contract, breach, and enforcement. Campaigns take place on a limited time frame, and, as organizations, campaigns have limited resources. Once the contract is signed and there is a breach, the injured party would have to bring a case in court to seek to enforce the contract terms. First, the campaign would have to decide to spend vital campaign resources in terms of funding, time, and effort (at the least, effort at monitoring lawyers who have been contracted to bring the suit) on the lawsuit instead of on election-related activities. Second, consider the timing of a lawsuit. If breach takes place early enough and the penalty rate is high enough to both damage the breaching opponent and justify the time, effort, and opportunity costs for the harmed campaign, then the campaign might consider bringing suit. If breach takes place close to Election Day, bringing a lawsuit to get formal enforcement may not pro-

114. Infra Appendix (noting "outside third party organizations . . . are airing, and will continue to air, independent expenditure advertisements and issue advertisements").

115. See, e.g., Eggen, supra note 62 (discussing Brown campaign's decision to pay charitable contribution as result of API advertising); Johnson, supra note 61 (same).

116. See, e.g., Barak D. Richman, Norms and Law: Putting the Horse Before the Cart, 62 Duke L.J. 739, 743–49 (2012) (describing two categories of private ordering mechanisms). For the classic treatments, see generally Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes (1991), which describes attempts to resolve differences independent of law, and Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950 (1979), which describes how parties reach negotiated agreements with law as a backdrop.

117. Infra Appendix.

vide redress in time for formal enforcement to make a difference for the electoral outcome, and the opportunity costs of funding and time will be greater. If the breach takes place at a time that guarantees the lawsuit will take place after the election, then the broader political dynamics suggest campaigns will not seek to enforce the agreement. Assuming the candidate that breached the contract loses the election, the victorious candidate has no need to bring suit for damages. She already won the race. Assuming the candidate that breached the contract wins the election, the losing candidate would feel wronged—but *still* might not want to bring suit. A lawsuit would again be time consuming and expensive, but for the suit to be meaningful to the losing candidate, she would have to persuade a court to overturn the election results because the victorious candidate breached the agreement and refused to pay money to charity. Indeed, this is why the People's Pledge assumes enforcement must "run . . . to the Candidates' own campaigns."[118]

While the candidates themselves are unlikely to bring suit to enforce the contract, the more interesting possibility is that campaigns could be liable to suits from the third party beneficiary (the charity) in certain circumstances. Under the terms of the original People's Pledge, no particular charity was identified as the beneficiary; the harmed candidate chose the charity.[119] As a result, no particular charity would be able to argue that it was the intended beneficiary of the contract and therefore harmed by the candidate's breach. If, however, the contract is drafted to specify a particular charity, as was proposed in the 2013 Boston mayoral election[120]—or if the harmed candidate picks a charity upon the outside group's entry into the race—then the charity would be an identifiable and intended third party beneficiary, who could likely enforce the contract.[121] There is, however, another wrinkle: In the case of a "sham ad," an advertisement that appears to benefit one candidate but actually harms that candidate, *both* campaigns might choose charities, arguing that the other benefitted from the advertisement. If both refuse to pay, then there will be a dispute about which campaign breached the contract—and a dispute about which charity is the third party beneficiary.

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118. Infra Appendix.

119. Infra Appendix (providing in event of breach, benefiting candidate "shall . . . pay 50% of the cost of that advertising buy to a charity of the opposing Candidate's choice").

120. In the Boston mayoral election, for example, candidate Rob Consalvo suggested a form of the People's Pledge, which he called the "Boston Pledge," that specified the One Fund Boston, the charity started to provide assistance to victims of the Boston Marathon bombing, as the designated charity for donations. Rob Consalvo, This Isn't Rocket Science, Blue Mass Group (July 15, 2013, 6:25 PM), http://bluemassgroup.com/2013/07/this-isnt-rocket-science/ (on file with the *Columbia Law Review*).

121. For a discussion of the historical developments and debates on the enforceability of contracts by third party beneficiaries, see generally 3 E. Allan Farnsworth, Farnsworth on Contracts § 10 (3d ed. 2004).

The second reason that informal mechanisms trump formal enforcement is the design of the contract and the difficulties around formal legal enforcement. The basic structure of the contract is that "if *X* does activity *Y*, I promise to pay money to charity." If a court were enforcing this contract, the most obvious remedy for breach would be specific performance—requiring that the breaching party perform the action she promised to perform. However, specific performance has generally been disfavored in contract law, particularly when real property and unique goods are not at issue; payment of monetary damages to the injured party is now the preferred remedy.[122] When it comes to money damages, calculating the damages to the injured campaign may be extremely difficult, as it is hard to tell how much the breaching campaign's reduction in funds would have mattered in shaping the election. Indeed, when expectancy damages are speculative, courts often will not provide a remedy.[123] On the other hand, because the bargained-for action is simply payment of funds to charity, specific performance and money damages (that can be easily calculated) are actually the same—a check to the third party for the percentage cost of the advertising buy. However, it is also possible that a court would construe the clause as a liquidated damages clause. Liquidated damages clauses usually receive heightened scrutiny from courts due to worries that the clauses are a punitive measure (legally, a "penalty," which is a term of art distinct from this Essay's use of "penalty") or a backdoor attempt to compel specific performance.[124] Such a construction would make enforcement less likely.

Taken together, informal political dynamics are the key to enforcement, due to uncertainty about the possibility of formal enforcement and the practical reality that campaigns are unlikely to seek formal enforcement. In some ways, this harkens back to some of the earliest academic writings in contract law and theory that argued that contracts describe a set of shared expectations for the parties and for the world.[125] The con-

122. See, e.g., id. §§ 12.1–.2, 12.4 (discussing remedies under contract law and development of doctrine of equitable relief); see also, e.g., Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33, 39–40 (8th Cir. 1975) (stating injunctive relief disfavored where adequate remedy exists at law); Van Wagner Adver. Corp. v. S & M Enters., 492 N.E.2d 756, 760 (N.Y. 1986) (explaining decision to award specific performance rests on uncertain value of money damages).

123. See, e.g., Freund v. Wash. Square Press, Inc., 314 N.E.2d 419, 420–21 (N.Y. 1974) (refusing to provide remedy for speculative royalties lost).

124. E.g., Farnsworth, supra note 121, § 12.18, at 300–01 ("The most important restriction [on contractually agreed-upon remedies] is the one denying [the parties] the power to stipulate in their contract a sum of money payable as damages that is so large as to be characterized as a penalty." (internal quotation marks omitted)).

125. The classic work that launched this line of thinking is Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 55 (1963).

tract relies more heavily on the fact of a promise[126]—and the social and economic (and in this case, political) costs of breaking a promise—to enforce the terms of the deal, than on the specific legal remedies available for breach. Indeed, scholars have long recognized that social structures and extralegal economic institutions have sustained contract agreements.[127]

In that sense, the best analogy for the political costs of breach in these contracts is the reputation cost of breach often discussed in economic theories of contract.[128] In these cases, a party upholds the contract based on a desire to build its reputation, or to prevent creating a negative reputation. However, there are important differences. The contract literature roots reputation costs in the breaching party's position as a repeat player in the market.[129] Of course, political candidates may run for election repeatedly across their careers, but because a campaign's duration is long, in the political context, costs to reputation are realized within the transaction itself. In other words, damage to reputation does not come in future elections (the equivalent of a future market transaction, as is conventional in contract theory) but rather in the instant election. Indeed, reputation costs from breach of these political contracts might in some cases *decrease* over successive elections if voters forgive and forget past transgressions.[130]

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126. See, e.g., Charles Fried, Contract as Promise 1 (1981) ("The promise principle . . . is the moral basis of contract law, [and] is that principle by which persons may impose on themselves obligations where none existed before.").

127. For a discussion of the historical and sociological literature, see Richman, supra note 116, at 743–57. For an analytic take, see Robert E. Scott, Conflict and Cooperation in Long-Term Contracts, 75 Calif. L. Rev. 2005, 2039–42 (1987).

128. There is a long history of reliance on reputation costs to compel enforcement and deter breach. See, e.g., Paul R. Milgrom, Douglass C. North & Barry R. Weingast, The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs, 2 Econ. & Pol. 1, 2–6 (1990) (discussing role of medieval law merchant in developing system of reputational enforcement). But see Stephen E. Sachs, From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant,' 21 Am. U. Int'l L. Rev. 685, 685–98 (2006) (rebutting widespread theory of medieval law merchant as ideal international private law mechanism).

129. Recent examples of this widespread understanding include Lucian A. Bebchuk & Richard A. Posner, One-Sided Contracts in Competitive Consumer Markets, 104 Mich. L. Rev. 827, 829–31 (2006); Maya Steinitz, The Litigation Finance Contract, 54 Wm. & Mary L. Rev. 455, 512–15 (2012); and Tess Wilkinson-Ryan, Legal Promise and Psychological Contract, 47 Wake Forest L. Rev. 843, 869–70 (2012).

130. See, e.g., Jan Moller, Sen. David Vitter Wins Re-Election in Remarkable Comeback, New Orleans Times-Picayune (Nov. 2, 2010, 11:12 PM), http://www.nola.com/politics/index.ssf/2010/11/sen_david_vitter_wins_re-elect.html (on file with the *Columbia Law Review*) (describing Senator's comeback after losing public trust over prostitution scandal).

C. *Loopholes and Challenges*

Although the People's Pledge was successful as a self-enforcing contract in the Brown-Warren race, the design of the contract incorporates a number of potential loopholes and challenges that risk exploitation by bad faith actors and that potentially make agreement more difficult.

1. *Penalty Rates and Discounted Advertising.* — The original People's Pledge and the modified Pledge adopted in the 2013 Lynch-Markey Senate primary election both set the penalty rate at 50% of the value of the third party's advertising buy.[131] The trouble with this penalty rate—or indeed any penalty rate less than 100% of the full value of the advertising buy—is that it, in effect, gives the benefiting campaign a discount on the value of television advertising. For example, suppose there is a campaign that is a party to a contract and has $2 million to spend on television advertising. A third party enters the race and spends $1 million on a television advertisement supporting that candidate. The candidate decides not to breach the contract and pays the penalty at the 50% rate—or $500,000. At this point the candidate has $1.5 million to spend on television ads and has benefitted from another $1 million in television ads—for a total of $2.5 million in beneficial television advertisements. Now, obviously the total value of television advertisements supporting the candidate is lower than it would have been if the candidate had not signed onto the contract ($3 million), but the candidate still is a net beneficiary of the third party's entrance into the race (half a million dollars of television advertisements more than the candidate's own funds). Although the participation of the third party itself would bring negative attention to the campaign, it still might be rational for third parties—and for candidates—to prefer third parties to participate when the penalty rate is less than 100% of the value of the third party's advertising buy. In contrast, at the 100% level, there is a direct tradeoff between dollars spent by the third party and the campaign. Given that campaign dollars spent on advertisements are more valuable than third party dollars and the negative-press costs, a 100% penalty would close this loophole. Additionally, campaigns concerned by this loophole might also consider an additional deterrent penalty—penalizing themselves for *more* than the amount of the third party's advertising buy. This additional deterrent would place greater pressure on third parties to stay out of the race, because their participation would punish the campaigns more than the third party action benefits the campaign.

At the same time, campaigns will worry about strategic attempts to bankrupt them, a possibility that increases as the penalty rate increases. Ultimately, campaigns adopting these contracts will have to decide whether they are more concerned with creating incentives for third par-

131. Lynch & Markey Pledge, supra note 10 (mandating benefiting party "shall . . . pay 50% of the cost of that advertising buy to a charity of the opposing Candidate's choice"); infra Appendix (mandating same).

ties to stay out of the race, in which case penalty rates should approach 100% of the value of the advertising buy, or whether they are more concerned about the possibility that an outside group will enter and strategically attempt to bankrupt their campaign. The latter case is one of the best examples of a situation when candidates would likely breach the agreement—but at the same time, it is also a situation in which the campaign would have an extremely strong argument to the public that breach was justified and legitimate.

2. *Sham Advertising*. — The most challenging loophole is referenced directly in the People's Pledge, in the provision committing both sides to work together to address the problem of "sham ads."[132] The sham ad problem emerges from the design of the triggering mechanism. Recall that the trigger for the penalty is that the advertising support or promote (or attack or undermine) one of the candidates.[133] The candidate that benefits must pay a penalty. The problem with this structure is that third parties could create groups and design advertisements that *appear* to benefit one candidate, while in fact harming that candidate. In that case, the candidate would be harmed by both the advertisement and the monetary penalty triggered by the contract.

A hypothetical example will help illustrate. Suppose during the Brown-Warren campaign, a third party group calling itself "Businessmen Supporting Scott Brown" emerged and funded a television advertisement—and the true funders of the group were unknown. The advertisement features the announcer telling the viewer that "Senator Brown stood up courageously for Massachusetts businessmen, voting against the Paycheck Fairness Act, which would have given women more power to enforce equal pay for equal work. Call Senator Brown and thank him for voting against equal pay legislation. Paid for by Businessmen Supporting Scott Brown." From just the text, the ad is a positive, supportive advertisement designed to benefit Senator Brown. The organization's name indicates that it is a group of men in business who support Scott Brown. The group is opposed to the Paycheck Fairness Act and equal pay legislation and believes Senator Brown should be praised and rewarded for his vote. On its face, the advertisement would require the Brown campaign to pay a penalty. However, in the context of an electorate in Massachusetts that strongly supports equal pay for equal work,[134] the

132. Infra Appendix ("The Candidates and their campaigns agree to continue to work together to limit the influence of third party advertisements and to close any loopholes (*including coverage of sham ads*) that arise in this agreement during the course of the campaign." (emphasis added)).

133. Infra Appendix (mandating benefiting campaign "pay 50% of the cost of that advertising buy" to charity for "any independent expenditure" "in support of" or "in opposition to a named . . . Candidate").

134. See, e.g., Press Release, UMass Amherst, 2012 Exit Poll Results: MA Exit Poll Shows Women Play Major Role in Senate Race, Question 2 (Nov. 6, 2012), http://www.

advertisement is actually a negative ad designed to undermine Brown's support with women.

In this example, the intent is obvious and the execution a bit clunky. Yet the problem could arise also from lack of political sophistication or extreme political sophistication. For example, suppose the Gun Owners Action League, a legitimate group of pro-gun advocates, ran an advertisement for Brown, applauding him for supporting the right to bear arms and opposing a federal assault weapons ban.[135] This group could genuinely want to support Brown and express their preferences in his favor on an issue of concern to them. However, in Massachusetts, where opposition to a federal assault weapons ban is unpopular, such an advertisement would likely backfire, undermining Brown's support even as his campaign is forced to pay for it. On the other end of the spectrum, imagine a television ad sponsored by the "Invest in Rebuilding America Coalition," a specially created third party group (again with an unknown funding source) that runs an ad in which the announcer tells the viewer that:

> Elizabeth Warren will help rebuild this country. She supports fixing our crumbling roads and bridges and investing in a twenty-first century rail and mass transit system. She'll raise taxes by $1 billion so we can build a better America. Call Elizabeth Warren and thank her for building a stronger foundation for our country. Paid for by the Invest in Rebuilding America Coalition.

This advertisement would appear to be a strongly positive television advertisement for Warren, identifying her support for a popular policy: rebuilding infrastructure (a theme Warren spoke frequently about during her campaign). But the advertisement includes six words that undermine the advertisement's benefit to Warren: "She'll raise taxes by $1 billion." In the context of the 2012 Senate race, the claim of support for raising taxes by $1 billion would likely have harmed, not helped, Warren.

Campaigns facing a sham ad have four options. First, they can pay the cost. This is obviously not ideal given that the candidate is suffering twice—from the ad and from the cost. Paying the cost also sets a bad precedent that might encourage other third parties with insincere motives to enter the race. Second, the campaign can cry foul. The campaign can attempt to persuade the press and public that the advertisement

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umass.edu/poll/polls/20121106b.html (on file with the *Columbia Law Review*) (noting 61% of voters polled reported equal pay was important issue for them).

135. After the election, and the Newtown, Connecticut shooting, Brown reversed his position. E.g., Michael Levenson & Stephanie Ebbert, Senator Scott Brown Reverses Position on Federal Assault Weapons Ban After Newtown Massacre, Bos. Globe: Political Intelligence (Dec. 19, 2012), http://www.boston.com/politicalintelligence/2012/12/19/senator-elect-elizabeth-warren-backs-assault-weapon-ban/Qj3ZdGwBRUlecaFMo6C4UP/story.html (on file with the *Columbia Law Review*).

actually harms the candidate and benefits the opponent, and call for the opponent to pay (which the opponent is unlikely to do). The People's Pledge contemplates this line of action by referencing sham ads by name. That reference enables a campaign to preemptively explain the issue of sham ads to the press when the contract is signed, so that the press understands that there is a possibility of sham ads showing up during the race, and so that the press can act as referee in the event a sham ad is aired. Third, the candidate can try to renegotiate the contract, suggesting perhaps that both sides should condemn the advertisement and reiterate their call for third parties to stay out of the race. The People's Pledge contemplates this action as well, committing both campaigns to work together to address loopholes.[136] However, it is unlikely that the opponent will agree when she can instead characterize the harmed candidate as seeking to breach the agreement. That leaves the final option: breach. The candidate can refuse to pay and breach the contract. The candidate will pay the price of negative news stories, which will be greater or lesser depending on the nature of the advertisement and the sponsoring third party and on whether the candidate has educated the press as to the possibility of sham ads. In addition, breach would mean that more outside money will enter the race.

3. *Multicandidate Races.* — Since the Brown-Warren race, self-enforcing contracts modeled on the People's Pledge have been suggested in a variety of multicandidate primary elections, including the special election for U.S. Senate in New Jersey[137] and the race for mayor of Boston,[138] and a version of the People's Pledge has been adopted in the race for the fifth congressional district of Massachusetts.[139] Multicandidate elections provide an additional complication that makes it difficult, though not impossible, to apply a self-enforcing contract effectively. In a multicandidate field, the triggering mechanism does not work unless modified. In the case of a third party advertisement supporting a specific candidate, the trigger works and the beneficiary candidate would pay a penalty. However, in the case of a third party advertisement *opposing* a specific candidate, it will not be clear which of the many candidates in the race is the beneficiary and therefore needs to pay the penalty. In some cases, the attack advertisement might benefit *all* the other candidates simply because it weakens their opponent. In other cases, depending on how the advertisement is written, the advertisement may disproportionately benefit one candidate. Given that there is no arbiter to iden-

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136. Infra Appendix ("The Candidates and their campaigns agree to continue to work together to limit the influence of third-party advertisements and to close any loopholes . . . .").

137. See, e.g., supra note 13 and accompanying text (noting failed attempt by New Jersey candidate Frank Pallone to convince other candidates to sign "People's Pledge").

138. See, e.g., supra notes 12, 120 and accompanying text (observing attempt by candidate Rob Consalvo to have mayoral candidates agree to "Boston Pledge").

139. Fifth Congressional District Pledge, supra note 11.

tify who the beneficiaries are (beyond the press), the contract's triggering mechanism does not operate effectively in multicandidate fields with respect to attack advertisements.

The solution to this problem is to modify the triggering and penalty mechanisms in the contract. In some cases, third parties may have endorsed a particular candidate in a multicandidate field. If one of these third parties runs an advertisement, the clear implication is that it would prefer its endorsed candidate. As a result, in multicandidate fields, the contract can be drafted to state that when a third party attacks a candidate, and the third party has endorsed one of the other candidates in a multicandidate field, then the endorsed candidate has to pay the penalty. This would help solve the problem of identifying who the beneficiary of the third party intervention is. To be sure, if the third party enters the race, there will likely be some spillover benefits to nonendorsed candidates, deriving from the weakened position of the candidate who was attacked. However, penalizing the third party's endorsed candidate alone will be a strong incentive for the third party to stay out of the race. Indeed, in the fifth congressional district primary in Massachusetts, the candidates adopted exactly this mechanism—using third party endorsements as a way to identify which candidate should pay for a negative advertisement.[140] Note that this design discourages formal endorsements among entities that want to sponsor advertisements, even if those groups have a single candidate they support.

In some cases, a third party might not have endorsed any particular candidate. There are three possible solutions to this problem: all of the beneficiaries in a multicandidate field can pay the full cost of the value of the advertising buy; all can pay a proportionate share of the advertising buy; or all can pay a penalty that is proportionate to their own finances. The first two options suffer from significant drawbacks. If every nonattacked candidate pays the full cost of the advertising buy, that solves the incentive problem. The penalty would operate as if each individual candidate spent her funds on the attack advertisement, penalizing her proportionately to the advantage gained. However, it is likely to stack the deck against low-budget campaigns. If a third party spends $500,000 on an attack advertisement, every campaign would have to spend $250,000—that might be possible for the most well-funded campaigns, but low-budget and lesser-known candidates might not be able to remain in the race.

The second option is also problematic. If each candidate pays a proportional share based on the number of nonattacked candidates in the field, the costs would be spread among candidates, some of whom are more or less likely to be competitive. This creates a problem akin to the penalty discount problem that emerges when the penalty rate is set below 100% of the advertising buy. For example, in a multicandidate field with

140. Id.

ten candidates, there might be three competitive candidates and seven noncompetitive candidates. A third party advertisement attacking one of the three competitive candidates would then penalize the other nine candidates for one-ninth of the cost of the advertisement each. In effect, the other two competitive candidates would benefit from the full amount of the damage to their competitive opponent, but each only pay one-ninth of the cost of the advertisement from which they benefit. This loophole creates incentives for third parties to enter and support their competitive candidate, while spreading the costs of advertising among the multicandidate field.

The third option avoids these problems. In multicandidate races, the penalty amount could be determined as a percentage of the total campaign funds most recently reported to the FEC. For example, Candidate 1 is attacked with $500,000. Candidate 2, the opponent with the largest war chest, could pay the standard 50% rate, or $250,000. Assume that this is 10% of Candidate 2's total funds from the last filing ($2.5 million). Every other candidate with less money than Candidate 2 would then pay the same rate—10% of their total funds last reported. This would ensure that every candidate pays, so that third parties do not have an incentive to enter the race, and that less well-funded candidates can remain competitive. To be sure, Candidate 2 could still be bankrupted by such a scheme—but this problem occurs even in the case of a two-person contract. As in a two-person race, campaigns will have to choose whether they are more concerned with creating incentives for third parties to stay out of the race, or whether they are more concerned about strategic attempts to bankrupt the campaign.

The People's Pledge adopted in the Massachusetts fifth congressional district primary, however, took a different approach to addressing third party attack ads where the third party had not endorsed any of the candidates. Instead of a penalty that would harm the beneficiary candidates, the contract only requires beneficiary candidates to place a disclaimer on their campaign websites for no less than twenty-four hours. The disclaimer must state that a third party has entered the race, in violation of the contract's goals, and then include a brief statement from the injured candidate (presumably responding to the attack, though the text of the contract does not specify the content of the injured candidate's statement).[141]

On its face, this approach has significant flaws. First, the cost to the benefiting campaign is negligible. For twenty-four hours, it must post a statement on its website noting that a third party group has entered the race. The financial costs are likely negligible, if not zero (assuming the campaign keeps its website relatively updated), and because the advertisement attacks one candidate in a multicandidate race, there is no way to ascribe blame to any particular beneficiary candidate, limiting the

141. Id.

costs from media and public opinion backlash. Second, as a result of the insignificant costs to the beneficiary candidate, third parties will have every incentive to enter the race. As long as the third party attacks a candidate and has not endorsed one of the other candidates, the third party can assist its preferred candidate without harming her. This loophole undermines the penalty mechanism and political dynamics that enable the contract to work.

In spite of these problems, this approach might be the most workable second-best solution, given the fact that the Pledge was taking place in a multicandidate *primary*, rather than a general election. Primaries differ from general elections for purposes of private ordering contracts in an important way: The other party's candidate(s) are outside of the contract. In a general election campaign—between two candidates or many candidates—every relevant candidate is a party to the contract. In a contract designed only for a primary election, the opposing party's candidates are outside the contract. As a result, they—and their third party allies—have every incentive to flood the primary with attack advertisements and drain the coffers of their potential general election opponent. (Note that they would not have any incentive to flood the airwaves with *supportive* advertisements, which would only improve the strength of their general election opponent.) The fifth district Democrats' solution was to revise the attack ads provision in their contract, leaving a weak transparency-based remedy.[142] This approach is likely to be less troubling in a primary than it would be in a general election because the members of the same party (and their third party allies) are less likely to engage in vicious attack ads against each other—as such attacks could weaken the ultimate winner and the party's chances of defeating its opponent in the general election.

Another option would be to attempt to bring candidates of both parties into the same contract, even during the primary. On this approach, attack advertisements in the primary would benefit not only the other primary candidates but the opposing party's general election nominee. The remedy would be for all candidates, regardless of party (except the attacked candidate), to pay a proportion of the penalty. Thus, if a third party supporting a Republican candidate attempts to weaken the Democrats during the primary by attacking a Democratic candidate, the Republican candidate—like other Democrats in the primary—would have to pay a penalty for the attack advertisements. This option, while more comprehensive than the disclosure option adopted in the fifth district, would likely be more difficult to implement because it would require getting the cooperation of every major party candidate in the election.

4. *Campaign Finance Hydraulics.* — Campaign finance reform efforts have always suffered from the problem of hydraulics: that efforts to stop

142. Id.

the flow of money in one area through regulation simply lead to money finding cracks and channels around the regulations and flowing ultimately toward the same political ends, just through more creative and innovative means.[143] This is obviously a problem for any campaign finance reform effort, and the private-ordering contract is no different. It is certainly possible that with enough time and attention, those who seek to spend on elections will find ways to circumvent the contract's restrictions. In particular, the "sham ad" loophole provides a particularly troubling avenue for money to flood in.

At the same time, however, the private-ordering contract does mitigate the hydraulics problem in an important way. By defining the scope of the covered activities, the candidates actually direct the flow of money into certain channels. For example, a contract that restricts spending on television and radio advertising but not on direct mail or organizing efforts tells third party groups that they can spend freely on direct mail and organizing efforts. The contract closes one channel for spending, but leaves open another. In other words, the contract actually gives candidates some power over the hydraulic process. Candidates who believe turnout is vital can design contracts that channel outside money into organizing efforts. Candidates who believe narrowly targeted persuasion is vital can leave open the direct mail channel. At the same time, the two (or more) candidates could still benefit from being the main actors shaping the central narrative of the race, which is largely defined by television, radio, and other public advertisements.

III. IMPLICATIONS FOR ELECTION LAW AND POLICY

As an innovation in campaign finance reform, self-enforcing contracts have important features. They do not require passage of any public laws to be implemented, meaning they can be adopted immediately in elections, without navigating congressional gridlock. They are less likely to run afoul of constitutional protections because they do not involve government action. Also, they have a broad scope, reaching beyond *Citizens United*'s particular holding to the broader problem of third party spending. At the same time, candidates will only adopt a self-enforcing contract in a limited number of situations, based on the expected costs and benefits. For scholars and reformers, the use of a private ordering model to address campaign finance reform raises interesting issues, both regarding the implications for election law and policy and about the possibility of expanding the use of these self-enforcing contracts in future elections.

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143. Samuel Issacharoff & Pamela S. Karlan, The Hydraulics of Campaign Finance Reform, 77 Tex. L. Rev. 1705, 1708 (1999) ("[P]olitical money, like water, has to go somewhere."). For a discussion of how *Citizens United*'s deregulatory move creates a "reverse hydraulic" effect, see Kang, The End, supra note 33, at 40–52.

A. *The Paradox of Private Ordering: Limiting Speech Through Private Contracts*

The use of a self-enforcing private contract to limit third party spending in elections creates a tension for supporters of *Citizens United*'s theory of the First Amendment, pitting their preference for more speech against their preference for private ordering. In a recent article, Professor Sullivan has argued that there are effectively two different visions of free speech.[144] One vision, the vision of *Citizens United*, can be called the political liberty vision. For supporters of this vision, "the First Amendment is a negative check on government tyranny, and treats with skepticism all government efforts at speech suppression that might skew the private ordering of ideas."[145] The goal of the right to free speech is to support a marketplace of ideas that is free from government paternalism or intervention, with individuals making their own judgments about the persuasiveness of ideas.[146] As Sullivan says, "free speech protects a system of private ordering—and only a system of private ordering—by increasingly rejecting the unconstitutional conditions claims that the free-speech-as-equality view generally accepts to ensure affirmative action for disadvantaged speech."[147]

The other vision, which Sullivan identifies as focusing on political equality, incorporates antidiscrimination and affirmative action principles. On this theory, the freedom of speech protects the rights of marginal viewpoints that might be targeted for their views (antidiscrimination) and also helps ensure that individuals have access to meaningful speech (affirmative action).[148] On this view, the world of *Citizens United* is "a dystopian universe in which political money has been driven further and further from the candidates who are themselves uniquely accountable to the voters through elections, where every citizen enjoys an equal vote."[149]

For supporters of the free-speech-as-liberty vision, self-enforcing contracts create an interesting problem. Their preferred theory of free speech is predicated on private ordering—on *government* noninterference

144. Sullivan, supra note 46, at 144–45; see also Karlan, supra note 32, at 31 (noting Court "came down decisively on the libertarian, as opposed to the egalitarian, side").

145. Sullivan, supra note 46, at 145.

146. See, e.g., id. at 144, 155 (discussing both views of political speech as valuing freedom from government intervention).

147. Id. at 159.

148. Id. at 144–45. For additional discussions of equality in campaign finance law, see generally Richard L. Hasen, *Citizens United* and the Orphaned Antidistortion Rationale, 27 Ga. St. U. L. Rev. 989 (2011), and Daniel P. Tokaji, The Obliteration of Equality in American Campaign Finance Law (and Why the Canadian Approach Is Superior) (The Ohio State Univ. Moritz Coll. of Law, Pub. Law & Legal Theory Working Paper No. 140, 2011), available at http://ssrn.com/abstract=1746868 (on file with the *Columbia Law Review*). For a discussion of the distinctions between self-government justifications and egalitarian justifications, see Richard H. Pildes, Foreword: The Constitutionalization of Democratic Politics, 118 Harv. L. Rev. 28, 149–53 (2004).

149. Sullivan, supra note 46, at 169.

with the decisions and actions of private actors in the marketplace of ideas. It takes no view on—or perhaps is even supportive of—inequality of speech within that marketplace. If some actors are more powerful, if some actors own distribution channels, if some actors have more money to spend, there is no problem, even if that imbalance indirectly puts pressure on the speech of other actors or drowns their speech in a cacophony of advertising. Interestingly, the self-enforcing contract operates as a private ordering mechanism for restricting speech. Unlike the laws at issue in *Citizens United* or even *Arizona Free Enterprise Club*, with a self-enforcing contract, there is no government intervention. Restrictions on speech are solely based on third parties feeling that it is not in their interest to speak, because of the penalties that their preferred candidate will face.

To the extent that supporters of the free-speech-as-liberty approach prefer private ordering to maximizing speech, they should support self-enforcing contracts as a way to keep decisions about free speech within the private realm. However, they will see limitations in both the amount of speech allowed and the type of speaker allowed. To the extent that they support speech over private ordering, they have a bigger problem. Supporting government intervention to regulate or ban private contracts like the People's Pledge contradicts their position that government should not intervene to put the thumb on the scale in favor of certain kinds of speech or speakers.

Supporters of free-speech-as-liberty might argue that these contracts should be unenforceable for public policy reasons.[150] As a principled matter, however, there is no real difference between government action voiding a contract for public policy reasons and government action regulating these contracts via legislation. In addition, traditional economic analysis of contract law cuts against treating these contracts as against public policy. Conventional analysis holds that contracts are generally social welfare maximizing and that one of the justifications for not enforcing contracts with harmful third party effects is that the contract might not maximize social welfare.[151] Importantly, the contract is not inefficient simply because there are harmful third party effects—the harms to the third party must exceed the overall benefits.[152]

The design of the self-enforcing contracts, however, complicates this analysis. A third party is not directly "harmed" in the sense that it is blocked from spending in the campaign; it is actually free to spend money in the race. The "harm" to the third party is simply that the third

150. For a general discussion of unenforceability on grounds of public policy, see 2 Farnsworth, supra note 121, § 5.1.

151. See, e.g., Steven Shavell, Foundations of Economic Analysis of Law 320–22 (2004) (discussing rationales for legally overriding contracts, including "existence of harmful externalities").

152. Note, A Law and Economics Look at Contracts Against Public Policy, 119 Harv. L. Rev. 1445, 1447 (2006).

party is faced with the choice of whether to enter the race and thus needs to calculate whether the harm to the candidates from its entry into the race is outweighed by its desire to participate in the race. This far more limited "harm" is further narrowed by the fact that the third party itself is involved in the decision. The third party gets to decide whether it believes that its additional speech is social welfare maximizing or whether the restrictions the campaigns have placed on it are social welfare maximizing. From the perspective at least of economic analysis, it is hard to argue that harm to third parties will outweigh the social benefits of the contract when the third parties themselves get to make that determination through their own actions. Even conceding that the contracts could be deemed against public policy, however, the public policy argument has little impact. The remedy in public policy cases is that the contract will not be enforced in court.[153] Given that the dominant form of enforcement is informal and political, not formal and legal, nonenforcement in court would have little impact. At best it would curtail the ability of third party beneficiaries who have been selected to enforce the contract terms (in many cases after the election). It seems unlikely that supporters of *Citizens United* who seek to protect speech interests would argue that preventing third party charities from getting additional funds, after the election is over, accomplishes their goals.

B. *Private Ordering as Supporting or Preventing Reform?*

The emergence of self-enforcing contracts also creates a problem for those who support campaign finance reform. While private ordering might be a workable option for restricting third party spending in some elections, it is not a comprehensive response to the problem as they see it. As a result, reformers will likely still want to pursue their efforts through constitutional amendment, various public financing programs, disclosure rules, and the like.

The challenge is in determining whether private ordering will support these further efforts at reform or will set them back.[154] On the one hand, successful use of self-enforcing contracts in races across the country could build support for reform, by showing that a robust political debate can take place without third party advertisements and by creating a cadre of elected officials who have been elected in races without third party influence (and might therefore be more inclined to support campaign finance reform laws). Over time, the crevasse from widespread exclusion of third party spending to laws preventing third party spending might not seem so wide.

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153. See, e.g., 2 Farnsworth, supra note 121, at § 5.1 (describing judicial treatment of contracts opposed to public policy as unenforceable or void).

154. Cf. Rachel Brewster, Stepping Stone or Stumbling Block: Incrementalism and National Climate Change Legislation, 28 Yale L. & Pol'y Rev. 245, 246 (2010) (arguing incremental measures may create barriers impeding progress against social problems).

On the other hand, successful use of self-enforcing contracts might actually be a barrier to further reforms. Widespread use of these contracts would bolster an argument that government regulation is unnecessary because the private ordering regime has found a way to exclude third party spending. Although there would be many races in which a contract is not adopted, critics of regulation could argue that the private ordering system appropriately balances free speech ideals, candidate preferences, and third party limitations. Ultimately, there is no obvious solution to the reformers' dilemma. Private ordering could have either effect.

C. *Possibilities of Future Adoption*

For those interested in expanding the use of the private ordering solution for restricting third party spending, there are at least two possible options: increasing public pressure to encourage private ordering and linking private ordering to public funding.

What makes the self-enforcing contract effective are the political dynamics at work in elections, including the important role that the press and negative news coverage play in shaping candidate behavior. One possible method for expanding the use of self-enforcing contracts for activists and reformers is to increase public and media awareness of these self-enforcing contracts as an option for candidates. Members of the public and the media could therefore ask the candidates whether they would sign such a contract—perhaps even prior to the candidates' proposing it. In that context, both candidates would face immediate media pressure to sign a pledge, and if they refused to sign, both candidates would suffer negative news stories criticizing them for wanting to allow third party spending in their campaign. Increased public pressure and media inquiries would slightly increase the likelihood of adoption by putting political and time pressure on candidates. Over time, it is possible that in some jurisdictions, success in gaining contract adoption would create a new social norm in favor of such contracts.[155]

A second option is making the offer or acceptance of a self-enforcing contract into a prerequisite for eligibility for state public funding systems.[156] One option for expanding the use of the self-enforcing contracts could be that any candidate seeking public funds must at least offer to her opponent (or accept if given an offer) a private ordering contract to limit third party activities. Although this approach

155. See, e.g., Todd R. Overman, Note, Shame on You: Campaign Finance Reform Through Social Norms, 55 Vand. L. Rev. 1243, 1291–95 (2002) (discussing role of social norms in supporting campaign finance limitations).

156. For a list of the sixteen states that provide some kind of public funding of elections, including the text of each state's public funding law, see Public Financing in the States, Money in Politics, Common Cause, http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4773825 (on file with the *Columbia Law Review*) (last updated June 2007).

would not apply to federal congressional elections (which do not have a public funding option), it would be another way to expand the use of self-enforcing contracts. At the same time, this option suffers from the downside of having to go through the political process and potentially falling short of constitutional muster, as government indirectly restricting political speech. It also might benefit frontrunners or incumbents to the detriment of well-funded underdogs: Frontrunners making this offer would restrict challengers' funding streams (if acceptance is required) or create negative press for the challenger (if acceptance is not required).

CONCLUSION

The emergence of a private ordering approach to addressing the issue of third party spending during campaigns is an important development in campaign finance law and policy. The Supreme Court's decision in *Citizens United* severely restricts the range of options for campaign finance reform at the legislative and regulatory level, and in the short run, these reforms and attempts to amend the Constitution seem unlikely to succeed. In contrast, the use of a self-enforcing contract has been shown to keep third party spending out of the most expensive Senate race in history, and it has been debated in other federal and local races since November 2012. While self-enforcing contracts will not be adopted in every election, they are nonetheless an important innovation because they offer an option for restricting third party spending that avoids the difficulties of congressional action and that does not run afoul of the Supreme Court's doctrine on government restrictions on speech. Scholars, reformers, and practitioners should consider it more closely as a way to achieve the goals of campaign finance reform.

APPENDIX: TEXT OF THE PEOPLE'S PLEDGE[157]

Because outside third party organizations—including but not limited to individuals, corporations, 527 organizations, 501(c) organizations, SuperPACs, and national and state party committees—are airing, and will continue to air, independent expenditure advertisements and issue advertisements either supporting or attacking Senator Scott Brown or Elizabeth Warren (individually the "Candidate" and collectively the "Candidates"); and

Because these groups function as independent expenditure organizations that are outside the direct control of either of the Candidates; and

Because the Candidates agree that they do not approve of such independent expenditure advertisements, and want those advertisements to immediately cease and desist for the duration of the 2012 election cycle; and

Because the Candidates recognize that in order to make Massachusetts a national example, and provide the citizens of Massachusetts with an election free of third party independent expenditure advertisements, they must be willing to include an enforcement mechanism that runs not to the third party organizations but to the Candidates' own campaigns:

The Candidates on behalf of their respective campaigns hereby agree to the following:

- In the event that a third party organization airs any independent expenditure broadcast (including radio), cable, satellite, or online advertising in support of a named, referenced (including by title) or otherwise identified Candidate, that Candidate's campaign shall, within three (3) days of discovery of the advertisement buy's total cost, duration, and source, pay 50% of the cost of that advertising buy to a charity of the opposing Candidate's choice.
- In the event that a third party organization airs any independent expenditure broadcast (including radio), cable, satellite, or online advertising in opposition to a named, referenced (including by title) or otherwise identified Candidate, that Candidate's campaign shall, within three (3) days of discovery of the advertisement buy's total cost, duration, and source, pay 50% of the cost of that advertising buy to a charity of the opposed Candidate's choice.
- In the event that a third party organization airs any broadcast (including radio), cable, or satellite advertising that promotes or supports a named, referenced (including by title) or otherwise identified Candidate, that Candidate's campaign shall, within three (3) days of discovery of the advertisement buy's total cost, duration, and source, pay

157. The People's Pledge, supra note 4.

50% of the cost of that advertising buy to a charity of the opposing Candidates [sic] choice.

- In the event that a third party organization airs any broadcast (including radio), cable, or satellite advertising that attacks or opposes a named, referenced (including by title) or otherwise identified Candidate, the opposing Candidate's campaign shall, within three (3) days of discovery of the advertisement buy's total cost, duration, and source, pay 50% of the cost of that advertising buy to a charity of the opposed Candidate's choice.
- The Candidates and their campaigns agree that neither they nor anyone acting on their behalf shall coordinate with any third party on any paid advertising for the duration of the 2012 election cycle. In the event that either Candidate or their campaign or anyone acting on their behalf coordinates any paid advertisement with a third party organization that Candidate's campaign shall pay 50% of the cost of the ad buy to a charity of the opposing Candidate's choice.
- The Candidates and their campaigns agree to continue to work together to limit the influence of third party advertisements and to close any loopholes (including coverage of sham ads) that arise in this agreement during the course of the campaign.

Scott Brown	January 23, 2012
Elizabeth Warren	January 22, 2012