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MCCUTCHEON CALLS FOR A NATIONAL REFERENDUM ON CAMPAIGN FINANCE (LITERALLY)

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In McCutcheon v. FEC, *the Supreme Court tightened First Amendment limits on Congress's authority to regulate campaign financing.* McCutcheon *ostensibly left in place the old regime that allows campaign-finance regulation so long as it strikes at quid pro quo corruption or its appearance. But two recurring themes in the* McCutcheon *opinion indicate that this standard will from hereon be more difficult to meet. One is that campaign-finance laws prevent individuals from participating meaningfully in democratic change. The second is that Congress cannot be trusted to pass campaign-finance laws because such laws are tainted by self-interest. As Chief Justice Roberts wrote in* McCutcheon*'s plurality opinion, "[T]hose who govern should be the* last *people to help decide who* should *govern." This Essay argues that these two themes actually chart a way forward for those who wish to see greater regulation of campaign financing. If Congress were to hold a national referendum to reenact the limits the Supreme Court struck down in* McCutcheon*, those limits would be constitutional even though the same limits passed by Congress were not. The reason is that limits backed by a popular vote would satisfy* McCutcheon*'s concerns with congressional self-dealing while vindicating directly its concern with maximizing each individual's opportunity to take an active part in democratic self-governance. Moreover, an answer from the People themselves to the most relevant question in any campaign-finance case—whether a practice gives rise to the appearance of corruption—is the best way one could imagine for discovering whether it does so. One might say that* McCutcheon *literally calls for a referendum on campaign finance. This Essay explores this notion in depth and closes by assessing the constitutionality and practicality of the referendum option.*

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INTRODUCTION

On April 2, 2014, the Supreme Court decided *McCutcheon v. FEC*, striking down aggregate campaign-contribution limits under the First Amendment.[1] The case followed hot on the heels of another important campaign-finance ruling, *Citizens United v. FEC*, which struck down limits on corporate campaign spending under the First Amendment.[2]

In what is sure to become *McCutcheon*'s most famous line, Chief Justice John Roberts expressed the opinion of five Justices that "those who govern should be the *last* people to help decide who *should* govern."[3] A majority of the Court for the first time has unambiguously endorsed the "incumbent self-protection" rationale for heightened scrutiny of campaign-finance laws.[4]

The incumbent self-protection rationale posits the existence of a fissure between the interests of the People themselves and their representatives.[5] In this view, incumbents are not the best stewards of the rules governing elections because they have an interest in staying in power. They have incentives to structure elections and limit speech to protect their positions of authority and influence, ensuring that existing hierarchies cannot be challenged by insurgents and outsiders.

As Chief Justice Roberts explained in *McCutcheon*'s peroration, the purpose of barring limits on campaign financing is to ensure "'the strictest union, the closest correspondence, and the most unreserved communication . . . [between the legislator and] his constituents,'"[6] for such "responsiveness is key to the very concept of self-governance through elected officials."[7] Limiting the legislator's ability to limit campaign financing "ensure[s] that the Government's efforts do not have the effect of

1. 134 S. Ct. 1434, 1442 (2014).

2. 130 S. Ct. 876, 913 (2010).

3. *McCutcheon*, 134 S. Ct. at 1441–42.

4. See generally *Citizens United*, 130 S. Ct. at 968–70 (Stevens, J., concurring in part and dissenting in part) (describing incumbent self-protection rationale).

5. See Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 692–93 (1990) (Scalia, J., dissenting) ("[W]ith evenly balanced speech incumbent officeholders generally win."); Lillian R. BeVier, Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform, 73 Calif. L. Rev. 1045, 1076 (1985) ("Indeed, there are reasons to believe that legislators, given free rein to inhibit political activity, might attempt to restructure the political balance of power so as principally to benefit themselves . . . . [M]any political process 'reforms' seem to promise tempting short-run political advantages to incumbents and their allies."); Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 470–72 (1996) (explaining theory).

6. *McCutcheon*, 134 S. Ct. at 1461–62 (quoting The Speeches of the Right Hon. Edmund Burke 129–30 (J. Burke ed., 1867)).

7. Id. at 1462.

restricting the First Amendment right of citizens to choose who shall govern them."[8]

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8. Id. Some have disagreed with the characterization of the *McCutcheon* decision as primarily grounded in concern about incumbent self-protection; they see in the opinion an overwhelming concern with protecting the right of each individual to participate equally in the democratic process. See, e.g., id. at 1440–41 ("There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right . . . [by] contribut[ing] to a candidate's campaign."); id. at 1442 ("We conclude, however, that the aggregate limits do little, if anything, to address . . . [the government's concern with combatting corruption or its appearance], while seriously restricting participation in the democratic process."); id. at 1449 ("It is no answer to say that the individual can . . . contribute less money to more people. To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process."); id. at 1462 ("We have . . . held that [the government's interest in combatting corruption] must be limited to a specific kind of corruption—quid pro quo corruption—[to] ensure that the Government's efforts do not have the effect of restricting the First Amendment right of citizens to choose who shall govern them.").

This reading of the opinion confuses the Court's identification of the interests at stake with its reasons for applying heightened scrutiny in the first place—an especially important distinction in First Amendment law. The Court's repeated return to the importance of "participation in the democratic process," id. at 1442, is designed to reiterate the weightiness of individuals' interests in making contributions to candidates of their choosing. While certainly a primary motive driving the Court's decision in *McCutcheon*, this important interest does nothing to explain the "closely drawn" scrutiny with bite the Court applied in the case. Id. at 1446. As explained below, infra note 9, all limitations on speech, whatever their motivations, restrict, to an often significant degree, the ability of individuals to participate equally in the democratic process. But only some of these laws receive heightened scrutiny. Limits on the time, place, and manner of speech—on, for example, when and where one may picket, leaflet, march, protest, or post signs—restrict the participation in the democratic process of some people and groups far more than others. Many of the statements in *McCutcheon* in favor of striking down aggregate campaign-finance limits could be readily transposed into an opinion striking down limits of any kind on any speech that had a disparate impact on some speakers, content, or viewpoints. See, e.g., *McCutcheon*, 134 S. Ct. at 1449 ("The First Amendment burden is especially great [in this case] for individuals who do not have ready access to alternative avenues for supporting their preferred politicians and policies [other than making campaign contributions]."). In cases where a law does not distinguish speech on the basis of its content—that is, where the regulation is "content-neutral"—courts ordinarily show deference to the judgment of the political branches in striking an appropriate balance between the government's interest in restricting speech, the degree of restriction imposed, and the value of that speech to the individual and to society. See, e.g., Hill v. Colorado, 530 U.S. 703, 727 (2000) (noting Colorado legislature must be afforded deference in imposing content-neutral restrictions on speech).

McCutcheon makes clear through the precedents it cites and its own language that the Court applies heightened scrutiny (that is, shows greater distrust for the judgment of Congress) in campaign-finance cases because legislators cannot be trusted to disinterestedly strike that balance when it comes to laws that might impact the outcome of elections, even if those laws are meant only to structure those elections in aid of the democratic process itself (rather than to disfavor speech or speakers with any particular content or viewpoint). See *McCutcheon*, 134 S. Ct. at 1441 ("In a series of cases over the past 40 years, we have spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible

As long as this incumbent self-protection rationale remains, no campaign-finance limitations passed by Congress are safe.[9]

The incumbent self-protection concern can be nullified, however, if laws backed by popular referendum ratify their public-interested character. A popular referendum in which an overwhelming majority of the People themselves voted to endorse campaign-finance limits would remedy the taint of self-dealing that clouds such laws.[10] *McCutcheon* literally

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desire simply to limit political speech."); id. at 1452 ("When the *Government* restricts speech, the Government bears the burden of proving the constitutionality of its actions." (emphasis added) (quoting United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 816 (2000)) (internal quotation marks omitted)); id. at 1456 ("The improbability of circumvention [of the base limits] indicates that the aggregate limits instead further the impermissible objective of simply limiting the amount of money in political campaigns.").

9. *McCutcheon*, like *Citizens United* before it, does not fix a bright line as to why campaign-finance laws should be subject to heightened scrutiny. Such laws are facially content neutral—everyone who wants to contribute to a federal election is limited in how much they can spend. It is only to the degree that such laws have a disparate impact that they might be thought to differ from ordinary time, place, and manner regulations on speech, which ordinarily receive considerably more deferential scrutiny. See Buckley v. Valeo, 424 U.S. 1, 259–60 (1976) (White, J., concurring in part and dissenting in part) ("[C]ontribution and expenditure limitations are neutral as to the content of speech and are not motivated by fear of the consequences of the political speech of particular candidates or of political speech in general . . . ."); Leslie Kendrick, Content Discrimination Revisited, 98 Va. L. Rev. 231, 237 n.14 (2012) (explaining campaign-finance-limitations cases are "technically not . . . content-discrimination cases" but "in campaign finance cases the Court, for obscure reasons, uses an effects test, which asks about the burden a regulation imposes on freedom of expression" rather than ordinary content-based–content-neutral dichotomy).

Indeed, ordinary content-neutral regulations often have significant disparate impacts on the abilities of speakers to reach audiences. Banning sound trucks in the interest of quiet neighborhoods or leafleting in airports has its most significant impact on those who wish to use those media to convey their messages. But see *Citizens United*, 130 S. Ct. at 898 (explaining strict scrutiny apparently must be applied against laws "that burden political speech" even if neutrally drawn because it is plain that "purpose and effect [of such laws] are to silence entities whose voices the Government deems to be suspect"). While Chief Justice Roberts does not draw a straight line between incumbent self-protection and heightened scrutiny, it is the only independent rationale offered for the new, more exacting version of "closely drawn" scrutiny in the *McCutcheon* opinion other than a generalized recourse to heightened scrutiny in the Court's past precedent. See, e.g., 134 S. Ct. at 1442, 1444, 1450, 1461–62 (emphasizing Court's use of heightened scrutiny is product of prior precedent and purpose of such scrutiny is primarily to ensure Congress does not distort electoral process). In the same way, this Essay argues that Congress could reenact laws limiting corporate electioneering even though *Citizens United* did not expressly rest on the incumbent self-protection rationale, because it appears evident that this rationale plays a significant role in motivating the Court's suspicion of such laws. See *Citizens United*, 130 S. Ct. at 968 n.67 (Stevens, J., concurring in part and dissenting in part) (explaining majority's claims that it "'must give weight' and 'due deference' to Congress' efforts to dispel corruption" make little sense when so little deference is shown to congressional judgment concerning these issues).

10. The question of precisely what the voting threshold in such a referendum should be is beyond the scope of this Essay. Strong arguments can be advanced that it must be a supermajority threshold given the First Amendment's countermajoritarian purposes.

mandates a referendum on campaign finance. If Congress wishes to pass such reforms again, it could overcome the principal criticism of campaign-finance laws in *McCutcheon*—that "those who govern should be the *last* people to help decide who *should* govern"[11]—by requiring that whatever reforms it passes only become effective if ratified by popular vote.

The remainder of this Essay explores this idea. First, it explains the incumbent self-protection problem. Second, it explains why a popular referendum should overcome the problem. Third, it assesses the constitutionality and practicality of the referendum option.

I. THE INCUMBENT SELF-PROTECTION RATIONALE

Individual Justices in the *McCutcheon* majority have made the incumbent self-protection argument in earlier campaign-finance rulings, but the Court conspicuously stopped short of adopting it outright in *Citizens United*. It was left to Justice Stevens, concurring in part and dissenting in part, to opine that though the majority's "opinion provide[d] no clear rationale for being so dismissive of Congress . . . the prior individual opinions on which it relies have offered one: the incentives of the legislators."[12]

In particular, dissenting in part in *McConnell v. FEC*, Justice Kennedy wrote that the campaign-finance law at issue there "look[ed] very much like an incumbency protection plan."[13] Justice Scalia, also dissenting in part in *McConnell*, went further: "We are governed by Congress," he wrote, "and this legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud

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Nonetheless, the Constitution itself was ratified by a simple majority in a supermajority of states, which might be another alternative. Even a simple majority may be sufficient where, as here, campaign-finance laws are facially content neutral and only receive heightened scrutiny—it appears—because they are tainted by the possibility of self-dealing. Unlike a situation in which an individual or a minority of the electorate's speech is limited just because a majority thinks it is a good idea, campaign-finance laws appear to garner distrust because of the principal–agent problems they pose. If the principals are being consulted, however, it is unclear why a simple majority would not be sufficient to cleanse the taint of self-dealing. Moreover, as Akhil Amar has elsewhere argued, a simple majority must be able to amend the Constitution if one takes seriously the ideal of "Popular Sovereignty" (that the source of constitutional power in the United States is in the People themselves), which gives the Constitution life and grounds its legitimacy in the eyes of many. See Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. Chi. L. Rev. 1043, 1060, 1072–73 (1988) [hereinafter Amar, Philadelphia Revisited].

11. *McCutcheon*, 134 S. Ct. at 1441–42.

12. *Citizens United*, 130 S. Ct. at 968 (Stevens, J., concurring in part and dissenting in part).

13. 540 U.S. 93, 306 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part), overruled by *Citizens United*, 130 S. Ct. 876.

voice."[14] And in *Austin v. Michigan Chamber of Commerce*, Justice Scalia hypothesized that officeholders favor "evenly balanced speech" because "with evenly balanced speech incumbent officeholders generally win."[15]

The Court's suspicions are not unsupported. In myriad ways, so-called even-handed campaign-finance limits can be shown to conspicuously favor incumbents.[16] A similar problem with self-dealing riddles redistricting law, where "when incumbent legislators draw the districts from which they are elected, the conflicts of interest are glaring" and "incumbents can and do gerrymander district lines to entrench themselves."[17] Assuming, then, that the incumbent self-protection rationale reflects a legitimate concern, the question becomes: "What should be done?"

The answer is a simple one, and one that Congress has never tried. Congress could reenact campaign-finance reform but condition its activation on its success in a national referendum. In doing so, it would democratically legitimate campaign-finance laws and ensure they were not merely the work of self-serving legislators.

II. NATIONAL POPULAR REFERENDUM AS AN ANSWER TO THE INCUMBENT SELF-PROTECTION PROBLEM

Three different lines of argument intersect to show that a campaign-finance law bottomed on a national referendum would overcome the heightened scrutiny applied to incumbent-enacted laws in *McCutcheon*. First, it would straightforwardly remove the taint of self-dealing in the same manner it long has in the law of agency. Second, it would take on quasi-constitutional dimensions by reflecting directly the will of the People as a whole. Third, if properly framed, it could directly answer the question of whether certain activities give rise to the appearance of corruption, the very test for the constitutionality of a campaign-finance regulation set forth in *McCutcheon*.

With respect to the first point, in an insightful recent article in the *Harvard Law Review* entitled *Politicians as Fiduciaries*, D. Theodore Rave has argued that "[w]hen the taint [of self-interest] is cleansed through the use of a neutral process," then "courts should apply a much more

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14. Id. at 248 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).

15. 494 U.S. 652, 692–93 (1990) (Scalia, J., dissenting), overruled by *Citizens United*, 130 S. Ct. 876.

16. See, e.g., *McConnell*, 540 U.S. at 306 (Kennedy, J., concurring in the judgment in part and dissenting in part) (citing James C. Miller, Monopoly Politics 84–101 (1999) (concluding regulations limiting election fundraising and spending constrain challengers more than incumbents)); id. at 249 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) (explaining myriad ways so-called even-handed campaign-finance limits conspicuously favor incumbents).

17. D. Theodore Rave, Politicians as Fiduciaries, 126 Harv. L. Rev. 671, 672 (2013).

deferential standard of review, focusing on the adequacy and independence of the process and deferring to the substantive outcome of a sufficiently independent process."[18] One of these processes—and the only one the Court is likely to trust given the substantial First Amendment stakes—has always been ratification by referendum. The reason is simple. When the principal herself endorses the action of her agent, it can no longer be said that her agent's acts were merely the result of his own frolic and detour, or worse, conflicted self-interest.[19]

With respect to the second point, endorsement by a national popular referendum would also remedy the taint of self-dealing by dint of the nearly constitutional status of any law backed by a national popular vote. As Akhil Amar has long argued, the Constitution itself—depending for its legitimacy as the supreme law of the United States on its roots in popular sovereignty—can be amended by national referendum.[20] Professor Amar has contended at length that the document's claim to legitimacy derives from its direct-democracy foundations. Thus, should the People act collectively to change the document, the Constitution must allow it, regardless of what Article V, the Amendment Clause, has to say about it.[21] The greater includes the lesser. The same forces that would make an amendment by national referendum legitimate—widespread civic participation, a sense of democratic self-governance, and the equal right of succeeding generations to determine the content of their own

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18. Id. at 679. For the complete discussion, see id. at 737–39 ("[W]ith the proper judicial supervision, ratification may suffice to cleanse the taint of incumbent self-dealing in redistricting.").

19. Ratification by the principal is a longstanding method of cleansing the taint of self-dealing in agency law. The same can be said of shareholder ratification in corporate law. But these concepts have their limits. In Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 737 (1964), the Supreme Court struck down a Colorado districting plan approved by a popular referendum. The Court wrote: "[T]he fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause . . . ." Id. There are reasons to think, however, that there are differences of constitutional magnitude between referenda held at the state and national levels.

20. Amar, Philadelphia Revisited, supra note 10, at 1072–73 ("Unless We the People of the 1980s can amend our Constitution by a simple majority—a majority of the polity, mind you, not of Congress (. . . it is a gross mistake to equate Congress with the People)—the Constitution loses its most defensible claim to derive from the People." (footnote omitted)). As Professor Amar takes pains to note, "The deep foundations for a nonexclusive reading of Article V have been laid by Charles Black and Bruce Ackerman." Id. at 1087.

21. Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 Colum. L. Rev. 457, 458–59 (1994) ("My proposition is that We the People of the United States—more specifically, a majority of voters—retain an unenumerated, constitutional right to alter our Government and revise our Constitution in a way not explicitly set out in Article V.").

Constitution—would lend a quasi-constitutional imprimatur to any law conditioned on such a momentous and important national act.[22]

With respect to the third point, in the special case of campaign finance, there is even another way that a popular referendum would work to cleanse the taint: *McCutcheon* endorsed the rule that any activity giving rise to "corruption *or the appearance of corruption*" may be regulated.[23] The Court, however, has been left to use a series of proxies and tests to resolve the question of what activities, exactly, give rise to this "appearance of corruption." But if Americans came together in a national referendum to overwhelmingly endorse limits on campaign financing, they could answer the question directly. Properly framed, any referendum seeking to restrict campaign financing could admonish the American People that they should only vote in favor if the activities

22. See id. at 474 ("The truth is, that, in our governments, the supreme, absolute, and uncontrollable power remains in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions. . . . The consequence is, that the people may change the constitutions whenever and however they please.'" (emphasis omitted) (quoting 2 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 432 (J.B. Lippincott & Co., 2d ed. 1881) (1836) (providing remarks of James Wilson in Pennsylvania ratifying debates))); see also id. at 481–87 (substantiating these points with specific citations to Founding-era materials). Professor Amar is not alone in his belief that there is something special about laws with direct-democratic foundations. Beyond Amar's excavation of the original understanding of the political theory underlying the Constitution, many statesmen, scholars, and jurists have argued that initiatives and referenda deserve greater respect than ordinary legislative enactments because they are especially democratic in their own right. See, e.g., Legislature v. Deukmejian, 669 P.2d 17, 35 (Cal. 1983) (en banc) (Richardson, J., dissenting) (noting initiatives entitled to "*very* special and *very* favored treatment"); Woodrow Wilson, The Issues of Reform, *in* The Initiative Referendum and Recall 69, 87 (W. Munro ed., 1912) (arguing aim in creating ballot initiative was "to restore, not to destroy, representative government"). As Richard Briffault has argued, "[D]irect legislation remedies some of the legislature's shortcomings and serves as a fitting complement to the legislative process." Richard Briffault, Distrust of Democracy, 63 Tex. L. Rev. 1347, 1350 (1985) (reviewing David B. Magleby, Direct Legislation: Voting on Ballot Propositions in the United States (1984)); id. at 1374 ("Theorists from Rousseau to the authors of the Port Huron Statement have focused on direct democracy as a means of transcending political mechanics by satisfying human needs as well as providing broad popular participation in lawmaking."); see also Clayton P. Gillette, Plebiscites, Participation, and Collective Action in Local Government Law, 86 Mich. L. Rev. 930, 939 (1988) (defending legitimacy of direct democracy). As Justice Black once remarked—part and parcel of his belief in the superior legitimacy of direct democracy over representative democracy—voter-approved legislation should be given more deference by the courts because such legislation is "as near to democracy as you can get." Oral Argument, Part 2, at 47:14, Reitman v. Mulkey, 387 U.S. 369 (1967) (No. 483), available at http://www.oyez.org/cases/1960-1969/1966/1966_483 (on file with the *Columbia Law Review*); see also James v. Valtierra, 402 U.S. 137, 141 (1971) (Black, J.) (stating provisions for referenda demonstrate "devotion to democracy"); Hunter v. Erickson, 393 U.S. 385, 397 (1969) (Black, J., dissenting) ("Just consider that for a moment. In this Government, which we boast is 'of the people, by the people, and for the people,' conditioning the enactment of a law on a majority vote of the people condemns that law as unconstitutional in the eyes of the Court!").

23. McCutcheon v. FEC, 134 S. Ct. 1434, 1441 (2014) (emphasis added).

regulated, in their view, gave rise to the "appearance of corruption." In this way, the vote on the referendum would be "declaratory" of the judgment of "We the People as the True High Court, reflecting not popular will but popular judgment."[24]

Thus, it would appear that a campaign-finance law endorsed by a national majority could embody the most salient values *McCutcheon* set forth, inviting voters to assume an even more participatory role in national lawmaking, while simultaneously erasing the taint of incumbent self-dealing ordinarily confronting campaign-finance laws.

III. THE CONSTITUTIONALITY AND PRACTICALITY OF A NATIONAL POPULAR REFERENDUM

This concluding Part sketches out the argument for why a law conditioned for its force on the outcome of a national referendum would probably be constitutional and explains what practical steps might be taken to carry out such a referendum.

A. *The Constitutionality of a Law Conditioned on the Outcome of a National Referendum*

A campaign-finance law whose legal effect is conditioned on its approval by a majority of voters in a national referendum would seem to be constitutional, though the question is far closer than one might at first imagine.

As an initial matter, no one could disagree that Congress could enact a law that would include a provision providing for a nonbinding national referendum on some issue. As long as the referendum were on an issue of importance to Congress's decision to execute one of Congress's other enumerated powers, Congress would possess the authority to hold such a referendum under the Necessary and Proper Clause, which quite literally empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."[25] Congress already passes laws all the time that do something like this—Congress has created numerous information-generating agencies, groups, task forces, and blue-ribbon commissions whose only task is to aid Congress in the execution of its work.[26] A nonbinding national referendum would simply be taking this concept to its logical extreme.

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24. Akhil Reed Amar, The People as Supreme Court: Some Incomplete Notes on Sager, 88 Nw. U. L. Rev. 457, 459 (1993).

25. U.S. Const. art. I, § 8, cl. 18.

26. See Matthew Eric Glassman & Jacob R. Straus, Cong. Research Serv., R40076, Congressional Commissions: Overview, Structure, and Legislative Considerations 1 (2013), available at http://fas.org/sgp/crs/misc/R40076.pdf (on file with the *Columbia Law Review*) (explaining "[t]hroughout American history, Congress has found commissions to be useful entities in the legislative process" and "[o]ver 90 congressional commissions have been established since 1989"); see also Steven R. Ross, Raphael A. Prober & Gabriel

But the analysis is somewhat more difficult when one speaks of the possibility of a *binding* national referendum, where a law's legal force is conditioned on its endorsement by a majority of voters during, for example, a national presidential election.[27]

Nothing in the Constitution affirmatively precludes such an outcome, and indeed, tens of thousands of laws are conditioned on the actions of some other party before they take effect. Many regulatory delegations, for example, provide that they will not bind regulated parties until such time as the administrator of the agency charged with administering the regulatory program takes certain ministerial acts—such as promulgating a regulation implementing the statute.[28] In principle, a national referendum is entitled to analysis under the same logic. If such a law were passed, Congress and the President, in their collective judgment, will have elected to delegate to the People themselves the decision of whether the law should or should not bind them.[29]

K. Gillett, The Rise and Permanence of Quasi-Legislative Independent Commissions, 27 J.L. & Pol. 415, 417–18 (2012) (explaining long history and continued use of quasi-legislative independent commissions by Congress).

27. One might reasonably consider whether the referendum would necessarily have to be binding to cleanse the taint of self-dealing associated with a campaign-finance law. After all, if two-thirds of the electorate endorsed a campaign-finance law through a nonbinding referendum, it would seem that the fact that the referendum was nonbinding would be of trivial consequence. But by the very same token, if the law's constitutionality is to be affected by the referendum at all, it will need a majority—perhaps a significant majority—of voters to endorse it. If the distinction between a binding and nonbinding referendum really is insubstantial, there would seem to be little reason not to make the referendum binding, if only to underscore the seriousness of Congress's purpose in choosing to employ it.

28. These laws, known as "intransitive laws," are unique in that they simply instruct a regulatory agency to develop rules. See Edward L. Rubin, Law and Legislation in the Administrative State, 89 Colum. L. Rev. 369, 381–82 (1989) (coining distinction between transitive laws, which create primary-conduct rules, and intransitive laws, which create instructions for third parties to create primary-conduct rules, and giving examples); see also Daniel B. Rodriguez, The Positive Political Dimensions of Regulatory Reform, 72 Wash. U. L.Q. 1, 115 (1994) ("Modern regulatory statutes tend to be, in Edward Rubin's phrase, rather intransitive; they represent broad directions to administrative agencies to make law."). Countless laws are of this variety. To give just one of innumerable possible examples, mandatory country-of-origin labels for meat products did not go into effect until the Secretary of Agriculture implemented them. See Am. Meat Inst. v. U.S. Dep't of Agric., No. 13-5281, 2014 WL 3732697, at *2 (D.C. Cir. July 29, 2014).

29. There may be administrative-law side issues to contend with here, but they seem at best trivial. Creative litigants might seek, for example, to challenge a referendum on the grounds that it violates the nondelegation doctrine. This challenge seems as though it would be easily surmounted in the case of a referendum, however. The nondelegation doctrine requires that a regulatory delegation "lay down . . . an intelligible principle to which the person or body authorized [to implement a regulatory delegation] . . . is directed to conform." J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); see also Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 484 (1989) (explaining nondelegation doctrine). The referendum's "intelligible principle" would be plainer than a "principle."

There are limits to this principle, however, though where they are to be found is a complex question. For instance, both the legislative veto (by which Congress allowed itself to veto a law at a later date) and the line-item veto (by which the President was authorized to pick and choose which parts of each law he would veto) have been held unconstitutional because they violate the Constitution's deep structural principles.[30] In light of these cases, it can safely be said that any law that meddles with how the Constitution fundamentally *works* is vulnerable to collateral constitutional attack on structural and separation-of-powers grounds.

However, in the narrow case of a law regulating campaign finance that is conditioned on success in a national referendum, two metals would alloy to armor it. First, the special status of the national referendum makes the national-referendum procedure a self-legitimating aspect of our constitutional government. To the degree that we truly believe the Constitution is founded on principles of popular sovereignty, the idea that the Congress would be constitutionally unable to condition the operation of a national law on the will of the nation appears bizarre indeed.

Second, because the referendum would specifically pertain to campaign finance and be designed to remedy a principal–agent problem created by the very fact that Congress cannot constitutionally pass campaign-finance laws regulating many kinds of campaign contributions and expenditures, the law itself would fit within a structural keyhole in the Constitution. Defenders of the referendum could explain that the Court has otherwise created a constitutional impossibility. Without the ability to pass campaign-finance laws through national referendum, there would exist a set of laws that would be concededly constitutional if they did exist (namely, campaign-finance laws that were not tainted by legislative self-interest) that could not legally be enacted (because the only method of proving they are untainted is ratification by popular referendum).

B. *The Practicality of a National Referendum*

Passing a campaign-finance law with a national-referendum provision would not be complex. The referendum could be timed to coincide with a national election, and states could coordinate with the federal government to place the referendum on the ballot. It is almost impossible to imagine, as a practical matter, that any state would refuse to allow its people to participate, so there is no need to worry about the consti-

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It would be a *mandate*: "Vote yes to implement the law at issue, or no to deny its implementation."

30. See William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 649 (1990) (describing Supreme Court's broad invalidation of legislative veto); Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2366 (2001) (describing Supreme Court's decision to strike down Line Item Veto Act).

tutionality of placing a national-referendum provision on, for instance, the presidential-election ballot. No state would decline voluntarily to do so.[31]

The ballot question would be short and ratificationary—it would ask for each voter's *legal* and *prudential* judgment. The ballot question might advise voters that they may only place limits on campaign financing where those limits target "corruption or the appearance of corruption"[32] and then ask voters to judge whether (a) corporations should be limited in their ability to spend in support of candidates (if the People wished to repass the law struck down in *Citizens United*), or (b) whether there should exist aggregate limits on campaign contributions (if the People wished to repass the law struck down in *McCutcheon*). It would not need to have the complexity or prolixity of the U.S. Code, since endorsement of the broad principle on the referendum question would be sufficient to confer on Congress at least some discretion to fill in the details of the regulatory scheme through appropriate legislation (which would itself be subject to judicial review).[33]

Moreover, since the law's text would already presumably be enacted and have existed for months, it would have been thoroughly vetted in the popular media, and it could also be made available for perusal at polling places and on the Internet.

In other words, there would be no serious practical impediment to a national referendum ratifying the law in question.

CONCLUSION

McCutcheon demands nothing more than a bit of creativity. To the extent it is believed that there is a nationwide coalition strongly supportive of the regulations of campaign financing struck down in *Citizens United* and *McCutcheon*, the Court has not definitely said such laws are

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31. It might be contended that this statement is overly optimistic; some states would not allow a campaign-finance referendum on the ballot without a fight. Were a state to disenfranchise its own citizens in this way, it would be shocking. It is not entirely clear what would happen in this situation.

32. McCutcheon v. FEC, 134 S. Ct. 1434, 1441 (2014).

33. Referendum and ballot questions in most states must often contend with the unfortunate reality that a complex statute cannot be set forth in its entirety on the ballot. David B. Magleby, Let the Voters Decide? An Assessment of the Initiative and Referendum Process, 66 U. Colo. L. Rev. 13, 39–40 (1995). In those states, the solution is for the backers of the referendum to summarize the law in a short space, with a cross-reference to the whole text for those interested in reading its verbatim text. See id. at 24–25 ("States regularly provide a short summary of the measure printed on the ballot, and some states provide a voter information pamphlet that offers a more detailed analysis."). This is all that is meant by the foregoing statement. However, it is also not inconceivable that Congress might ask that the People pass by referendum a short, plain, broadly worded delegation of limited authority to Congress to make certain laws regulating campaign finance, and this too would seem to comport with the constitutional principles explained herein.

unconstitutional, only that such laws, as they were enacted, were likely to be tainted by self-dealing and were unlikely to target what could honestly be called the appearance of corruption. Both questions could be answered by passing new campaign-finance laws that would be activated upon ratification by a majority of the People. Such a referendum would remove the taint of self-dealing from such laws while affirming that in the judgment of the People themselves, the practices those laws target do in fact give rise to the appearance of corruption.

In other words, *McCutcheon* demands a national referendum on campaign finance—literally.

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