
Article

Campaigns, Inc.

Robert Yablon[†]

Introduction	151
I. A Primer on the Campaign Industry	157
A. Origins	157
B. Structure and Operations	168
II. The Campaign Industry's Systemic Impacts	180
A. Candidate Selection Effects	182
B. Campaign Effects	187
C. Policy Effects	191
III. Conceptual and Practical Implications	194
A. Money in Politics	195
B. Political Parties	203
IV. Contemplating Reform	209
A. Substantive Regulation	210
B. Transparency-Oriented Regulation	219
C. Private Ordering	222
Conclusion	228

INTRODUCTION

Politics has always been theater. Today, it is also business. The billions of dollars that flow into modern U.S. election campaigns sustain a thriving ecosystem of political service providers who develop strategy and execute operations in virtually every major race. This is not news to historians who have charted the evolution of campaigning or to political scientists who study the

[†] Assistant Professor of Law, University of Wisconsin Law School. For valuable comments and conversations, many thanks to Barry Burden, David Canon, Andrew Coan, Anuj Desai, Joey Fishkin, Sam Issacharoff, Justin Levitt, Steve Ross, David Schwartz, Miriam Seifter, and Dan Tokaji. Thanks also to participants in workshops at Arizona, Penn State, and Wisconsin, and in the ACS Junior Scholars Public Law Workshop; and to Jared Mehre and Anna Peterson for excellent research assistance. Copyright © 2018 by Robert Yablon.

activities of campaign professionals.¹ Leading scholars in these fields have described the emergence of the campaign industry as a singularly important development in our nation's politics.² Yet, remarkably, the campaign industry is almost entirely absent from election law discourse.³

1. Among the classic works in this area are ROBERT AGRANOFF, THE NEW STYLE IN ELECTION CAMPAIGNS (1972); SIDNEY BLUMENTHAL, THE PERMANENT CAMPAIGN: INSIDE THE WORLD OF ELITE POLITICAL OPERATIVES (1980); JOE McGINNIS, THE SELLING OF THE PRESIDENT 1968 (1969); DAN NIMMO, THE POLITICAL PERSUADERS: THE TECHNIQUES OF MODERN ELECTION CAMPAIGNS (1970); DAVID LEE ROSENBLUM, THE ELECTION MEN: PROFESSIONAL CAMPAIGN MANAGERS AND AMERICAN DEMOCRACY (1973); and LARRY SABATO, THE RISE OF THE POLITICAL CONSULTANTS: NEW WAYS OF WINNING ELECTIONS (1981) [hereinafter SABATO, POLITICAL CONSULTANTS]. Notable recent contributions include DENNIS W. JOHNSON, DEMOCRACY FOR HIRE: A HISTORY OF AMERICAN POLITICAL CONSULTING (2017) [hereinafter JOHNSON, DEMOCRACY FOR HIRE]; and ADAM SHEINGATE, BUILDING A BUSINESS OF POLITICS: THE RISE OF POLITICAL CONSULTING AND THE TRANSFORMATION OF AMERICAN DEMOCRACY (2016).

2. See, e.g., SABATO, POLITICAL CONSULTANTS, *supra* note 1, at 3 ("There is no more significant change in the conduct of campaigns than the consultant's recent rise to prominence, if not preeminence"); SHEINGATE, *supra* note 1, at 12 ("Whether we like it or not, political consultants play a crucial part in democratic practice, and the rise of a modern business of politics provides a critical window into the changing character of American democracy."); James A. Thurber, *Understanding the Dynamics and the Transformation of American Government*, in CAMPAIGNS AND ELECTIONS AMERICAN STYLE 1, 19 (James A. Thurber & Candice J. Nelson eds., 4th ed. 2014) [hereinafter Thurber, *Understanding*] ("Few changes have transformed American elections more in the past three decades than the professionalization of campaign management and the evolution of new strategies and tactics."); Jill Lepore, *The Lie Factory: How Politics Became a Business*, NEW YORKER, Sept. 24, 2012, at 50, 54 ("No single development has altered the workings of American democracy in the last century so much as political consulting").

3. Campaign professionals have made cameos in works on campaign finance. See, e.g., Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court's Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679, 685–86 (2010). One short essay considers the value of campaign consultants. Ellen Zeng, *Are Campaign Consultants Valuable?*, 4 HARV. L. & POL'Y REV. 439, 450–51 (2010). But the business of politics has received no extended treatment in the legal literature. While political scientists have been somewhat more attentive to the topic, they continue to describe it as understudied even within their own field. E.g., Matt Grossmann, *Campaigning as an Industry: Consulting Business Models and Intra-Party Competition*, 11 BUS. & POL. 1, 1, 4 (2009) [hereinafter Grossmann, *Campaigning*] (asserting that "scholars have largely ignored campaigns as a business activity" and "know little about how business practices might affect political campaigns"); Gregory J. Martin & Zachary Peskowitz, *Agency Problems in Political Campaigns: Media Buying and Consulting*, 112 AM. POL. SCI. REV. 231, 231 (2017) ("[P]olitical scientists have paid relatively little attention to the firms that actually produce nearly all campaign advertisements, and that handle a sizable share of all campaign funds raised.").

As our electoral politics becomes increasingly professionalized and industrialized, the time has come for legal scholars, policymakers, and jurists to grapple with the campaign industry's ascendancy. From a practical perspective, studying the market for political services and its imperfections raises questions of whether and how the business of politics ought to be superintended. Currently, the campaign industry is subject to minimal public or private oversight.⁴ From a more theoretical perspective, taking account of the campaign industry adds a new dimension to ongoing debates about money in politics and the status of political parties. In short, while existing legal commentary rarely acknowledges them, professional campaigners are as central to modern electoral politics as professional lobbyists and lawyers are to policymaking and litigation, and they ought to be regarded as such.⁵

This Article begins the process of incorporating the campaign industry into the study of election law. As an initial step, it situates the campaign industry in a legal narrative. The industry's rise to prominence was not preordained. The industry cannot be understood solely as the handiwork of particular political entrepreneurs, or as the inevitable byproduct of technological advances and social change. Instead, the industry exists as it does in large part because the law unintentionally paved the way. Beginning in the late nineteenth century, and continuing for many decades thereafter, legal reforms weakened the capacity of the major political parties to dominate campaigning as they had in the past.⁶ At the same time, the law continued to allow money to flow relatively freely into the political process, and it effectively legitimated paid political service providers as proper recipients of those funds.⁷

Having emerged from a particular legal milieu, the campaign industry has proceeded to reshape the democratic process

4. See *infra* note 340 and accompanying text.

5. Cf. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 510 (1994) (making a similar point in the litigation context); Larry Sabato, *Political Influence, the News Media and Campaign Consultants*, 22 PS: POL. SCI. & POL. 15, 16 (1989) [hereinafter Sabato, *Political Influence*] (suggesting that campaign professionals "need to be examined just as closely as any other power center in American politics"); Matthew C. Stephenson & Howell E. Jackson, *Lobbyists as Imperfect Agents*, 47 HARV. J. ON LEGIS. 1, 4 (2010) ("Consideration of the lobbyist-constituent agency problem should be a regular fixture, rather than an occasional afterthought, in analyses of pluralist policymaking.").

6. See *infra* Part I.A.

7. See *id.*

in its own distinctive image. The industry's impact has been transformative both for individual campaigns and for the political system writ large. Consider first the campaign-level perspective. Candidates and other campaigners rely on the campaign industry to convert a particular input—namely, dollars—into electioneering activities that ultimately aim to produce a particular output—namely, votes. The industry can offer these political actors valuable expertise and operational capabilities, but it does not always serve them well. Rather than scrupulously promoting their clients' interests, campaign professionals may seek to aggrandize themselves or maximize their own financial returns instead. While such agency problems can arise in a host of contexts, particular features of campaigns and the campaign industry may make them especially prevalent and acute.⁸ For example, Super PACs and similar entities, which reap a substantial share of campaign dollars, allow campaign professionals to operate with minimal oversight, inviting self-dealing and other abuses.⁹ For campaigners and their funders, the pertinent question is how to ensure that campaign professionals faithfully and effectively advance their electoral interests.

A campaign-level vantage point, however, offers only a glimpse of the campaign industry's import. A broader, system-level perspective reveals the industry's impact on our politics as a whole.¹⁰ For starters, campaign professionals affect the complexion of those who seek office. In particular, they tilt the playing field toward candidates who, by virtue of their fundraising potential and perhaps their perceived pliability, are attractive clients to campaign professionals.¹¹ Second, the campaign industry and its economic incentives affect the nature of electioneering.¹² Among other things, professionals overemphasize capital-intensive campaign activities that they can monetize, such as mass media advertisements, which offer a lucrative source of commissions.¹³ In contrast, they underemphasize activities, such as grassroots outreach, that may foster deeper democratic engagement.¹⁴ The industry may thus contribute to the rising tide of political cynicism and disenchantment. Third, the campaign

8. See *infra* notes 161–63 and accompanying text.

9. See *infra* notes 166–72 and accompanying text.

10. See *infra* Part II.

11. See *infra* Part II.A.

12. See *infra* Part II.B.

13. See *infra* notes 216–22 and accompanying text.

14. See *infra* notes 223–26 and accompanying text.

industry's dominance affects policy positions and priorities.¹⁵ Willfully or not, campaign professionals may nudge candidates and officials toward positions that accord with the interests of actual or prospective non-campaign clients, including corporations, trade associations, and foreign governments and officials.

The campaign industry's centrality to modern elections also has important implications for debates about both money in politics and political parties. The fact that campaign professionals handle the bulk of electoral advocacy complicates the relationship between money and speech.¹⁶ It means that campaign funders and even candidates themselves are often at least one step removed from any communicative acts. Whether funders contribute to a candidate's official campaign organization or independently spend money on electioneering, they are rarely underwriting their own self-expression.¹⁷ Instead, professionals often make the key judgments about the content, form, and timing of campaign advocacy.¹⁸ Among other things, this reality raises doubts about whether limits on independent expenditures ought to be more constitutionally suspect than limits on contributions, as the Supreme Court has long maintained. Moreover, because campaign professionals may spend money in ways that do not maximize speech production, funding restrictions do not invariably limit speech, as the Supreme Court has sometimes presumed.¹⁹ Additionally, as a policy matter, attending to the campaign industry offers a new perspective on public financing proposals and efforts to galvanize small donors. By increasing the money flowing into the system, such measures effectively subsidize the industry and magnify its associated ills.²⁰

As for political parties, campaign professionals contribute to their organizational peculiarities.²¹ The major parties, commentators have observed, have become hollowed out.²² Their traditional grassroots organizations have withered, shifting power to

15. See *infra* Part II.C.

16. See *infra* Part III.A.

17. See *infra* notes 271–84 and accompanying text.

18. See *id.*

19. See *infra* notes 285–302 and accompanying text.

20. See *infra* notes 303–06 and accompanying text.

21. See *infra* Part III.B.

22. See, e.g., Joseph Fishkin & Heather K. Gerken, *The Party's Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175, 213 (2014) [hereinafter Fishkin & Gerken, *The Party's Over*]; Joseph Fishkin & Heather K. Gerken, *The Two Trends that Matter for Party Politics*, 89 N.Y.U. L. REV. ONLINE 32 (2014) [hereinafter Fishkin & Gerken, *Two*

elites and, in particular, to wealthy actors who deploy resources independent of formal party structures in an effort to shape party policy and identity.²³ Campaign professionals offer strategic guidance and services that allow these big-money elites to wage their battles for supremacy within and between the parties.²⁴ In other words, campaign professionals have helped to reconfigure the parties and stand as perhaps the biggest beneficiaries of that reconfiguration. Attending to the campaign industry thus appears to bolster the case of those who urge party reforms that seek to restore the primacy of formal party structures and shift influence back to grassroots party activists at the state and local levels.²⁵

While efforts to stem the flow of money into the electoral system and to reform political parties might indirectly restrain the campaign industry, direct action to reform industry practices might also be possible. For both practical and constitutional reasons, no one is likely to put the campaign industry out of business. A variety of strategies, however, might help to curb some of the industry's worst tendencies. Lawmakers might pursue substantive regulatory interventions, such as conflict-of-interest rules and rate regulations,²⁶ or transparency measures that aim to root out industry abuses by bringing them to light.²⁷ To this end, existing regulations on lobbyists and other professionals may offer useful lessons and guidance, including insight into potential First Amendment constraints. Notably, a few jurisdictions have recently begun to consider and adopt regulations on the campaign industry, indicating that reform is a real possibility.²⁸ Beyond governmental action, reformers might look to potential private solutions, such as developing professional standards and accreditation systems.²⁹

The discussion below elaborates on these points. Part I explains how a series of legal reforms related to political parties and campaign finance helped to propel the campaign industry's rise. Drawing on political science studies, journalist accounts, and analysis of primary source material, Part I also offers an

*Trends]; Samuel Issacharoff, *Outsourcing Politics: The Hostile Takeover of Our Hollowed-Out Political Parties*, 54 HOUS. L. REV. 845, 847 (2017).*

23. See *infra* notes 321–29 and accompanying text.

24. See *infra* notes 330–34 and accompanying text.

25. See *infra* notes 336–39 and accompanying text.

26. See *infra* Part IV.A.

27. See *infra* Part IV.B.

28. See *infra* notes 360–62, 387–98 and accompanying text.

29. See *infra* Part IV.C.

overview of key structural features of the modern campaign industry. Part II assesses the consequences of the campaign industry, focusing on the industry's effects on candidate selection, campaigning, and policy. Part III then explains how accounting for the campaign industry can complicate and enrich existing theoretical and policy debates surrounding money in politics and political parties. Finally, Part IV considers potential steps that public and private actors might pursue to address some of the industry's negative impacts.

I. A PRIMER ON THE CAMPAIGN INDUSTRY

A. ORIGINS

This Section situates the campaign industry in its historical context, placing law at the center of the narrative. It draws upon a body of non-legal scholarship that explores the industry's emergence,³⁰ and it integrates that work into a legal literature that stresses how legal rules and structures shape democratic practice.³¹ According to this synthesis, the market for campaign services took shape over the course of the twentieth century as political actors adapted to regulations that directly and indirectly shaped the process of campaigning. The business of politics, in other words, is an outgrowth of the law of politics.

For much of the nineteenth century and well into the twentieth, election campaigns were largely the domain of political parties and their operatives.³² The major parties had a national

30. Of particular significance are the recent and richly detailed works of political scientists Dennis Johnson and Adam Sheingate. See JOHNSON, DEMOCRACY FOR HIRE, *supra* note 1; SHEINGATE, *supra* note 1.

31. See, e.g., SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 1 (5th ed. 2016) ("The kind of democratic politics we have is always and inevitably itself a product of institutional forms and legal structures."); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 806 (2014) (urging consideration of "the ways that legal doctrines and frameworks, as well as institutional structures, determine the modes through which political power is effectively mobilized, organized, and encouraged or discouraged").

32. See, e.g., JAMIE L. CARSON & JASON M. ROBERTS, AMBITION, COMPETITION, AND ELECTORAL REFORM: THE POLITICS OF CONGRESSIONAL ELECTIONS ACROSS TIME 14 (2013); JOHNSON, DEMOCRACY FOR HIRE, *supra* note 1, at 2–6; ROBERT E. MUTCH, BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM 3–4 (2014); SHEINGATE, *supra* note 1, at 2–3; Dennis W. Johnson, *Campaign Consultants*, in THE CONCISE PRINCETON ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 56–59 (Michael Kazin ed., 2011) [hereinafter Johnson,

profile, but their vitality rested primarily on bottom-up organizing at the state and especially local levels. Party insiders selected the candidates who would be their standard bearers and then orchestrated the politicking to get them elected.³³ The labor behind these party-directed efforts to drum up support and deliver votes came mainly from the party rank and file.³⁴

The parties commonly engendered loyalty and incentivized engagement through the practice of patronage: by securing victory for their party, campaigners could secure government jobs for themselves.³⁵ Patronage existed at the federal level since the country's early days and, beginning in the Jacksonian era, burgeoned into a full-fledged spoils system.³⁶ The practice loomed even larger in many states and localities, especially in major cities, where the high concentration of government employment opportunities enabled urban political machines to thrive.³⁷ In exchange for their jobs, patronage workers not only labored on the party's behalf; they were also expected to help finance the party by paying over a fraction of their salaries.³⁸ Beyond underwriting electioneering activities, these funds enabled parties to play

Campaign Consultants]. For historical background on parties and their campaign activities, see generally JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA (1995); RICHARD FRANKLIN BENSEL, THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY (2004).

33. See, e.g., Thurber, *Understanding*, *supra* note 2, at 9; Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. 531, 552 (2016).

34. JOHNSON, DEMOCRACY FOR HIRE, *supra* note 1, at 4.

35. See generally CARL RUSSELL FISH, THE CIVIL SERVICE AND THE PATRONAGE (1905) (charting the rise of the spoils system in the nineteenth century and early efforts at civil service reform); ARI HOOGENBOOM, OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT (1961); James Q. Wilson, *The Economy of Patronage*, 69 J. POL. ECON. 369 (1961).

36. See *Elrod v. Burns*, 427 U.S. 347, 353 (1976) (plurality opinion); *id.* at 378 (Powell, J., dissenting).

37. See, e.g., Issacharoff, *supra* note 22, at 870 ("[T]he prospect of public employment was the glue that held together the party apparatus, particularly at the local level."). Though common, patronage and machine politics were not universal features of nineteenth century politics. By one estimate, party organizations "characterized by bosses, patronage workers, and disciplined control of nominations . . . governed about 55 percent of the population" at their peak. Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSP. ON POL. 571, 588 (2012) (citing estimates from DAVID R. MAYHEW, PLACING PARTIES IN AMERICAN POLITICS: ORGANIZATION, ELECTORAL SETTINGS, AND GOVERNMENT ACTIVITY IN THE TWENTIETH CENTURY 200 (1986)).

38. See Mutch, *supra* note 32, at 3; Cynthia Grant Bowman, "We Don't Want Anybody Sent": *The Death of Patronage Hiring in Chicago*, 86 NW. U. L.

a social welfare role and deliver aid to members in need—a further loyalty-building mechanism.³⁹

This prevailing regime of party primacy imposed a certain order on politics, but at a high cost. Generations of reformers denounced the corruption and public maladministration that accompanied party machines.⁴⁰ In fits and starts, they achieved a succession of legal changes that gradually weakened the parties' capacity to play their traditional electoral roles.⁴¹ Their efforts helped—quite unintentionally—to open the door to a new breed of entrepreneurial campaign service provider.

One significant category of reform activity involved rooting out patronage and the spoils system. Over the span of many decades, patronage gave way to a nonpartisan, merit-based civil service. Parties lost the ability to deliver a valuable benefit to their loyalists, who in turn had less incentive to do the party's work. At the federal level, early legislative efforts included the Pendleton Act of 1883, which established the federal civil service system, limited the electoral activities of civil servants, and strengthened rules that barred parties from coercing federal employees to hand over part of their salaries.⁴² These enactments had numerous limitations and were initially underenforced,⁴³ but Congress and the Executive bolstered them over time and eventually went further.⁴⁴ The Hatch Act of 1939 expanded restrictions on the political activities of executive branch employees even beyond the classified civil service, excepting only high-level officials.⁴⁵

REV. 57, 84 (1991); Jed Handelsman Shugarman, *The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance*, 31 J.L. & POL. 139, 143 (2015).

39. See, e.g., Kang, *supra* note 33, at 549.

40. See, e.g., NANCY L. ROSENBLUM, ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP 165–80 (2010) (describing the tradition of progressive anti-partyism).

41. CARSON & ROBERTS, *supra* note 32, at 25 (“With each passing election in the early twentieth century, parties were losing their grip over the electoral system they had once firmly controlled.”).

42. Civil Service (Pendleton) Act, ch. 27, 22 Stat. 403 (1883).

43. See, e.g., Louis Lawrence Boyle, *Reforming Civil Service Reform: Should the Federal Government Continue to Regulate State and Local Government Employees?*, 7 J.L. & POL. 243, 249–50, 249 n.35 (1991); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 542 n.115 (2015).

44. See, e.g., Issacharoff, *supra* note 22, at 873.

45. Hatch Political Activity Act, Pub. L. No. 76-252, 53 Stat. 1147 (1939) (codified in scattered sections of 5 U.S.C.). See generally JAMES ECCLES, THE HATCH ACT AND THE AMERICAN BUREAUCRACY (1981).

At the state and local levels, civil service reform occurred on disparate timelines and in varying degrees. Many jurisdictions established civil service systems during the late nineteenth and early twentieth centuries.⁴⁶ A 1940 amendment to the Hatch Act extended the prohibition on the political activities of federal employees to certain state and local employees who held federally funded positions.⁴⁷ Yet patronage remained widespread until at least the 1950s.⁴⁸ In a few places, such as Chicago, it lingered even longer.⁴⁹ The U.S. Supreme Court ultimately stepped in and rejected patronage practices on First Amendment grounds.⁵⁰ Parties attempted to blunt the loss of their patronage networks in part by aligning themselves closely with organized interest groups,⁵¹ but their ability to reward these groups and their members for campaign assistance was generally more attenuated. Moreover, some of these groups, such as labor unions, have themselves weakened over time.⁵²

At the same time that anti-patronage measures were stripping parties of their traditional campaign labor force, reforms were also shifting power over candidate nominations from party bosses and elites to the broader electorate. Between 1899 and 1915, all but three states adopted direct primary systems for selecting party nominees.⁵³ Primaries meant a new round of campaign activity in which candidates sought the party's imprimatur by winning over voters rather than insiders.⁵⁴ Although

46. See, e.g., Frank J. Sorauf, *The Silent Revolution in Patronage*, 20 PUB. ADMIN. REV. 28 (1960); Pamela S. Tolbert & Lynne G. Zucker, *Institutional Sources of Change in the Formal Structure of Organizations: The Diffusion of Civil Service Reform, 1880–1935*, 28 ADMIN. SCI. Q. 22 (1983).

47. Act of July 19, 1940, ch. 640, Pub. L. No. 76-753, 54 Stat. 767.

48. See, e.g., DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW 477 (5th ed. 2012); ALAN WARE, THE AMERICAN DIRECT PRIMARY: PARTY INSTITUTIONALIZATION AND TRANSFORMATION IN THE NORTH 242 (2002); Bowman, *supra* note 38, at 60–61.

49. See Bowman, *supra* note 38.

50. See *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion) (holding that patronage dismissals violate the First Amendment); see also *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 65 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980).

51. Frank J. Sorauf, *Patronage and Party*, 3 MIDWEST J. POL. SCI. 115, 119 (1959).

52. See, e.g., JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 163–64, 180–81 (2014).

53. WARE, *supra* note 48, at 15. Political scientists disagree about the extent to which parties resisted the imposition of direct primaries. See CARSON & ROBERTS, *supra* note 32, at 22; WARE, *supra* note 48, at 20.

54. LOWENSTEIN ET AL., *supra* note 48, at 415.

party leaders frequently sought to manage the process by throwing the weight of the party machine behind their preferred candidates, they no longer fully controlled the outcomes.⁵⁵ While it took several decades for the impact of this change to be fully felt, the primary system ushered in a new era of intraparty contestation—one in which at least some competitors had to look beyond the party apparatus for campaign assistance.⁵⁶

Several other Progressive Era reforms further destabilized the parties and reoriented electoral politics. First, just before moving to direct primaries, most states adopted the standardized, state-printed Australian ballot.⁵⁷ Previously, parties had printed and distributed their own ballots and saw to it that supporters deposited them in the ballot box. From the perspective of the parties, the shift to the Australian ballot had some upsides,⁵⁸ but it also loosened their grip on electioneering.⁵⁹ Second, a number of states and localities, particularly in the West, embraced direct democracy tools such as ballot initiatives and referenda.⁶⁰ By providing for policymaking through electoral politics, these jurisdictions generated new campaign activity that did not necessarily track traditional party fault lines.⁶¹ Third, many localities made their elections formally nonpartisan, making it more difficult for parties to push their preferred candidates.⁶² Finally,

55. See ROSENBLUM, *supra* note 40, at 201.

56. See, e.g., V.O. KEY, POLITICS, PARTIES & PRESSURE GROUPS 422; AUSTIN RANNEY, CURING THE MISCHIEFS OF FACTION: PARTY REFORM IN AMERICA 121 (1975); WARE, *supra* note 48, at 196. Notably, presidential nominations remained largely in the hands of party insiders until the 1970s, when state-level primaries became more central to the process. See, e.g., WARE, *supra* note 48, at 248–52; Bawn et al., *supra* note 37, at 572, 586; Robert Blaemire, *The Evolution of Microtargeting*, in CAMPAIGNS AND ELECTIONS AMERICAN STYLE, *supra* note 2, at 217, 219.

57. WARE, *supra* note 48, at 31–56.

58. In particular, states often reserved ballot spots for the candidates of the established parties, which meant giving those parties formal legal recognition.

59. See CARSON & ROBERTS, *supra* note 32, at 41.

60. See ISSACHAROFF ET AL., *supra* note 31, at 984.

61. See *id.* at 983 (observing that, during the Progressive Era, “direct democracy came to be seen as an antidote to the entrenched power of political machines and the powers of moneyed interests at the legislative level”). Although “the initiative began as part of the populist and progressive movements that aimed in part to weaken the power of political parties,” parties today frequently do become involved in initiative campaigns and strategically use direct democracy mechanisms to advance their partisan interests. Richard L. Hasen, *Parties Take the Initiative (and Vice Versa)*, 100 COLUM. L. REV. 731, 733 (2000).

62. See, e.g., David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 465 (2007).

efforts to enfranchise women, which culminated with the Nineteenth Amendment's ratification in 1920,⁶³ resulted in huge numbers of new voters for campaigners to try to reach.⁶⁴

Changes in the law thus established new electoral battlegrounds while simultaneously demobilizing traditional campaign foot soldiers. This evolving political landscape called for new campaigners and new modes of campaigning.⁶⁵ In a back-and-forth that continues to this day, politicians searching for an edge connected with enterprising service providers who purported to deliver one.⁶⁶ Initially, these were ad hoc interchanges. As political scientist Adam Sheingate describes it, early twentieth century politicians—mainly presidential aspirants and other high-level figures—began to enlist publicity experts, press agents, and advertising gurus to assist their campaigns.⁶⁷ For these progenitors of the modern campaign professional, politics was typically a hobby or side business. They applied their skills to politics as needed and then turned back to their day jobs and their regular clients, frequently major corporations.⁶⁸

By the mid-twentieth century, emerging entrepreneurs were making campaign-related work their primary occupation. Scholars generally credit two Californians, Clement Whitaker and Leone Baxter, with establishing the nation's first dedicated political consulting operation in 1934.⁶⁹ The firm's name was Campaigns, Inc., a fitting title for this Article. Whitaker and Baxter developed strategies and messages, managed media relations, orchestrated advertising buys, and more.⁷⁰ California

63. U.S. CONST. amend. XIX.

64. See ISSACHAROFF ET AL., *supra* note 31, at 27 ("[T]he electorate nearly doubled in size between 1910 and 1920 as a result [of the Nineteenth Amendment] . . .").

65. See CARSON & ROBERTS, *supra* note 32, at 9 ("[E]lectoral reforms transformed the electoral environment from a party-run cartel to a political marketplace.").

66. See JOHNSON, DEMOCRACY FOR HIRE, *supra* note 1, at 6 ("[P]olitical consultants emerged . . . because of the crumbling of the political party as a source of manpower and strategic advice, and because of the weakening of traditional party loyalties among voters.").

67. SHEINGATE, *supra* note 1, at 25–31, 50–65; see also JOHNSON, DEMOCRACY FOR HIRE, *supra* note 1, at 11–19 (describing the emergence of campaign professionals in the early 20th century).

68. JOHNSON, DEMOCRACY FOR HIRE, *supra* note 1, at 19; SHEINGATE, *supra* note 1, at 102.

69. See JOHNSON, DEMOCRACY FOR HIRE, *supra* note 1, at 24–36; SHEINGATE, *supra* note 1, at 102–33; Lepore, *supra* note 2, at 3 (describing Campaigns, Inc. as "the first political-consulting firm in the history of the world").

70. See Lepore, *supra* note 2, at 3–8.

was a natural place for the campaign industry to gain a foothold. The state had weakened its political parties perhaps more comprehensively than anywhere else.⁷¹ Its direct primary process was particularly open, its municipal elections were nonpartisan, and it had embraced direct democracy.⁷² Indeed, Whitaker and Baxter's first project together was to manage a campaign against a state ballot initiative, and such work remained a lucrative mainstay of their business.⁷³ Demographics also mattered: California was experiencing an influx of new residents who had not been absorbed into traditional party organizations.⁷⁴ Meanwhile, the state's large population, dispersed among multiple major media markets, resulted in operationally complex, high-stakes campaigns that were capable of sustaining a class of professional service providers.⁷⁵

While California was the campaign industry's initial hotbed, several dozen specialty campaign firms operated around the country by the 1950s, and many more advertising and public relations businesses participated in at least some campaign work.⁷⁶ During the 1950s and 1960s, campaign professionals increasingly became fixtures in presidential, Senate, and gubernatorial races, initially supplementing the efforts of loyalists and hobbyists rather than displacing them.⁷⁷ In 1960, for example, many of the central figures in John F. Kennedy's presidential campaign were friends and confidants, but Kennedy also relied on advertising firms to produce television commercials and became the first presidential candidate to work directly with a professional pollster.⁷⁸ As the industry mushroomed and matured

71. See WARE, *supra* note 48, at 234–36.

72. JOHNSON, DEMOCRACY FOR HIRE, *supra* note 1, at 23; SHEINGATE, *supra* note 1, at 103.

73. JOHNSON, DEMOCRACY FOR HIRE, *supra* note 1, at 25, 36; SHEINGATE, *supra* note 1, at 105, 128.

74. JOHNSON, DEMOCRACY FOR HIRE, *supra* note 1, at 23.

75. *Id.* at 23–24; SHEINGATE, *supra* note 1, at 103, 128-32.

76. JOHNSON, DEMOCRACY FOR HIRE, *supra* note 1, at 39 (describing a survey of 130 public relations firms involved in campaigns from 1952–57); see also Dennis W. Johnson, *Formative Years of Political Consulting in America, 1934–2000*, 11 J. POL. MARKETING. 54, 56 (2012) [hereinafter Johnson, *Formative Years*].

77. Johnson, *Campaign Consultants*, *supra* note 32, at 57.

78. JOHNSON, DEMOCRACY FOR HIRE, *supra* note 1, at 54.

from the 1960s forward, professionals participated in a widening array of campaigns and became increasingly dominant players.⁷⁹

Although party-related reforms set the stage for these developments, they cannot fully account for the campaign industry's success. Two additional catalysts were crucial. The first was innovation. As new technologies emerged, including radio and—most significantly—television, political entrepreneurs developed and marketed ways for campaigns to use them.⁸⁰ They did the same with new social science tools, such as public opinion polling.⁸¹ Some existing accounts treat the campaign industry's emergence as a natural and inevitable consequence of these advances.⁸² Campaign professionals themselves widely subscribe to this view.⁸³ But such determinism oversimplifies matters. These innovations were attractive to campaigners partly because legal reforms had devitalized traditional party organizations. With local party networks less reliably delivering votes, turning to mass media campaign methods made sense.⁸⁴ In a different legal setting, newfangled ways of campaigning might have held less appeal. And to the extent new technologies did seem promising as campaign tools, the parties themselves might have had the capacity to harness them in-house.⁸⁵

The second essential catalyst was money. A market for campaign services requires clients who can pay the bills.⁸⁶ Here, the story turns not on what the law did, but on what it failed to do. While legal reforms from the late nineteenth century forward

79. See Johnson, *Formative Years*, *supra* note 76, at 56 ("During the 1960s, campaign management became more routine in American elections, especially at the presidential, gubernatorial, and U.S. Senate levels.").

80. See JOHNSON, DEMOCRACY FOR HIRE, *supra* note 1, at 57–81; SHEINGATE, *supra* note 1, at 141–45.

81. See JOHNSON, DEMOCRACY FOR HIRE, *supra* note 1, at 40–56, 147–67; SHEINGATE, *supra* note 1, at 74–90.

82. See, e.g., Patrick Novotny, *From Polis to Agora: The Marketing of Political Consultants*, 5 HARV. INT'L J. PRESS/POL. 12, 13 (2000).

83. Matt Grossmann, *Going Pro? Political Campaign Consulting and the Professional Model*, 8 J. POL. MARKETING 81, 91 (2009) [hereinafter Grossmann, *Going Pro?*].

84. See, e.g., Julian E. Zelizer, *Seeds of Cynicism: The Struggle Over Campaign Finance, 1956–1974*, 14 J. POL'Y HIST. 73, 75 (2002) (suggesting that "the declining importance of political parties[] le[ft] high-cost television as the principle medium of political communications").

85. Cf. Walter De Vries, *American Campaign Consulting: Trends and Concerns*, 22 PS: POL. SCI. & POL. 21, 21 (1989) ("A major reason—if not the only reason—for having campaign consultants is that political parties basically failed to do their job in a changing technological and social environment.").

86. See SHEINGATE, *supra* note 1, at 133.

upended the political parties, reformers made few strides in stemming the flow of money into the political process. At both the federal and state levels, early campaign finance laws were notoriously weak and ineffective.⁸⁷ Candidates and parties remained largely unrestricted in their ability to solicit and receive campaign funds, creating ideal conditions for the industry's growth: campaigners raised money to pay for the services professionals were offering, which encouraged professionals to offer more services, which in turn spurred even more fundraising.⁸⁸ This cycle became especially pronounced as campaigners came to see expensive television advertising as a campaign necessity.⁸⁹ The campaign industry itself greased the wheels by offering professional fundraising services to help campaigners bring money in the door.⁹⁰

Somewhat ironically, when meaningful campaign finance reform finally arrived at the federal level in the early 1970s, it proved more helpful than harmful to the campaign industry. Very briefly it might have seemed otherwise. The Federal Election Campaign Act of 1971 (FECA)⁹¹ and the 1974 FECA Amendments⁹² introduced an array of regulations, including limits on campaign expenditures. Those expenditure caps could have limited the industry's growth potential, at least absent rampant circumvention.⁹³ But the Supreme Court soon invalidated them in *Buckley v. Valeo*.⁹⁴

The provisions of FECA that remained on the books after *Buckley* boosted the industry in several related ways. First, FECA's regulatory framework essentially codified and reinforced the shift away from party-centered campaigns toward

87. See, e.g., Melvin I. Urofsky, *Campaign Finance Reform Before 1971*, 1 ALB. GOVT L. REV. 1, 30 (2008) ("[F]ederal and state laws aimed at regulating campaign finance all added up to nothing more than an exercise in futility.").

88. See, e.g., HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS & POLITICAL REFORM 10–17 (4th ed. 1992) [hereinafter ALEXANDER, FINANCING POLITICS 4th ed.]; SHEINGATE, *supra* note 1, at 133.

89. See Urofsky, *supra* note 87, at 43–44.

90. See, e.g., SHEINGATE, *supra* note 1, at 166–67 (describing the work of direct mail fundraisers).

91. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of the U.S. Code).

92. Federal Election Campaign Act, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

93. See Urofsky, *supra* note 87, at 49–50, 57 (describing the expenditure caps).

94. 424 U.S. 1 (1976) (per curiam).

candidate-centered ones.⁹⁵ Under the law, individual-candidate campaign committees served as the main locus of campaign activity.⁹⁶ The onus was on office seekers to solicit contributions for their committees (subject to statutory caps) and then to deploy those resources in an effort to win votes.⁹⁷ This usually meant hiring paid staff and consultants.⁹⁸ Meanwhile, the law restricted party fundraising and outlays in ways that relegated party organizations to a secondary role.⁹⁹ Second, by channeling campaign activity through so many discrete entities—candidate committees, party committees, political action committees, and more—FECA created an abundance of potential clients for campaign professionals.¹⁰⁰ Third, the FECA regime required candidates to document and disclose not just their fundraising, but their expenditures as well.¹⁰¹ Sheingate identifies these transparency rules as “a boon to the consulting industry,” explaining that “[l]oose accounting practices that had greased the party system for so long gave way to a new regime in which professional services like polling or media became a clean and legal way to spend money.”¹⁰² Finally, the very existence of a complex regulatory system encouraged campaigners to seek out experts who understood the law and could ensure compliance.¹⁰³

More recent developments in campaign finance law have further fueled the campaign industry’s growth. The Bipartisan

95. Raymond J. La Raja, *Campaign Finance and Partisan Polarization in the United States Congress*, 9 DUKE J. CONST. L. & PUB. POL’Y 223, 229 (2014).

96. *Id.* at 232.

97. *Id.*

98. *Id.*

99. See, e.g., *Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (upholding FECA’s limits on party expenditures made in coordination with candidates); La Raja, *supra* note 95, at 232 (“FECA institutionalized a candidate-centered campaign finance system that left parties with only a residual consultative role as service organizations.”). Party organizations regained some clout in 1990s as they raised and deployed increasing amounts of “soft money” that fell outside FECA’s regulations, but those funds did not restore the parties to their former primacy. See Zelizer, *supra* note 84, at 75.

100. SHEINGATE, *supra* note 1, at 172, 178.

101. *Id.* at 168 (citing 1974 FECA Amendments, Pub. L. No. 93-443, 88 Stat. 1263).

102. *Id.* at 168–69. While Sheingate focuses on the federal level, state disclosure laws began creating similar incentives for campaigners even before FECA. See, e.g., Urofsky, *supra* note 87, at 33 (reporting that, by 1959, forty-three states required at least some expenditure disclosure).

103. ALEXANDER, FINANCING POLITICS 4th ed., *supra* note 88, at 88; HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM 35 (1976).

Campaign Reform Act of 2002 (BCRA)¹⁰⁴ sought to close loopholes in the FECA regime, but in the process it served to redirect money and campaign activity in ways that aggrandize campaign professionals. Among other things, BCRA stemmed the flow of unregulated “soft money” contributions to political parties,¹⁰⁵ prompting major donors to turn to new, professionally created and controlled campaign entities that are independent (at least nominally) from party and candidate committees.¹⁰⁶ This trend accelerated after the Supreme Court’s decision in *Citizens United v. Federal Election Commission*,¹⁰⁷ which lifted restrictions on corporate electioneering, and the D.C. Circuit’s decision in *SpeechNow.org v. Federal Election Commission*,¹⁰⁸ which gave the green light to Super PACs—organizations that can raise and spend unlimited amounts on electioneering as long as they do not improperly coordinate with candidates or parties.¹⁰⁹ In short, existing campaign finance law boosts the campaign industry not only by allowing large sums of money to enter the system, but also by encouraging funds to be routed to and deployed by campaign professionals.

Two addenda to this story of the campaign industry’s rise deserve mention. First, the causal relationships at play are complicated and run in multiple directions. While legal and institutional developments spurred campaign professionalization, professionalization also contributed to legal and institutional change. The campaign industry helped to fill gaps that emerged as traditional party organizations weakened, but the industry’s

104. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

105. See ISSACHAROFF ET AL., *supra* note 31, at 484–85.

106. See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 265 (2006) (Kennedy, J., concurring in the judgment) (observing that, in response to regulations on party financing, “new entities such as political action committees” have “[e]nter[ed] to fill the void”); Issacharoff, *supra* note 22, at 869 (“[T]he combined effects of recent reforms have been to hamper the ability of parties to raise money and to push hard dollars to the candidates independently, or to direct major funding of politics outside the regulated domain altogether.”); Pildes, *supra* note 31, at 835–36 (explaining that soft-money regulation served “to diminish the already-weakened political parties as a force in elections and to create incentives for this party ‘soft money’ to flow to independent groups”).

107. 558 U.S. 310 (2010).

108. 599 F.3d 686 (D.C. Cir. 2010).

109. See, e.g., Eliza Newlin Carney, *Democracy Has Become a Cash Cow*, CQ WKLY. 14, 14 (2015) (“In the recent midterms, which cost \$3.7 billion, \$275 million of it was spent by outside groups whose activities are partly or completely undisclosed.”).

growth then contributed to the further weakening of those organizations.¹¹⁰ Politicians, for instance, may have become less resistant to civil service reform over time in part because professionals increasingly supplied campaign services independent of patronage networks.¹¹¹

Second, taken together, the factors discussed here help to explain the campaign industry's particular prominence in the United States.¹¹² Compared to the United States, most other established democracies have an electoral politics in which political parties exert greater control over candidate selection and voter canvassing, diminishing the demand for outside service providers.¹¹³ Many also have campaign finance rules and other structural features that make campaigns less capital intensive.¹¹⁴ On top of that, the vast scale of U.S. democracy creates unmatched market opportunities for professionals to tap, as the next Section elaborates.¹¹⁵

B. STRUCTURE AND OPERATIONS

Campaign professionals pervade modern U.S. electoral politics.¹¹⁶ Although precise estimates vary, it is safe to say that the campaign industry employs many thousands of people¹¹⁷ and

110. See, e.g., Kang, *supra* note 33, at 552–53 (describing the interrelated nature of media-driven candidate-centered campaigns and the changing role of political parties).

111. See Richard L. Hasen, *Patronage*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1885–86 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

112. Cf. Grossmann, *Going Pro?*, *supra* note 83, at 82 (“[T]he United States is considered the home of the world’s most professionalized campaigns . . .”).

113. See David M. Farrell, *Political Consultancy Overseas: The Internationalization of Campaign Consultancy*, 31 PS: POL. SCI. & POL. 171, 174 (1998) (observing that party dominance diminishes the needs for campaign consultants).

114. See *id.*

115. See JOHNSON, DEMOCRACY FOR HIRE, *supra* note 1, at 1.

116. See, e.g., SHEINGATE, *supra* note 1, at 141 (“[I]n the 2014 campaign, more than 75 percent of House candidates spent at least \$100,000 on media, polls, and direct mail; among incumbents running for re-election, more than 90 percent of candidates spent \$100,000 or more on the services of professional consultants.”); Grossmann, *Going Pro?*, *supra* note 83, at 83; Brendan Nyhan & Jacob M. Montgomery, *Connecting the Candidates: Consultant Networks and the Diffusion of Campaign Strategy in American Congressional Elections*, 59 AM. J. POL. SCI. 292, 293 (2015).

117. See, e.g., SHEINGATE, *supra* note 1, at 155 (citing an estimate from 1989 that “12,000 people earned part or most of their living from campaign consulting”); De Vries, *supra* note 85, at 21 (“An estimated 12,000 people in America earn part or most of their living on political campaign consulting.”); Johnson,

generates billions of dollars of annual revenue.¹¹⁸ Business opportunities are especially abundant in major contests, where the perceived stakes are high enough to generate large sums of campaign cash. Presidential races are uniquely lucrative, followed by statewide gubernatorial and U.S. Senate races.¹¹⁹ Elections for the House of Representatives, for statewide offices below the governor, and for leadership positions in major cities also attract enough money for credible candidates to wage highly professionalized campaigns.¹²⁰ This Article focuses primarily on the business of politics as practiced in these upper echelons of the democratic system—an emphasis consistent with most academic and journalistic accounts.¹²¹ At these levels, professional involvement is at its peak, and the market for electoral services is national in scope. In smaller scale races, campaigners do routinely obtain professional assistance, but they generally receive a more limited set of services and rely on locally oriented practitioners.¹²²

This Section offers a descriptive primer on the campaign industry. It considers how campaign professionals interface with clients, organize their operations, and earn their livelihoods. Like agents in other contexts, campaign professionals can offer campaigners vital expertise and enable them to harness economies of scale.¹²³ Yet, at the same time, they can also shirk, self-

Campaign Consultants, *supra* note 32, at 57 (estimating that, as of 2008, “approximately 3,000 consulting firms specialized in political campaigns”).

118. See, e.g., SHEINGATE, *supra* note 1, at 2 (offering an estimate of \$8.9 billion in earnings during the 2012 election cycle).

119. See, e.g., Johnson, *Campaign Consultants*, *supra* note 32, at 56 (describing the average amount of money spent in different types of elections).

120. *Id.*

121. Cf. Sean A. Cain, *An Elite Theory of Political Consulting and Its Implications for U.S. House Election Competition*, 33 POL. BEHAV. 375, 380 (2011) (identifying a “top tier in the industry” consisting of a few dozen leading service providers).

122. See SHEINGATE, *supra* note 1, at 184.

123. See JOHNSON, DEMOCRACY FOR HIRE, *supra* note 1, at 2; Grossmann, *Going Pro?*, *supra* note 83, at 89; Martin & Peskowitz, *supra* note 3, at 232; Nina Walton & Nicholas Weller, Moral Hazard in Campaigns: Do Political Candidates Keep Hiring Their Consultants? 2 (Nov. 2009) (unpublished manuscript), <http://ssrn.com/abstract=1443449>. Empirically, it is nearly impossible to isolate and quantify the value of professionals to their clients. See, e.g., Jennifer Rayner, *What About Winning? Looking into the Blind Spot of the Theory of Campaign Professionalization*, 13 J. POL. MARKETING 334, 335 (2014); Zeng, *supra* note 3, at 450–51. Some political science work indicates that campaign professionals can outperform amateurs at particular campaign-related tasks. See, e.g., Ryan D. Enos & Eitan D. Hersh, *Party Activists as Campaign Advertisers: The Ground Campaign as a Principal-Agent Problem*, 109 AM. POL. SCI. REV. 252,

deal, and otherwise disserve or exploit their clients.¹²⁴ Distinctive structural attributes of campaigns and the campaign industry shape the absolute and relative magnitude of the potential benefits the industry generates and the agency problems it spawns. By highlighting some of these dynamics, this Section lays the groundwork for the remainder of the Article.

Candidates and other campaigners—including party committees and outside groups such as Super PACs—hire professionals in a variety of capacities to perform an array of tasks. Some professionals take on roles as in-house staff, serving as campaign managers, field directors, fundraising specialists, and so on.¹²⁵ Campaigners, however, typically outsource many core functions—media production, ad buying, polling, direct mail, data analytics, legal compliance, and much more—to a panoply of independent consultants and vendors.¹²⁶ Campaign organizations, in other words, face a “make or buy” decision of the sort Ronald Coase described in his classic account of a business firm’s choice between carrying out activities internally or through market transactions,¹²⁷ and they generally do more buying than making. This tendency follows at least in part from the limited duration of electoral contests, which can make it impractical and uneconomical to build in-house capacity.¹²⁸

252–53 (2015); Paul S. Herrnson, *Campaign Professionalism and Fundraising in Congressional Elections*, 54 J. POL. 859 (1992); Christopher B. Mann & Casey A. Klofstad, *The Role of Call Quality in Voter Mobilization: Implications for Electoral Outcomes and Experimental Design*, 37 POL. BEHAV. 135 (2015). And a few studies claim to find qualified support for the broader proposition that “political consultants are effective in helping their clients garner votes.” Stephen K. Medvic, *The Effectiveness of the Political Consultant as a Campaign Resource*, 31 PS: POL. SCI. & POL. 150, 153 (1998) [hereinafter Medvic, *The Effectiveness*].

124. See, e.g., Martin & Peskowitz, *supra* note 3, at 231–32 (discussing the sometimes divergent incentives of candidates and campaign professionals).

125. See PAUL S. HERRNSON, CONGRESSIONAL ELECTIONS: CAMPAIGNING AT HOME AND IN WASHINGTON 73–76 (7th ed. 2016).

126. See, e.g., JOHNSON, DEMOCRACY FOR HIRE, *supra* note 1, at 6; see also Israel Waismel-Manor, *Spinning Forward: Professionalization Among Campaign Consultants*, 10 J. POL. MARKETING 350, 353 (2011) (tallying thirty-four specializations among campaign professionals).

127. R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 393–96 (1937); see also Issacharoff, *supra* note 22, at 851 (describing political parties as facing a “make or buy” decision).

128. Cf. Walton & Weller, *supra* note 123, at 2 (“By virtue of their temporary nature and the real risks associated with a strategy of trial and error, it is difficult for campaigns to build up real expertise in-house in a timely manner.”).

As avid outsourcers, campaigners end up relying heavily on individuals and firms who do not work exclusively for them. Consultants and vendors frequently assist multiple campaign clients simultaneously.¹²⁹ In doing so, they generally associate with a single party and its candidates.¹³⁰ Professionals sometimes further specialize in serving clients aligned with a particular ideological contingent of Democrats or Republicans.¹³¹ Such specialization can help professionals build trust with clients and minimize potential conflicts of interest among them.¹³² It does not, however, eliminate the challenge of balancing individual clients' competing needs and demands, especially during the frenzied sprint to election day.¹³³ Beyond working for domestic campaign clients, some professionals boost their earnings by consulting on foreign election campaigns,¹³⁴ and many also take on non-campaign clients.¹³⁵

The extent to which modern campaign professionals have diversified their client bases and expanded their operations is striking. Although campaign work is more lucrative than ever, professionals have increasingly looked beyond electoral politics in an effort to grow and smooth their revenue flows. For example, professionals today routinely assist corporations and industry groups with public relations and lobbying efforts.¹³⁶ This phenomenon, which has burgeoned over the past two decades,

129. See DAVID A. DULIO, FOR BETTER OR WORSE?: HOW POLITICAL CONSULTANTS ARE CHANGING ELECTIONS IN THE UNITED STATES 68–70 (2004); Walton & Weller, *supra* note 123, at 18–19, 34.

130. See Robin Kolodny & Angela Logan, *Political Consultants and the Extension of Party Goals*, 31 PS: POL. SCI. & POL. 155, 155–56 (1998); Nyhan & Montgomery, *supra* note 116, at 294.

131. See Martin & Peskowitz, *supra* note 3, at 293.

132. See Grossmann, *Going Pro?*, *supra* note 83, at 92; Martin & Peskowitz, *supra* note 3, at 232–33.

133. See SABATO, POLITICAL CONSULTANTS, *supra* note 1, at 308 (“Some consultants . . . take on far too many campaigns, vastly overextending themselves and promising far more than they can deliver effectively.”).

134. Some trace the international consulting business to 1969, when consultant Joe Napolitan worked on the reelection campaign of Ferdinand Marcos in the Philippines. See, e.g., Farrell, *supra* note 113, at 171.

135. See *infra* notes 136–40 and accompanying text.

136. See, e.g., James A. Thurber, *From Campaigning to Lobbying, in SHADES OF GRAY: PERSPECTIVES ON CAMPAIGN ETHICS* 151, 152 (Candice J. Nelson et al. eds., 2002) (“Hundreds and even thousands of people involved in campaigns later lobby politicians . . .”); Novotny, *supra* note 82, at 13 (discussing political consultants’ work with corporate clients and noting the “merging of political consulting with business-oriented advertising, lobbying, and government relations”); Sandy Bergo, *The Rise of ‘Revolving-Door’ Consultants*, CTR. FOR PUB.

marks something of a reversal from what occurred as the campaign industry took shape.¹³⁷ In the industry's early days, corporate marketing and advertising professionals reached into the world of politics and applied their expertise to campaigns.¹³⁸ As the market for campaign services matured, professionals who specialized in elections became the dominant players.¹³⁹ Now, those campaign professionals are reaching back to the corporate world, marketing their analytic tools, crisis management capabilities, and political connections.¹⁴⁰ At least on the margins, legal reform in the realm of lobbying may have contributed to this trend. As Congress has tightened regulations on traditional lobbying activities, businesses and other organized interests may increasingly see campaign-style tactics as an alternative strategy for achieving their policy objectives.¹⁴¹

With the business of politics becoming more intertwined with the business of business, it is perhaps unsurprising that at least two prominent trends from the corporate world have reached the campaign industry and are now reconfiguring it. First, technology-oriented entrepreneurialism and Silicon Valley startup culture have begun to permeate at least some parts of the industry.¹⁴² New market opportunities are materializing as savvy experts work to help campaigners harness emerging technologies.¹⁴³ Over the past decade, demand has soared for digital media services and for big-data collection and analysis.¹⁴⁴ Re-

INTEGRITY (Dec. 21, 2006), <https://www.publicintegrity.org/2006/12/21/6633/rise-revolving-door-consultants>.

137. See, e.g., DOUGLAS A. LATHROP, THE CAMPAIGN CONTINUES: HOW POLITICAL CONSULTANTS AND CAMPAIGN TACTICS AFFECT PUBLIC POLICY 120–23 (2003); Novotny, *supra* note 82, at 17–18. Novotny traces this development in part to the success of the health insurance industry's efforts to defeat President Clinton's health care reform efforts in 1994. *Id.* at 22.

138. See *supra* notes 67–68 and accompanying text; see also Novotny, *supra* note 82, at 13–14.

139. See Novotny, *supra* note 82, at 14.

140. See, e.g., *id.* at 23.

141. See *id.* at 17.

142. See, e.g., Michael J. Coren, *Silicon Valley Is Flipping Elections in its Spare Time*, QUARTZ (Dec. 13, 2017), <https://qz.com/1153271/silicon-valley-is-flipping-elections-in-its-spare-time>.

143. See, e.g., *id.*

144. For in-depth discussion of digital-era campaigning, see, for example, EITAN D. HERSH, HACKING THE ELECTORATE: HOW CAMPAIGNS PERCEIVE VOTERS (2015); DANIEL KREISS, PROTOTYPE POLITICS: TECHNOLOGY-INTENSIVE CAMPAIGNING AND THE DATA OF DEMOCRACY (2016); RASMUS KLEIS NIELSEN,

cently, investors have even begun using venture capital techniques to launch new enterprises that focus on campaign technology.¹⁴⁵

Second, even as campaign-related start-ups proliferate, the industry also has experienced consolidation and conglomeration. While thousands of firms offer campaign services, Sheingate estimates that in 2012 just a few dozen, each “averaging around \$50 million in expenditures, handled 75 percent of all consulting services in federal campaigns.”¹⁴⁶ Large campaign firms frequently absorb smaller ones, and large firms have themselves been bought up by even bigger global communications enterprises.¹⁴⁷ For instance, the political media firm GMMB, which was the largest vendor for the presidential campaigns of both Hillary Clinton in 2016 and President Obama in 2012, is a subsidiary of FleishmanHillard, one of the world’s largest public relations firms.¹⁴⁸ FleishmanHillard itself is owned by advertising conglomerate Omnicom Media Group.¹⁴⁹

At the individual level, professionals routinely migrate between in-house staff positions and outside consultant roles from one election cycle to the next, or even within a cycle.¹⁵⁰ They may launch their careers by working directly for individual candidates or party organizations, then affiliate with a consulting firm where they serve a range of campaign and non-campaign clients,

GROUND WARS: PERSONALIZED COMMUNICATION IN POLITICAL CAMPAIGNS
(2012).

145. See Issie Lapowsky, *Obama Alums Pour \$1.5 Million into Progressive Tech Startups*, WIRED (Aug. 2, 2017), <https://www.wired.com/story/obama-alums-pour-money-into-political-tech-startups>.

146. SHEINGATE, *supra* note 1, at 2; see also Grossmann, *Campaigning*, *supra* note 3, at 7.

147. See JOHNSON, DEMOCRACY FOR HIRE, *supra* note 1, at 352–53; SHEINGATE, *supra* note 1, at 10, 183.

148. Erin Quinn, *Who Needs Lobbyists? See What Big Business Spends to Win American Minds*, CTR. FOR PUB. INTEGRITY (Jan. 15, 2015), <https://www.publicintegrity.org/2015/01/15/16596/who-needs-lobbyists-see-what-big-business-spends-win-american-minds>.

149. *Id.*; see also SHEINGATE, *supra* note 1, at 191–92 (noting that WPP, the world’s largest public relations company, owns at least “twenty-six firms in the United States alone that specialize in political consulting, polling, and lobbying[,]” with some serving Democratic clients and others serving Republican candidates).

150. See, e.g., Carney, *supra* note 109, at 18 (reporting that “more than two dozen Obama campaign alumni . . . [went] on to consulting ventures that collectively earned millions in the . . . [2014] midterm”); *The ‘Shadow’ Republican Party*, N.Y. TIMES (Oct. 29, 2011), <https://www.nytimes.com/interactive/2011/10/29/us/politics/the-shadow-republican-party.html> (discussing professionals’ migration between party committees and independent groups).

and then perhaps return for stints as a high-level staffer or advisor to candidates in especially prominent races.¹⁵¹ Professionals who assist winning candidates also sometimes follow those candidates into government.¹⁵² At least at senior levels, serving as an outside consultant tends to be more remunerative than working as a campaign or government staffer.¹⁵³ While staff positions are usually salaried, consultants and vendors often receive hefty fees or commissions.¹⁵⁴ Media consultants, for instance, charge commissions as high as fifteen percent for buying advertising time on behalf of their clients.¹⁵⁵ Given their ongoing relationships with one another and their shared economic interests, professionals often have more enduring loyalties to one another than to the campaigners they happen to be assisting at any given time.¹⁵⁶

Professionals sometimes even wear multiple hats at once, working directly for a particular candidate as a staffer or advisor while maintaining ties to an outside consulting firm that provides services to the campaign.¹⁵⁷ Journalists and other observ-

151. See, e.g., *The ‘Shadow’ Republican Party*, *supra* note 150 (detailing the paths of various party-related officials from their former posts to their current roles as consultants).

152. See, e.g., Sarah Halzack, *After Election, Campaign Staffers Likely To Descend on Washington in Search of Work*, WASH. POST (Nov. 11, 2012), https://www.washingtonpost.com/business/capitalbusiness/after-election-campaign-staffers-likely-to-descend-on-washington-in-search-of-work/2012/11/09/d7a1b04e-2907-11e2-bab2-eda299503684_story.html; Eric Lipton & Danielle Ivory, *How the Spoils Were Doled Out to Trump Campaign Workers and Allies*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/business/trump-federal-jobs.html>.

153. Dan Eggen & Tom Hamburger, *Private Consultants See Huge Election Profits*, WASH. POST (Nov. 10, 2012), https://www.washingtonpost.com/politics/decision2012/private-consultants-see-huge-election-profits/2012/11/10/edaaab580-29d8-11e2-96b6-8e6a7524553f_story.html.

154. Grossmann, *Campaigning*, *supra* note 3, at 10 (“The most commonly used compensation structure for consultants is payment by a percentage of expenditures.”).

155. See, e.g., Carney, *supra* note 109, at 17.

156. See, e.g., SABATO, *POLITICAL CONSULTANTS*, *supra* note 1, at 43–44 (noting the fraternity between consultants and their preference to rely on one another instead of unknown quantities).

157. Harry Davies, *Ted Cruz Erased Trump’s Iowa Lead by Spending Millions on Voter Targeting*, GUARDIAN (Feb. 1, 2016), <https://www.theguardian.com/us-news/2016/feb/01/ted-cruz-trump-iowa-caucus-voter-targeting> (noting that Jeb Bush’s presidential campaign used the services of Deep Root Analytics, a firm co-founded by the campaign’s director of analytics); Julie Patel, *Super PAC Leaders Score Perks from Political Donations*, CTR FOR PUB. INTEGRITY (Apr. 15, 2014), <https://www.publicintegrity.org/2014/04/15/14537/super-pac-leaders-score-perks-from-political-donations>.

ers have uncovered numerous instances of campaigns patronizing firms connected with campaign officials.¹⁵⁸ During the 2016 race, the Clinton and Trump campaigns—as well as the campaigns of many of their primary challengers—directed millions of dollars to media, digital, and polling firms linked to their senior campaign strategists.¹⁵⁹ In a prominently reported episode from the 2012 presidential race, a senior advisor to the Obama campaign purportedly opposed the campaign’s efforts to develop its own in-house ad buying tools because he saw them as a threat to the substantial commissions that his own media firm was receiving from the campaign.¹⁶⁰

More broadly, the campaign industry operates in a financial context highly susceptible to agency costs and waste. Most of

-leaders-score-perks-political-donations (discussing instances in which Super PACs made payments to firms associated with the groups’ leaders). In addition, consultants sometimes become physically embedded within a campaign office, blurring the line between in-house and outsourced activities. *See, e.g.*, Davies, *supra* (noting that data scientists with Cambridge Analytica were “embedded at Cruz’s campaign headquarters in Houston”).

158. *See, e.g.*, SHEINGATE, *supra* note 1, at 190 (noting that numerous officials with the Obama and Romney campaigns in 2012 had connections to the campaigns’ main outside digital services firms).

159. *See, e.g.*, Ctr. For Responsive Politics, *Expenditures Breakdown, Hillary Clinton, 2016 Cycle*, OPENSECRETS.ORG, <https://www.opensecrets.org/pres16/expenditures?id=N00000019> (last visited Aug. 26, 2018) (listing top vendors for the Clinton campaign); Eli Clifton & Joshua Holland, *Bernie’s Fundraising Was Revolutionary. How He Spent His Money Was Not.*, SLATE (July 13, 2016), http://www.slate.com/articles/news_and_politics/politics/2016/07/how_bernie_spent_his_millions_was_anything_but_revolutionary.html (reporting that Bernie Sanders’ campaign paid millions of dollars in commissions to a senior campaign strategist and his associated media firm); Matea Gold & Anu Narayanswamy, *Donald Trump’s Campaign Spending More than Doubled in September. Here’s Where the Money Went*, WASH. POST (Oct. 20, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/10/20/donald-trumps-campaign-spending-more-than-doubled-in-september-heres-where-the-money-went> (reporting that the Trump campaign made substantial payments to a media firm where the campaign’s communications director was a senior executive); Andrew Perez & David Sirota, *Hillary Clinton Strategist Attacks Bernie Sanders’ Anti-Wall Street Ad While His Firm Works for Wall Street*, INT'L BUS. TIMES (Jan. 14, 2016), <http://www.ibtimes.com/political-capital/hillary-clinton-strategist-attacks-bernie-sanders-anti-wall-street-ad-while-his> (describing work of senior Clinton strategist and his firm). The Trump campaign also made substantial payments to Trump’s own businesses. *See, e.g.*, Rebecca Ballhaus, *Donald Trump’s Entities, Family Rank High as Vendors to Campaign*, WALL ST. J. (Oct. 28, 2016), <https://www.wsj.com/articles/donald-trump-entities-family-rank-high-as-vendors-to-campaign-1477686100>.

160. *See* Jim Rutenberg, *Data You Can Believe In: The Obama Campaign’s Digital Masterminds Cash In*, N.Y. TIMES (June 20, 2013), <https://www.nytimes.com/2013/06/23/magazine/the-obama-campaigns-digital-masterminds-cash-in.html>.

what campaign organizations spend on professional services does not come directly out of the pockets of those who make the spending decisions. Instead, the money comes from campaign donors, who give specifically to underwrite campaigning.¹⁶¹ As a result, candidates and other campaign principals conceive of the opportunity costs associated with paying—or overpaying—for campaign services in fairly narrow terms. While they have an electoral interest in ensuring that campaign money is used wisely, they do not suffer a personal financial penalty if campaign funds are misspent. Moreover, to the extent they are able to keep raising funds, they may feel less pressure to maximize the value of every dollar the campaign spends. The frenetic pace of campaigns can compound these tendencies by leaving campaigners with little bandwidth to vet and supervise their service providers, who may in turn be prone to overcharge or cut corners.¹⁶² Even after the fact, scrutiny of campaign spending decisions is often minimal. Winning candidates may be willing to overlook or excuse questionable payments or inefficiencies, while losers may simply move on.¹⁶³ Similarly, although donors might balk if they see their money being squandered, they rarely learn the full details of how campaign funds are spent, and certainly not in real time.¹⁶⁴ In any event, once contributions are made,

161. See MICHAEL J. MALBIN & BRENDAN GLAVIN, CFI'S GUIDE TO MONEY IN FEDERAL ELECTIONS 13–14 (2018), http://www.cfinst.org/pdf/federal/2016Report/CFIguide_MoneyinFederalElections.pdf (reporting that contributions from individuals and PACs account for the vast majority of congressional campaign funds, with non-incumbents somewhat more likely to self-fund than incumbents); J.T. Stepleton, *The (Mostly) Unchanged Efficacy of Self-Funding a Political Campaign*, FOLLOWTHEMONEY.ORG (July 28, 2016), <https://www.followthemoney.org/research/institute-reports/the-mostly-unchanged-efficacy-of-self-funding-a-political-campaign> (reporting that “[self-financing accounted for a mere 10 percent of the \$6.7 billion raised altogether in direct contributions” to candidates for state office between 2010 and 2015).

162. Martin & Peskowitz, *supra* note 3, at 1–2 (noting that the interests of candidates and consultants do not always align, which can incentivize consultants to overcharge or recommend less fiscally efficient options); Walton & Weller, *supra* note 128, at 9 (suggesting that consultants may cut corners to reduce costs).

163. Cf. Matthew C. Stephenson & Howell E. Jackson, *Lobbyists as Imperfect Agents: Implications for Public Policy in a Pluralist System*, 47 HARV. J. ON LEGIS. 1, 7–8 (2010) (observing a similar dynamic in the context of professional lobbyists).

164. Cf. Christopher O'Donnell et al., *Zombie Campaigns*, TAMPA BAY TIMES (Jan. 31, 2018), <http://www.tampabay.com/projects/2018/investigations/zombie-campaigns/spending-millions-after-office> (reporting on many potential campaign finance violations that went unnoticed for years).

and especially once they are spent, dissatisfied donors have minimal recourse.¹⁶⁵

Opportunities for campaign professionals to engage in self-dealing and financial improprieties are especially pronounced in the context of Super PACs and their ilk. By law, such organizations must operate independently of the candidates they support, which precludes those candidates from playing any formal oversight role.¹⁶⁶ Instead, campaign professionals often set up and manage these organizations themselves, effectively becoming their own bosses.¹⁶⁷ They then have latitude to make whatever spending decisions they choose, including determining their own salaries and fees and procuring services from consulting firms in which they have a stake.¹⁶⁸ Unsurprisingly, professionals sometimes reap substantial financial rewards from their Super PAC affiliations.¹⁶⁹ In some instances, Super PACs spend the

165. Cf. *id.* (explaining that, even when they are no longer seeking office, politicians need not return contributions and sometimes spend leftover campaign funds in questionable ways).

166. See 52 U.S.C. § 30101(17) (2012) (defining independent expenditure); *SpeechNow.org. v. Fed. Election Comm'n*, 599 F.3d 686, 693 (2010).

167. David Frum, *Twilight of the Super PAC*, ATLANTIC (Feb. 24, 2016), <https://www.theatlantic.com/politics/archive/2016/02/super-pacs-2016/470697> (“The effect of the [S]uper PAC system is to put the consultants, not the politicians, in charge of the largest pools of political money—and then to wrap those consultants’ takings in layer upon layer of non-transparency and non-accountability.”). During the 2016 presidential race, a number of entrepreneurial political operatives sought to cash in by establishing pro-Trump Super PACs. See Alex Altman & Zeke J. Miller, *The War Among the Donald Trump Super PACs*, TIME (June 2, 2016), <http://time.com/4354564/donald-trump-super-pac>—campaign-finance. One of these entities, Great America PAC, raised money in part by touting the credentials of its high-profile co-chair, longtime Republican consultant Ed Rollins. See *id.*

168. See, e.g., Carney, *supra* note 109, at 17 (observing that Super PACs “have complex and often opaque relationships with their vendors, who sometimes run or advise the very PACs that pay them”); Frum, *supra* note 167 (explaining that the Super-PAC system puts consultants in charge of their own “takings”); Melanie Mason & Matea Gold, ‘Super PAC’ Leaders Profit from Lack of Oversight, L.A. TIMES (Feb. 22, 2012), <http://articles.latimes.com/2012/feb/22/nation/la-na-superpac-spending-20120223> (describing Super PACs as “a bonanza for political consultants and media firms who are free to determine how to expend the war chests”).

169. See, e.g., Kim Barker & Al Shaw, *Campaign Spending Shows Political Ties, Self-Dealing*, PROPUBLICA (Mar. 28, 2012), <https://www.propublica.org/article/campaign-spending-shows-political-ties-self-dealing>; Carney, *supra* note 109, at 17 (identifying numerous Super PACs “that spend far more on overhead than on elections”); Evan Halper & Joseph Tanfani, *The Clintons’ Old Attack Dogs Have a Profitable New Role, and Sometimes It Makes the Campaign Nervous*, L.A. TIMES (Nov. 4, 2016), <http://www.latimes.com/politics/la-na-pol-clinton-operatives-20161104-story.html>; Patel, *supra* note 157 (“Super

bulk of their resources on professional fees.¹⁷⁰ The apotheosis of these questionable practices is the so-called “scam PAC”—a term used to refer to entities that raise money largely for the personal benefit of their organizers.¹⁷¹ Beyond Super PACs, ballot initiative campaigns can also present conditions favorable to self-enrichment since professionals in such contests often lack the sort of oversight present in candidate elections.¹⁷²

One final descriptive point bears mention: although political scientists, journalists, and others have helped to expose the campaign industry’s workings, a defining attribute of the industry is its relative opacity. For campaigners who seek to procure professional services, no central clearinghouse offers reviews, comparisons, or price quotes—a reality that heightens vetting and monitoring challenges.¹⁷³ Indeed, consultants and vendors

PACs . . . are a source of income for political consultants[.]”). According to a tally by the Center for Public Integrity, nearly half of itemized expenditures of Super PACs in 2013 “went toward overhead costs such as salaries, payments to consultants and marketing[,]” as opposed to activities such as “fundraising, events, research, data, list acquisitions, polling, voter outreach, and mailings,” which can themselves generate income for professionals. Patel, *supra* note 157.

170. See, e.g., Jaime Fuller, *The Draft Ben Carson Super PAC Raised a Massive Amount of Money Over the Last Three Months. How?*, WASH. POST (Apr. 17, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/04/17/the-draft-ben-carson-super-pac-raised-a-massive-amount-of-money-over-the-last-three-months-how/>; Paul H. Jossey, *How We Killed the Tea Party*, POLITICO (Aug. 14, 2016), <https://www.politico.com/magazine/story/2016/08/tea-party-pacs-ideas-death-214164>; Eric Lipton & Jennifer Steinhauer, *Fire Paul Ryan? Rebel PACs Hit Republicans, and It Pays*, N.Y. TIMES (Oct. 23, 2015), <https://www.nytimes.com/2015/10/24/us/politics/conservative-pacs-turn-attack-on-gop-leaders-into-fund-raising-tool.html>.

171. See Matthew S. Raymer, *Scam PACs: Fraudulent Political Fundraising in the Age of Super PACs*, 66 SYRACUSE L. REV. 239, 240 (2016).

172. See SHEINGATE, *supra* note 1, at 128 (noting the “extraordinary degree of control” ballot measures give to professional campaign managers); see also Johnson, *Formative Years*, *supra* note 76, at 69 (reporting that, in 2005 alone, \$417.2 million was spent on California’s eight ballot initiatives). See generally Todd Donovan et al., *Political Consultants and the Initiative Industrial Complex*, in DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 101–34 (Larry Sabato et al. eds., 2001) (describing the role of political consultants in California’s ballot initiatives).

173. See Gregory Martin & Zachary Peskowitz, *How to Judge Your Consultant*, CAMPAIGNS & ELECTIONS (Dec. 4, 2014), <https://www.campaignsandelections.com/campaign-insider/how-to-judge-your-consultant>. The campaign industry’s leading trade publication, *Campaigns & Elections*, does offer searchable listings of campaign firms, but lacks a review feature. See *Listings: Full Campaign Service Firms*, CAMPAIGNS & ELECTIONS, <https://www.campaignsandelections.com/politicalpages/categories/full-campaign-service-firms> (last visited Aug. 27, 2018).

sometimes enter into agreements with their clients to keep compensation arrangements confidential, which can make it difficult for campaigners to compare deals and determine whether they are being overcharged.¹⁷⁴ Moreover, beyond looking at a professional's win-loss record in prior races, which provides limited insight, few objective performance metrics are available.¹⁷⁵ Such information gaps may pose special challenges for inexperienced candidates, who often lack personal familiarity with industry practices and practitioners.¹⁷⁶

The industry's affairs are perhaps even less visible to the broader public. While existing campaign finance disclosure regimes generally require campaign committees to itemize their disbursements, they offer only a glimpse into campaigners' arrangements with professionals.¹⁷⁷ At the federal level and in most states, campaigns need only disclose their gross payments to their direct service providers, without specifying how much those providers retain as fees or commissions, and how much they transfer to third parties.¹⁷⁸ In practice, consulting firms commonly function partly as pass-through entities, buying goods and services and enlisting subcontractors on the campaign's behalf. To take a high-profile example from the 2016 presidential campaign, the research firm that compiled a dossier on ties between Donald Trump and Russia was paid in part by the Clinton campaign through the campaign's lead law firm.¹⁷⁹ The cam-

174. See Patel, *supra* note 157; Maeve Reston, *Jeb's 2016 Departure Draws Out Mike Murphy Critics*, CNN (Feb. 22, 2016), <http://www.cnn.com/2016/02/21/politics/mike-murphy-jeb-bush-drops-out-right-to-rise>.

175. See Martin & Peskowitz, *supra* note 173 (describing the difficulty of objectively evaluating the work of consultants). In another article, Martin and Peskowitz contend that campaigners *could* attempt to determine the extent to which consultants have worked for candidates who ultimately exceeded their vote share expectations, but do not currently base their hiring decisions on such fine-grained analysis. See Gregory J. Martin & Zachary Peskowitz, *Parties and Electoral Performance in the Market for Political Consultants*, 40 LEGIS. STUD. Q. 441, 466 (2015).

176. Walton & Weller, *supra* note 123, at 23.

177. See, e.g., 52 U.S.C. § 30104 (2016).

178. See, e.g., *id.*; N.C. GEN. STAT. § 163A-1422 (2017) (delineating the reporting requirements for campaign expenditures); UTAH CODE § 20A-11-101 (2018) (defining "detailed listings" as required for expenditure disclosures).

179. Adam Entous et al., *Clinton Campaign, DNC Paid for Research that Led to Russia Dossier*, WASH. POST (Oct. 24, 2017), https://www.washingtonpost.com/world/national-security/clinton-campaign-dnc-paid-for-research-that-led-to-russia-dossier/2017/10/24/226fabf0-b8e4-11e7-a908-a3470754bbb9_story.html.

paign disclosed payments to its law firm, but the campaign's connection to the research firm and the dossier remained concealed.¹⁸⁰

Campaign professionals sometimes further obscure their dealings by operating through black box entities. Consider the twenty largest recipients of federal campaign funds during the 2016 election cycle—service providers that collected an average of \$96.7 million each in campaign revenue.¹⁸¹ While the majority are well established firms with public profiles, including websites that advertise their offerings and identify key personnel,¹⁸² at least seven are shrouded in mystery.¹⁸³ Sleuthing journalists have linked some of these ghost entities to known firms,¹⁸⁴ suggesting that they are essentially shells created to serve at least one of two functions: they assure formal legal separation when a firm is simultaneously serving candidates and ostensibly independent Super PACs, and they help to conceal campaign strategies and activities from political rivals and other observers.¹⁸⁵

The central takeaway from the above discussion is this: the campaign industry has come to play a preeminent role in U.S. electoral politics. The protagonists in modern election contests are not just the competing candidates, parties, and interest groups, but also the professional service providers who have made politics their vocation. The next Part considers how these professionals—with their various incentives and entanglements—affect the democratic process.

II. THE CAMPAIGN INDUSTRY'S SYSTEMIC IMPACTS

The complex and fraught relationship between campaigners and campaign professionals can have major consequences for the success and failure of individual campaigns. But a bigger story

180. *Id.*

181. See Ctr. For Responsive Politics, *Top Vendors*, OPENSECRETS.ORG, <https://www.opensecrets.org/expends/vendors.php?year=2016&type=cycle> (last visited Oct. 21, 2018).

182. See, e.g., GMMB, <http://gmmgb.com> (last visited Oct. 21, 2018); MENTZER MEDIA SERVICES., <http://www.mentzermedia.com> (last visited Oct. 21, 2018).

183. See Robert Yablon, Vendor Table (2018) (unpublished table) (on file with author).

184. See, e.g., Michael McAuliff & Paul Blumenthal, *Political Consultants from Mysterious Firm Tread Fine Legal Line Putting the Lie to Reality*, HUFFINGTON POST (June 8, 2012), https://www.huffingtonpost.com/2012/06/08/political-consultants-2012-campaign-big-money_n_1579661.html.

185. See *id.*

lurks behind these campaign level effects. The campaign industry does not merely serve and disserve particular clients; it impacts the political system as a whole. This Part focuses on these system level consequences, highlighting three in particular. First, campaign professionals serve a gatekeeping role, screening out certain types of candidates and screening in others. Second, campaign professionals alter the nature of campaigning by systematically overemphasizing certain strategies and techniques and underemphasizing others. Third, campaign professionals influence candidates' policy positions and priorities in particular directions both during campaigns and after.

As a preliminary matter, it bears noting that any analysis of the campaign industry's effects requires a notion of how the system would look were the campaign industry not playing its current role. Several alternative universes seem plausible. One is a system in which the campaign industry retains its centrality but operates in a more restrained manner thanks to altered incentives or increased oversight (along the lines discussed in Part IV). A second possibility is a system in which traditional political party organizations have been revitalized, perhaps with the help of legal reforms, so that they again play the sort of dominant role that they did in the past. A final option is to accept political parties in their modern, weakened state and then to envision a world in which campaign professionals have been ousted as the chief suppliers of election-related services. Idealists might dream that stripping the electoral process of both strong parties and campaign professionals would usher in a golden age of grassroots activism and enlightened democratic engagement. But that seems improbable, especially at a time when many civic associations and other traditional mediating institutions are struggling.¹⁸⁶ Instead, sidelining campaign professionals would likely make the media, both old and new, even more influential as a platform for candidates and source of information for the electorate. The 2016 Trump campaign arguably points toward this possibility. Compared to other recent presidential contenders, Trump relied somewhat less on paid staff and consultants

186. See, e.g., Tabatha Abu El-Haj, *Beyond Campaign Finance Reform*, 57 B.C. L. Rev. 1127, 1133 (2016) (discussing "the political disorganization of ordinary American citizens" and urging steps toward "civic reorganization"); Kate Andrias, *Hollowed-Out Democracy*, 89 N.Y.U. L. REV. ONLINE 48, 48 (2014); Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 421 (2015).

(though he still had many) and instead pursued a strategy that centered on maximizing free media attention.¹⁸⁷

Maintaining such a comparative perspective is important. It offers a reminder that, while the campaign industry has far-reaching impacts, the industry cannot be blamed for every perceived shortcoming of the political system. Other modes of campaigning would likely reproduce at least some of the status quo's imperfections, and generate new problems of their own.¹⁸⁸ Mindful of this reality, the Sections below focus on ways in which the existing regime of campaign industry primacy appears to differ from at least one of the plausible alternatives—namely, from (1) a system in which the campaign industry retains its clout, but faces certain new constraints; (2) a system in which party organizations hold relatively greater sway; and (3) a system in which the media predominates even more than at present.

A. CANDIDATE SELECTION EFFECTS

Initially, campaign professionals play an important gatekeeping role. They often choose candidates as much as candidates choose them.¹⁸⁹ This not only means deciding whether to take on or seek out particular candidates as clients; it can also mean actively working to identify and recruit candidates.¹⁹⁰ Even at the presidential level, professionals routinely play an

187. See, e.g., Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 212–13 (2017); Sanford Levinson & Jack M. Balkin, *Democracy and Dysfunction: An Exchange*, 50 IND. L. REV. 281, 320–21 (2016); Mary Harris, *A Media Post-Mortem on the 2016 Presidential Election*, MEDIAQUANT (Nov. 14, 2016), <https://www.mediaquant.net/2016/11/a-media-post-mortem-on-the-2016-presidential-election>.

188. Cf. STEPHEN K. MEDVIC, *POLITICAL CONSULTANTS IN U.S. CONGRESSIONAL ELECTIONS* 148 (2001) [hereinafter MEDVIC, *POLITICAL CONSULTANTS*] (“Those clinging to an ideal of the ‘golden age of campaigning’ ought to be disabused of such a notion.”).

189. See Sabato, *Political Influence*, *supra* note 5, at 16 (“[C]onsultants . . . have a great deal of influence on which candidates succeed and which don’t.”).

190. See, e.g., Andy Kroll, *New Koch-linked Political Firm Aims to Handpick “Electable” Candidates*, MOTHER JONES (Jan. 17, 2014), <https://www.motherjones.com/politics/2014/01/koch-brothers-candidate-training-recruiting-aegis-strategic>; Kara B. Turrentine, *How to Navigate Candidate Recruitment*, CAMPAIGNS & ELECTIONS (Apr. 7, 2017), <https://www.campaignsandelections.com/campaign-insider/how-to-navigate-candidate-recruitment>; Kenneth P. Vogel, *How the Kochs Launched Joni Ernst*, POLITICO (Nov. 12, 2015), <https://www.politico.com/story/2015/11/the-kochs-vs-the-gop-215672>; Jason Zengerle, *The Most Powerful Man in the GOP (And You've Never Heard of Him)*, GQ (Feb. 17, 2016), <https://www.gq.com/story/rex-elsass-secret-wizard-of-the-far-right>.

instrumental role in grooming potential candidates and persuading them to run.¹⁹¹

These early judgments by professionals can significantly affect who seeks and wins elective office.¹⁹² This is partly because professional services directly help candidates mount viable campaigns,¹⁹³ but also because professionals—and especially highly regarded ones—can serve to validate candidates by choosing to affiliate with them. A top professional's decision to work with a particular candidate can help that candidate draw early interest and funds.¹⁹⁴ For political elites and the media, a candidate's success in building an all-star professional team signals the candidate's strength.¹⁹⁵ Conversely, failing to attract top-tier staff and consultants can derail a candidacy from the outset.¹⁹⁶

As campaign professionals select their candidate clients, they tend to prioritize several key criteria. These criteria differ

191. See JOHNSON, DEMOCRACY FOR HIRE, *supra* note 1, at 5 (“A political consultant persuaded Barry Goldwater to run for the presidency, and political consultants helped prepare a political novice, the one-time movie actor Ronald Reagan, in his quest for the governor’s office in California. . . . A consultant helped build the career of George W. Bush and persuade him to run for the presidency.”). The phenomenon of the campaign professional as candidate recruiter has even been portrayed in film. See THE CANDIDATE (Warner Bros. 1972) (depicting a fictional political consultant’s effort to recruit a candidate into a seemingly hopeless U.S. Senate race).

192. See Sabato, *Political Influence*, *supra* note 5, at 16.

193. See, e.g., Johnson, *Campaign Consultants*, *supra* note 32, at 56–59 (describing the important role consultants play in helping candidates run disciplined and cohesive campaigns).

194. See, e.g., MEDVIC, POLITICAL CONSULTANTS, *supra* note 188, at 126 (“[T]he mere presence of a political consultant sends a message to potential contributors . . . especially . . . when the consultant has something of a reputation.”); James A. Thurber, *Introduction to the Study of Campaign Consultants*, in CAMPAIGN WARRIORS: THE ROLE OF POLITICAL CONSULTANTS IN ELECTIONS 5 (James A. Thurber & Candice J. Nelson eds., 2000); Medvic, *The Effectiveness*, *supra* note 123 at 150 (noting a correlation between the use of campaign consultants and an increase in a candidate’s likelihood of raising more money).

195. See, e.g., Cain, *supra* note 121, at 376–77 (explaining that hiring reputable consultants influences the perceived competitiveness of a race); see also De Vries, *supra* note 85, at 22 (“Candidates today are often judged by their stable of consultants. One takes a look at who has been retained by the candidate and, based on that judgment, makes a decision about the viability of that candidate’s campaign.”).

196. See Celinda Lake, *Political Consultants: Opening Up a New System of Political Power*, 22 PS: POL. SCI. & POL. 26, 26 (1989).

from the ones that most citizens will later use to make their voting decisions.¹⁹⁷ They also diverge in part from the selection criteria that would prevail if parties or the media exerted relatively greater electoral influence. Party organizations would presumably favor candidates with a record of loyalty and service to the party and perhaps also candidates perceived to be especially capable of advancing the party's substantive agenda. Media-dominated campaigns, meanwhile, would presumably favor effective communicators with big personalities and perhaps also advantage candidates with preexisting public profiles. Such candidate attributes may be relevant to campaign professionals, but they typically take a backseat to other considerations.

First, because campaign professionals want to get paid, and preferably more rather than less, professionals consider a candidate's fundraising potential.¹⁹⁸ In a survey of 200 political consultants, ninety-eight percent reported that "a candidate's ability to raise money and pay the bills was either very or somewhat important."¹⁹⁹ Other research has indicated "that more consultants cared about whether their clients could pay their bills than whether they were capable of governing."²⁰⁰ The market for professional campaign services thus amplifies the electoral system's tendency to favor "candidates who are themselves wealthy or have networks of wealthy friends . . . relative to candidates with other kinds of political skills."²⁰¹ Commentators sometimes discuss the phenomenon of the "money primary," in which candidates compete to attract early momentum-generating funds.²⁰² But potential candidates may not even enter the money primary if they fare poorly in the consultant beauty pageant.²⁰³

197. Cf. SABATO, POLITICAL CONSULTANTS, *supra* note 1, at 337 ("A candidate's adaptability to the new techniques of campaigning, not his competence, has become the standard by which he is judged by political professionals[.]").

198. Cain, *supra* note 121, at 378.

199. James A. Thurber et al., *Portrait of Campaign Consultants*, in CAMPAIGN WARRIORS, *supra* note 194, at 16 [hereinafter Thurber, *Portrait*].

200. Cain, *supra* note 121, at 378; see also Sabato, *Political Influence*, *supra* note 5, at 16.

201. Martin & Peskowitz, *supra* note 3, at 232.

202. See, e.g., DAVID B. MAGLEBY & CANDICE J. NELSON, THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 66 (1990); Tom Donnelly, *Candidate Venture Capital*, 80 U. CIN. L. REV. 753 (2012) (discussing the importance of early money in a campaign); Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273 (1993).

203. See Lake, *supra* note 196, at 26.

Second, campaign professionals assess a candidate's likelihood of electoral success.²⁰⁴ Professionals are sometimes willing to work with long-shot candidates, especially ones with deep pockets.²⁰⁵ After all, professionals can distinguish themselves by guiding long shots to victory, while explaining away losses as inevitable. But, on the whole, professionals generally prefer to have more winning races on their resume than losing ones.²⁰⁶ For better or for worse, this may make professionals—at least the most well-established and reputable ones—risk-averse in their choice of candidates, potentially giving conventional candidates a boost over unconventional ones and incumbents a boost over challengers.²⁰⁷

Both of these considerations have implications for candidate diversity. If professionals prefer candidates who are connected to wealthy donor networks—networks that are disproportionately Caucasian and male—and who resemble candidates who have succeeded in the past,²⁰⁸ then minorities and women may find themselves at a particular disadvantage.²⁰⁹ The campaign industry's own demographics may reinforce this dynamic.²¹⁰ Women and minorities are significantly underrepresented among campaign service providers.²¹¹ According to one study,

204. See Thurber, *Portrait*, *supra* note 199, at 15 (reporting that overwhelming majorities of surveyed consultants described the “probability of a candidate winning” as “very or somewhat important in their calculus for selecting their clients”).

205. See Lake, *supra* note 196, at 26.

206. See, e.g., SABATO, POLITICAL CONSULTANTS, *supra* note 1, at 17–18.

207. See SHEINGATE, *supra* note 1, at 215 (“[T]he business of politics contributes to the entrenchment of a political elite . . . ”).

208. See, e.g., Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1426 (2015).

209. Cf. Jennifer L. Lawless, *Female Candidates and Legislators*, 18 ANN. REV. POL. SCI. 349, 355 (2015) (“[A]mong potential candidates, men are about 15% more likely than women to have received the suggestion to run for office, from a party leader, elected official, or nonelected political activist . . . ”); Paru Shah, *It Takes a Black Candidate: A Supply-Side Theory of Minority Representation*, 67 POL. RES. Q. 266 (2014) (concluding that lack of candidate recruitment is an obstacle to minority representation).

210. Cf. Kate Maeder, *Why Female Consultants Matter Right Now*, CAMPAIGNS & ELECTIONS (May, 17, 2017), <https://www.campaignsandelections.com/campaign-insider/why-female-consultants-matter-right-now> (suggesting that the paucity of women in the political consulting industry hinders efforts to elect more women to office).

211. See Thurber, *Portrait*, *supra* note 199, at 12 (reporting survey results indicating “that principals in the major campaign consulting firms are primarily white and male”).

less than two percent of payments the National Democratic campaign committees made to consultants during the 2010 and 2012 cycles went to minority-run firms.²¹² And women comprise just thirty-two percent of the membership of the American Association of Political Consultants.²¹³ Perhaps unsurprisingly, studies indicate that political insiders encourage women to run for office less often than they encourage men, even though women are equally responsive to such suggestions when asked.²¹⁴

An additional factor that consultants may consider in choosing candidates—though they may be understandably reluctant to admit it—is a candidate's perceived pliability. All else being equal, professionals presumably prefer to work with candidates who will be inclined to accept their advice and give them fairly wide latitude to act.²¹⁵ To the extent they find such candidates, professionals can reinforce their dominance in ways that may magnify both the agency costs discussed in Section I.B and the campaign and policy effects discussed below.

212. Aaron Blake, *Democrats Spend Very Little on Minority-Run Consulting Firms, Study Finds*, WASH. POST (June 25, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/06/25/democrats-spend-very-little-on-minority-run-consulting-firms-study-finds>. Some efforts are being undertaken to reduce these disparities. In 2017, a group of mostly Democratic consultants formed the National Association of Diverse Consultants. See Sean J. Miller, *New National Association to Focus on Connecting Minority-Owned Firms*, CAMPAIGNS & ELECTIONS (July 20, 2017), <https://www.campaignsandelections.com/campaign-insider/new-national-association-to-focus-on-connecting-minority-owned-firms>.

213. See Email from Allison Kramer-Mills, Admin. Specialist, Am. Ass'n of Political Consultants, to Anna Collins Peterson (Nov. 28, 2017, 15:08 CST) (on file with author). The number of women in the industry has been on the uptick over the past two decades. See Costas Panagopoulos et al., *Lady Luck? Women Political Consultants in U.S. Congressional Campaigns*, 10 J. POL. MARKETING 251, 260 (2011) (finding that, among consulting firms working in U.S. House races in 1998, women held only nineteen percent of the leadership positions).

214. See Lawless, *supra* note 209, at 355.

215. See, e.g., LATHROP, *supra* note 137, at 5–6 (“Some consultants, in their more candid moments, confess that they do not respect many of their political clients . . .”); Molly Ball, ‘There’s Nothing Better than a Scared, Rich Candidate.’ How Political Consulting Works—Or Doesn’t, ATLANTIC (Oct. 2016), <https://www.theatlantic.com/magazine/archive/2016/10/theres-nothing-better-than-a-scared-rich-candidate/497522> (suggesting that such motivations lay behind the effort to recruit Ben Carson in the 2016 presidential race); cf. JAMES MOORE & WAYNE SLATER, *BUSH’S BRAIN: HOW KARL ROVE MADE GEORGE W. BUSH PRESIDENTIAL* (2003) (describing Karl Rove’s extensive influence on the campaign and presidency of George W. Bush).

B. CAMPAIGN EFFECTS

Beyond shaping the pool of candidates who seek office, campaign professionals influence the nature of campaigning. This occurs in large part because some modes of campaigning generate revenue for the campaign industry more readily and reliably than others.²¹⁶ In particular, producing mass media ads and purchasing advertising slots have long been especially profitable activities for campaign professionals.²¹⁷ Political scientists Gregory Martin and Zachary Peskowitz recently estimated that “a campaign must pay a consulting firm between \$1.41 and \$1.44 to produce \$1 worth of advertising.”²¹⁸ For Super PACs, the average markup is even greater, with such entities paying media consultants a remarkable “\$2.51–\$2.69 to generate \$1 worth of advertising.”²¹⁹ In contrast, field organizing and activities such as door-to-door canvassing have traditionally been more difficult to monetize.²²⁰ As a result, professionals have long touted and facilitated campaigns that prioritize paid advertising through mass media, even though empirical evidence suggests that retail

216. Cf. SABATO, POLITICAL CONSULTANTS, *supra* note 1, at 312–13 (“[P]olitical professionals have surely added to the spiral of campaign costs, not merely by charging exorbitant fees and commissions . . . but also by making enormously expensive technologies standard items in modern campaigns.”); Grossmann, *Going Pro?*, *supra* note 83, at 98 (“Like in most professions, consultants’ ideology of client service sometimes correlates strongly with their financial interests.”).

217. SHEINGATE, *supra* note 1, at 213.

218. Martin & Peskowitz, *supra* note 3, at 236.

219. *Id.* at 238.

220. See David Broockman & Joshua Kalla, *Experiments Show This Is the Best Way To Win Campaigns. But Is Anyone Actually Doing It?*, VOX (Nov. 13, 2014), <https://www.vox.com/2014/11/13/7214339/campaign-ground-game>. This has been changing somewhat in recent years as campaign professionals have come to offer technology and data-related services to help campaigns identify the right voters to target for personalized contacts. See, e.g., Alicia Kolar Prevost, *The Ground Game: Fieldwork in Political Campaigns*, in CAMPAIGNS AND ELECTIONS AMERICAN STYLE, *supra* note 2, at 198.

politicking can offer candidates more bang for the buck.²²¹ Indeed, some studies suggest that paid advertising often has little marginal effect on voters' candidate preferences.²²²

By overemphasizing mass advertising, campaign professionals end up promoting a quite superficial form of democratic engagement.²²³ It is superficial in the sense that it views citizens as passive spectators rather than as active participants.²²⁴ Little is asked of citizens beyond their dollars and their votes. It is also superficial in the sense that advertising is not conducive to high-level discourse. Professionals distill a campaign's message to soundbites that focus on some mix of salient wedge issues and the personal characteristics of the candidates.²²⁵ Along the way, nuance is lost, and community-specific issues may get overlooked. Contrary to the aphorism that all politics is local, campaign professionals—who frequently work on races in unfamiliar places—may help make even local politics national.²²⁶

221. See, e.g., SHEINGATE, *supra* note 1, at 5; Ball, *supra* note 215 (discussing the ineffective capital-intensive strategies used by many political consultants during the 2016 presidential campaign); Danielle Kurtzleben, *2016 Campaigns Will Spend \$4.4 Billion on TV Ads, But Why?*, NPR (Aug. 19, 2015), <http://www.npr.org/sections/itsallpolitics/2015/08/19/432759311/2016-campaign-tv-ad-spending> (highlighting the reduced effectiveness of television advertising). But see Joshua L. Kalla & David E. Brockman, *The Minimal Persuasive Effects of Campaign Contact in General Elections: Evidence from 49 Field Experiments*, 112 AM. POL. SCI. REV. 148, 149 (2018) (contending that direct canvassing generally does not influence voters' choice of general election candidates).

222. See, e.g., Gerber et al., *How Large and Long-Lasting Are the Persuasive Effects of Televised Campaign Ads? Results from a Randomized Field Experiment*, 105 AM. POL. SCI. REV. 135, 148 (2011) (revealing evidence that advertising loses its effectiveness rapidly); Kalla & Brockman, *supra* note 221, at 148 (contending that political advertising generally does not influence voters' choice of general election candidates); Aaron Blake, *The End of Political Campaigns as We Know Them? A New Study Suggests We're Doing It All Wrong*, WASH. POST (Sept. 26, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/09/26/the-end-of-political-campaigns-as-we-know-them-a-new-study-suggests-were-doing-it-all-wrong> (discussing Kalla & Brockman study).

223. Mark P. Petracca, *Political Consultants and Democratic Governance*, 22 PS: POL. SCI. & POL. 11, 13 (1989) ("[C]onsultants emphasize those aspects of a campaign which are least conducive to participatory politics.").

224. DENNIS W. JOHNSON, *NO PLACE FOR AMATEURS* xvi (2001) ("Thanks in large measure to professional campaign strategies, citizens are increasingly disenchanted spectators in the blood sport of campaigning.").

225. See, e.g., Thurber, *Understanding*, *supra* note 2, at 13 (discussing the focus on personal characteristics); Grossmann, *Going Pro?*, *supra* note 83, at 102 (discussing the focus on wedge issues).

226. See JOHNSON, *DEMOCRACY FOR HIRE*, *supra* note 1, at 2 (discussing "the nationalization of what were once local contests"); SABATO, *POLITICAL CONSULTANTS*, *supra* note 1, at 311 (suggesting that campaign professionals have contributed to "the homogenization of American state politics").

Although the empirical evidence is by no means decisive, campaign professionals may also bear at least some responsibility for the high level of negativity in many campaigns.²²⁷ In surveys, large majorities of campaign professionals say that they see negative advertising as an appropriate and effective strategy.²²⁸ Candidates who find negativity distasteful may be more willing to go negative if that is what the experts recommend.²²⁹ Negativity levels do appear to have risen in recent decades, corresponding in time to the campaign industry's rise.²³⁰ In some instances, professionals are also behind dirty tricks and unseemly campaign practices.²³¹ A recurring example is push poll-

227. See, e.g., Owen G. Abbe et al., *Are Professional Campaigns More Negative?*, in *PLAYING HARDBALL: CAMPAIGNING FOR THE U.S. CONGRESS* 70, 86 (Paul S. Herrnson ed., 2001); Peter L. Francia & Paul S. Herrnson, *Keeping it Professional: The Influence of Political Consultants on Candidate Attitudes Toward Negative Campaigning*, 35 POL. & POL'Y 246 (2007); Matt Grossmann, *What (or Who) Makes Campaigns Negative?*, 33 AM. REV. POL. 1 (2012); John Theilmann & Allen Wilhite, *Campaign Tactics and the Decision to Attack*, 60 J. POL. 1050 (1998).

228. Grossmann, *Going Pro?*, *supra* note 83, at 96 ("Despite public protest, consultants remain confident that negative advertising is an effective campaign strategy that serves a useful role for voters."); Thurber, *Portrait*, *supra* note 199, at 28 ("[I]t is clear that consultants do 'go negative' and that they find it a useful and acceptable campaign tactic, as 98.5 percent say it is not unethical."); *Don't Blame Us: The Views of Political Consultants*, PEW RES. CTR. (June 17, 1998), <http://www.peoplepress.org/1998/06/17/dont-blame-us> (reporting, based on a survey of political consultants, that "[m]ost do not think campaign practices that suppress turnout, use scare tactics and take facts out of context are unethical," and "[t]hey are nearly unanimous—97%—in the belief that negative advertising is not wrong"). See generally KERWIN C. SWINT, *POLITICAL CONSULTANTS AND NEGATIVE CAMPAIGNING: THE SECRETS OF THE PROS* (1998) (describing the various rationales of political consultants who use negative ads); Richard R. Lau & Ivy Brown Rovner, *Negative Campaigning*, 12 ANN. REV. POL. SCI. 285 (2009) (reviewing literature on the use and effects of negative campaigning).

229. Grossmann, *Campaigning*, *supra* note 3, at 3 ("Candidates with consultants are more likely to believe that negative campaigning is acceptable and that raising some kinds of issues is more acceptable."); see also Toni M. Massaro & Robin Stryker, *Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement*, 54 ARIZ. L. REV. 375, 426–27 (2012); Zengerle, *supra* note 190 (describing tactics consultants used to persuade candidates to go negative).

230. See Massaro & Stryker, *supra* note 229, at 421.

231. See, e.g., MEDVIC, *POLITICAL CONSULTANTS*, *supra* note 188, at 156 (contending that a "lack of consultant accountability" means that "consultants are given a free hand to push the envelope of ethical campaign behavior"); SABATO, *POLITICAL CONSULTANTS*, *supra* note 1, at 322 ("[Consultants'] marks have been detected on some of the more shameful modern acts of political deception.").

ing, which involves conveying negative (and typically false) information about a political candidate under the guise of a telephone poll.²³²

Campaign professionals' promotion of capital-intensive campaign strategies over more frugal approaches goes hand in hand with a fixation on fundraising. Professionals drill into their clients the message that money must continually flow in the door.²³³ The fundraising process is itself professionalized, with consultants sometimes taking a cut of the contributions that they help generate.²³⁴ By pushing more money into politics, the campaign industry is complicit in the various pathologies that critics of the campaign finance system lament.²³⁵

All of this, in turn, may produce campaigns that breed cynicism and disaffection among the public.²³⁶ With more money entering the electoral system and the campaign industry booming, public dissatisfaction with campaigns has grown.²³⁷ People not only see deep-pocketed interests attempting to exert outsized influence over voters and politicians; they also see campaign insiders opportunistically seeking to enrich themselves in the process.²³⁸ Even when campaign professionals serve their clients well in the narrow sense of helping them prevail over rivals, they may be propagating methods of electioneering that disserve democracy writ large.

232. See, e.g., Glen Bolger, *The Use of Survey Research in Campaigns, in CAMPAIGNS AND ELECTIONS AMERICAN STYLE*, *supra* note 2, at 47, 67–68.

233. See, e.g., SHEINGATE, *supra* note 1, at 213; Ball, *supra* note 215.

234. See, e.g., Nicholas Confessore, *The Secret World of a Well-Paid 'Donor-Advisor' in Politics*, N.Y. TIMES (Feb. 5, 2015), <https://www.nytimes.com/2015/02/06/us/in-invisible-world-of-political-donor-advisers-a-highly-visible-player.html>; J. Patrick Coolican, *GOP Chairwoman Jennifer Carnahan Wants a 10 Percent Commission on All Big Donations*, STAR TRIB. (Jan. 18, 2018), <http://www.startribune.com/gop-chair-jennifer-carnahan-wants-a-10-percent-commission-on-all-big-donations/469795253>; Eggen & Hamburger, *supra* note 153.

235. See, e.g., RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* (2016) (detailing defects in the current campaign finance system).

236. Petracca, *supra* note 223, at 13 (observing that, by sidelining average citizens, campaign professionals contribute to “a loss of control [that] fosters cynicism and apathy”).

237. Grossmann, *Going Pro?*, *supra* note 83, at 102 (“If consultants continue to implement occupational norms even if they are displeasing to the public, we are likely to see an increasing divergence between consultants and the public in their normative evaluation of modern campaigns.”).

238. Cf. Confessore, *supra* note 234 (describing donor dissatisfaction with the high fees charged by consultants).

To be clear, the campaign industry is by no means solely to blame for the imperfections of campaigns. Party operatives are certainly capable of negative campaigning,²³⁹ and many media outlets do little to elevate the quality of electoral discourse or to promote citizen engagement.²⁴⁰ That said, if parties or the media supplanted the campaign industry, electioneering would likely look at least somewhat different. Perhaps parties would be wary of excessive negativity for fear of doing long-term damage to their brands. And to the extent they were reinvigorated at the local level, perhaps they would generate campaigns that rely more on grassroots activism and less on paid advertising. Similarly, perhaps media-centered campaigning would reduce campaigners' preoccupation with fundraising. Even without displacing the campaign industry, reforms might alter the industry's incentives in ways that incrementally improve campaigning.

C. POLICY EFFECTS

Campaign professionals not only influence candidate selection and campaign tactics and tone. They also can shape policy, both during campaigns and after.²⁴¹ According to survey research on the industry, candidates tend to focus mainly on the high-level strategic plans for their campaigns, leaving professionals in the driver's seat "when it comes to setting issue priorities" and "the day-to-day tactical operation of the campaign."²⁴² In their policy development role, campaign professionals are presumably attentive to their clients' preexisting positions and commitments, but they also bring their own judgment to bear. As they do, they may be guided in part by personal views, which may or may not precisely align with the views of their clients.²⁴³

239. Cf. DULIO, *supra* note 129, at 184 (noting that negative campaigning long predates the campaign industry's emergence).

240. Cf. SABATO, POLITICAL CONSULTANTS, *supra* note 1, at 322 ("The unpaid media are just as wedded to the carnival aspects of politics, and politicians willingly embrace them.").

241. See, e.g., LATHROP, *supra* note 137, at 136 ("[P]olitical consultants have become indispensable advisors to decision makers on major policy matters."); SABATO, POLITICAL CONSULTANTS, *supra* note 1, at 36; Sabato, *Political Influence*, *supra* note 5, at 16; Zengerle, *supra* note 190 (discussing consultants' particular influence on the policy positions of "rookie candidates").

242. Petracca, *supra* note 223, at 13; see also Grossmann, *Going Pro?*, *supra* note 83, at 101 ("[M]any of the important decisions in campaigns are now made by consultants . . ."); Walton & Weller, *supra* note 123, at 5 (noting a perception that candidates "have been captured by their consultants").

243. See, e.g., SABATO, POLITICAL CONSULTANTS, *supra* note 1, at 314 (ob-

And, deliberately or not, they also may consider the interests of other clients.²⁴⁴

As previously discussed, campaign professionals—especially outside consultants—often serve, or have served, many masters. A professional, for instance, who has worked for foreign governments or for foreign officials' campaigns may convey a favorable impression of those actors to domestic candidate clients. The same goes for professionals who have done, or seek to do, public relations work on behalf of corporations or trade associations.²⁴⁵ Indeed, keeping company with campaign professionals may be an effective way for deep-pocketed interests to gain the favor of office seekers.²⁴⁶ The myriad entanglements of former Trump campaign chair Paul Manafort offer a high-profile illustration of these concerns. Earlier in his career, Manafort paired work on the presidential campaigns of Gerald Ford, Ronald Reagan, and Bob Dole, with work on behalf of several foreign dictators, including Ferdinand Marcos of the Philippines and Mobutu Sese Seko of the Democratic Republic of the Congo.²⁴⁷ He also co-founded a lobbying firm.²⁴⁸ More recently, he worked for Russian and Ukrainian oligarchs and for pro-Russian political parties in Ukraine, where he helped elect Russian-backed Viktor Yanukovych.²⁴⁹ Even during his tenure with the Trump campaign, Manafort apparently offered private briefings to a

serving that pollsters sometimes “fail to make a clear distinction between survey findings and their own opinions”).

244. Cf. Cain, *supra* note 121, at 377 (“[T]he political consultants who craft and implement campaign strategies do not always share the same goals as their clients. . . . Consultants’ goals include advancing their own beliefs or ideologies and making money”).

245. Lake, *supra* note 196, at 27–28 (reporting that “trade association[s] and power-brokers know that consultants have a unique kind of access to the political system” and that these “patterns of access . . . have real implications for policy outcomes”).

246. Sabato, *Political Influence*, *supra* note 5, at 16 (explaining that “private lobby groups, corporate clients and labor union clients” hire campaign professionals “because they have influence”).

247. Andrew Prokop, *Paul Manafort’s Central Role in the Trump-Russia Investigation, Explained*, VOX (Oct. 30, 2017), <https://www.vox.com/policy-and-politics/2017/8/31/16125776/paul-manafort-russia-trump-mueller>.

248. *Id.*

249. *Id.*; see, e.g., David A. Graham, *Former Trump Campaign Chair Paul Manafort Faces 12 Federal Charges*, ATLANTIC (Oct. 30, 2017), <https://www.theatlantic.com/politics/archive/2017/10/report-former-trump-chair-paul-manafort-and-partner-told-to-surrender/544331>; Paul Wood, *Manafort Earned \$600,000 a Month from Pro-Russia Party: Ukrainian Report*, USA TODAY (Oct. 31, 2017), <https://www.usatoday.com/story/news/world/2017/10/31/manafort-pro-russia-party-report/816242001>.

Kremlin-aligned Russian billionaire for whom he had worked.²⁵⁰ Ongoing investigations may ultimately reveal more about the extent to which these foreign entanglements tainted Manafort's work with Trump.²⁵¹

Campaign professionals, moreover, often remain close to successful candidates once those candidates take office, enjoying privileged influence and access even if they lack a formal role within the government.²⁵² In some instances, they overtly use their insider status to market themselves to private-sector or foreign-government clients and then seek to deliver policy results for those clients.²⁵³ The Trump presidency has provided some vivid examples of campaign officials leveraging their relationships with the White House on behalf of their clients. Consider former Trump campaign manager Corey Lewandowski, who serves as an informal adviser to the President while also actively marketing his close White House ties as he offers consulting services to corporations and foreign officials.²⁵⁴ He also advises the Vice President's leadership PAC and frequently appears as a cable news contributor.²⁵⁵ The phenomenon, however, is not

250. Tom Hamburger et al., *Manafort Offered To Give Russian Billionaire Private Briefings' on 2016 Campaign*, WASH. POST (Sept. 20, 2017), https://www.washingtonpost.com/politics/manafort-offered-to-give-russian-billionaire-private-briefings-on-2016-campaign/2017/09/20/399bba1a-9d48-11e7-8ea1-ed975285475e_story.html; Jeff Horwitz & Chad Day, *AP Exclusive: Before Trump Job, Manafort Worked To Aid Putin*, ASSOCIATED PRESS (Mar. 22, 2017), <https://apnews.com/122ae0b5848345faa88108a03de40c5a/Manafort%27s-plan-to-%27greatly-benefit-the-Putin-Government%27>.

251. See, e.g., Chris Strohm, *Mueller's Latest Charges Bring Together Trump Campaign, Russia*, BLOOMBERG (June 9, 2018), <https://www.bloomberg.com/news/articles/2018-06-09/mueller-s-latest-charges-bring-together-trump-campaign-russia>.

252. See, e.g., LATHROP, *supra* note 137, at 3–4; De Vries, *supra* note 85, at 23; Novotny, *supra* note 82, at 21; Bergo, *supra* note 136.

253. See Bergo, *supra* note 136.

254. See, e.g., Nicholas Confessore & Kenneth P. Vogel, *Trump Loyalist Mixes Businesses and Access at 'Advisory' Firm*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/2017/08/01/us/politics/corey-lewandowski-trump.html>; Kenneth P. Vogel & Josh Dawsey, *Lewandowski's Firm Appears to Offer Trump Meetings*, POLITICO (Apr. 28, 2017), <https://www.politico.com/story/2017/04/28/corey-lewandowski-trump-meetings-237725>.

255. See Christopher Cadelago, *Trump's Outside Advisers See Little Upside in Joining White House as Staff*, POLITICO (June 18, 2018), <https://www.politico.com/story/2018/06/18/trump-white-house-staff-advisers-650868>; Theodoric Meyer & Margaret Harding McGill, *Lewandowski Advising T-Mobile on Sprint Merger*, POLITICO (May 25, 2018), <https://www.politico.com/story/2018/05/25/corey-lewandowski-tmobile-consultant-sprint-merger-609168>.

new,²⁵⁶ and it exists not just at the federal level, but at the state and local levels as well.²⁵⁷

Perhaps more subtly, the campaign industry also may be making policymaking itself more campaign-like. Interest groups and corporations increasingly hire campaign professionals to deploy campaign-style tactics to achieve policy goals.²⁵⁸ Some have suggested that these tactics—including attack ads and public mobilization efforts—have made lawmaking more divisive, hindering collaboration and compromise.²⁵⁹ Again, campaign professionals are not responsible for every defect in the policymaking process, but their complicated allegiances and incentives nevertheless raise real concerns—concerns that would not arise, at least in the same form, if the industry played a more circumscribed role.

III. CONCEPTUAL AND PRACTICAL IMPLICATIONS

Given its centrality to modern politics and its far-reaching effects, the campaign industry inevitably interacts with other structural features of the U.S. electoral system. As discussed in Part I, the campaign industry came to dominate and shape our politics thanks, in large part, to a favorable institutional climate—one that weakened political parties while allowing money to flow relatively unimpeded. Just as those institutional features had implications for the campaign industry, the campaign industry today has implications for campaign finance and political parties. This Part assesses those implications. It considers what the campaign industry’s rise suggests about the constitutionality and propriety of regulating money in politics and about the structure and reform of political parties.

256. In the late 1990s, for example, concerns were raised about pollsters who worked for the 1996 Clinton campaign and retained ties to the administration while also “working for a growing roster of corporate clients.” Novotny, *supra* note 82, at 18–19.

257. See, e.g., SABATO, POLITICAL CONSULTANTS, *supra* note 1, at 309–10; Bergo, *supra* note 136; Jason Hancock, *Missouri Legislative Staffers Earn Big Money as Political Consultants*, KAN. CITY STAR (Dec. 20, 2015), <https://www.kansascity.com/news/politics-government/article50828510.html>; Ken Lovett, *Growing Trend Finds Political Consultants Lobbying Those They Get Elected*, N.Y. DAILY NEWS (Apr. 30, 2013), <http://www.nydailynews.com/blogs/daily-politics/growing-trend-finds-political-consultants-lobbying-elected-blog-entry-1.1694448>.

258. See *supra* notes 136–41 and accompanying text.

259. See LATHROP, *supra* note 137, at 150–51 (offering the Clinton-era debate over health care reform as a case study).

A. MONEY IN POLITICS

Existing discourse about money in politics largely overlooks the campaign industry's pivotal role. Campaign professionals drive fundraising efforts and steer spending decisions, and significant sums end up in their pockets.²⁶⁰ Recognizing these realities adds a new dimension to longstanding jurisprudential debates about the relationship between money and speech and, relatedly, the nature and scope of the constitutional rights at stake in campaign finance cases. It also casts new light on prominent campaign reform proposals and perhaps suggests new directions for reformers.

The Supreme Court has long regarded the giving and spending of campaign funds as inextricably intertwined with campaign speech.²⁶¹ It has thus deemed campaign finance regulation a matter of core First Amendment concern.²⁶² In one sense, the campaign industry's centrality to the electoral process bolsters the notion of a constitutionally significant connection between money and speech. While case law has stressed the need for campaigners to pay for various modes of mass communication,²⁶³ modern American electioneering is even more deeply transactional and market driven than existing judicial accounts recognize. Practically speaking, paid service providers have become crucial and arguably indispensable facilitators of electioneering. They are alchemists who purport to transform money into advocacy and, ultimately, into votes.²⁶⁴ Whatever one's normative views of the matter, if our system treats campaigning as a market-based activity, then the right to engage in electoral advocacy may indeed presuppose a right to finance campaigns.²⁶⁵

260. See *supra* notes 161–72 and accompanying text.

261. *Buckley v. Valeo*, 424 U.S. 1, 22–23 (1976) (per curiam).

262. See, e.g., *id.*; Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953, 957 (2011) (“*Buckley's* central claim is that restrictions on giving and spending money should be treated as restrictions on ‘speech’ as that term is used in the First Amendment.”).

263. See, e.g., *Buckley*, 424 U.S. at 19.

264. Cf. SHEINGATE, *supra* note 1, at 201 (“If the nineteenth-century alchemists of American politics turned whiskey into votes, modern-day consultants transform political contributions into the ubiquitous advertisements and polls of contemporary campaigns.”).

265. See, e.g., *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 252 (2003) (Scalia, J., concurring in part and dissenting in part) (“The right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise.”); *Buckley*, 424 U.S. at 26 (“Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide

That said, attending to the campaign industry's role may undercut the Supreme Court's campaign finance jurisprudence more than reinforce it. The reason is that, even as campaign professionals capitalize on the link between money and speech, their intermediation attenuates the money-speech nexus in ways that existing case law fails to acknowledge. As others have observed, the Court's precedents offer two basic accounts of how campaign finance restrictions offend the First Amendment.²⁶⁶ One emphasizes the threat that regulations pose to the expressive autonomy and individual liberty of campaign funders.²⁶⁷ The other maintains that regulations unduly constrain or distort the marketplace of ideas.²⁶⁸ Though these accounts often commingle in the Court's opinions, they reflect analytically distinct concerns. It is thus worth disentangling them to see how the campaign industry's presence tempers each concern and, as a result, challenges the aggressively anti-regulatory views that the Court has sometimes espoused, particularly in its more recent cases.²⁶⁹

Consider first the Court's conception of how campaign finance regulations impact expressive autonomy. Since *Buckley*, the Court has subjected limits on campaign contributions to a somewhat less stringent standard of review than limits on independent expenditures.²⁷⁰ This differential treatment is partly based on the Court's perception that contribution limits do not encumber the expression of would-be funders as directly and substantially as expenditure limits.²⁷¹ According to the Court,

the resources necessary to conduct a successful campaign."); Hellman, *supra* note 262, at 985–86 ("If a constitutional right depends on a good that is distributed via the market, then the right must be understood to include the right to spend money to exercise it.").

266. See, e.g., Daniel R. Ortiz, *Recovering the Individual in Politics*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 263, 264–65 (2012); Monica Youn, *First Amendment Fault Lines and the Citizens United Decision*, 5 HARV. L. & POL'Y REV. 135, 136–37 (2011).

267. See, e.g., Ortiz, *supra* note 266, at 264–65; Youn, *supra* note 266, at 136.

268. See, e.g., Ortiz, *supra* note 266, at 265; Youn, *supra* note 266, at 137.

269. See, e.g., Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

270. Contributions refer to money given to candidate or party committees (or to entities that themselves give to those committees), while independent expenditures are money that individuals or organizations spend on campaign advocacy independently—that is, without coordinating their activities with a candidate or party. See, e.g., *Buckley*, 424 U.S. at 13, 19–21.

271. See *id.*; see also *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1444 (2014) (plurality opinion) (recounting *Buckley's* expenditure-contribution

campaign donors communicate relatively little through their contributions: “A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.”²⁷² *Buckley* described contributors as a step removed from whatever advocacy they finance because “the transformation of contributions into political debate involves speech by someone other than the contributor.”²⁷³ Elsewhere, the Court has called this “speech by proxy.”²⁷⁴ In contrast, the Court equates election-related expenditures with “political speech.”²⁷⁵ As the Court explained it in *Buckley*, “[t]his is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”²⁷⁶ The Court’s intuition has been that, if someone wants to share a campaign-related message and has to pay to convey it, then that expenditure is inseparable from the communication itself.²⁷⁷

The Court’s contribution-expenditure distinction is already much maligned,²⁷⁸ but focusing on the campaign industry suggests a new critique. Specifically, contrary to the distinction’s underlying premise, expenditures in practice tend not to be more expressive than contributions.²⁷⁹ No matter how funders inject their money into the electoral process, they are rarely disseminating their own autonomous, self-actualizing messages.²⁸⁰ In-

distinction); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 666 (1997).

272. *Buckley*, 424 U.S. at 21.

273. *Id.*

274. See, e.g., Cal. Med. Ass’n v. Fed. Election Comm’n, 453 U.S. 182, 196 (1981) (plurality opinion); see also Youn, *supra* note 266, at 158.

275. *Buckley*, 424 U.S. at 19, 39.

276. *Id.* at 19.

277. See, e.g., *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340–41 (2010); see also *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1448 (2014) (plurality opinion) (emphasizing the First Amendment protections afforded to “someone who spends ‘substantial amounts of money in order to communicate [his] political ideas through sophisticated’ means” (quoting *Fed. Election Comm’n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985))).

278. See, e.g., Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 747 (2007).

279. Albert W. Alschuler, *Limiting Political Contributions After McCutcheon*, *Citizens United, and SpeechNow*, 67 FLA. L. REV. 389, 475 (2015) (“Super PAC contributions have no greater communicative value than campaign contributions.”).

280. Cf. *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n*, 518 U.S. 604, 638–39 (1996) (Thomas, J., concurring in the judgment) (“Even in the

stead, whether they contribute to a candidate's campaign organization or bankroll a Super PAC that independently engages in electoral advocacy, funders are underwriting professional service providers who exercise substantial control over whether, when, and how electioneering will occur.²⁸¹ Among other things, professionals make strategic choices about message content, emphasis, tone, and audience, which may result in communications that bear little resemblance to anything the funder might have chosen to say.²⁸²

Contributions and independent expenditures thus both tend to reflect only general support for a campaign cause and leave proxies to figure out the rest. As a result, and contrary to the Supreme Court's suggestion in *Citizens United*, expenditure limits generally do not operate to deny would-be funders "the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."²⁸³ This is not meant to imply that campaign givers and spenders lack constitutionally protected interests. Instead, the upshot is that, from an autonomy perspective, expenditures are akin to contributions, and, accordingly, expenditure limits may not warrant a higher level of judicial scrutiny than contribution limits.²⁸⁴

The campaign industry similarly complicates the Court's second account of the harm associated with campaign finance regulations—namely, that regulation encumbers the free exchange of information and ideas, arguably to the detriment of democratic self-governance.²⁸⁵ This account draws on a First Amendment tradition that prioritizes "the public's interest in receiving information" and embraces "more speech, not less, [as]

case of a direct expenditure, there is usually some go-between that facilitates the dissemination of the spender's message . . .").

281. See Youn, *supra* note 266, at 140–41.

282. *See id.*

283. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340–41 (2010).

284. Justice Stevens similarly advocated dispensing with *Buckley*'s contribution-expenditure distinction and ratcheting down the level of scrutiny applicable to expenditures, though not based specifically on the role of the campaign industry. *See Randall v. Sorrell*, 548 U.S. 230, 273–81 (2006) (Stevens, J., dissenting); *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 399 (2000) (Stevens, J., concurring).

285. *See, e.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 750 (2011); *Citizens United*, 558 U.S. at 354 (invoking "the 'open marketplace' of ideas protected by the First Amendment").

the governing rule.”²⁸⁶ Especially in recent years, the Court has given top billing to this free-market perspective, invoking the expressive interests of individual funders only secondarily.²⁸⁷ The free-market view featured prominently in *Citizens United*, where the Court emphatically condemned restrictions on corporate campaign expenditures, despite corporations’ questionable claims to expressive autonomy.²⁸⁸ The free-market account is also central to ongoing debates about the contribution-expenditure distinction. Individual Justices have urged the Court to jettison the distinction and subject all financing restrictions to strict scrutiny on the ground that “[c]ontributions to political campaigns, no less than direct expenditures, ‘generate essential political speech.’”²⁸⁹ Though the Court has not gone that far, its 2014 decision in *McCutcheon v. Federal Election Commission* “subtly ratcheted up the . . . standard of review of contribution restrictions.”²⁹⁰

The Court’s view that campaign finance regulations invariably stifle electoral discourse rests in part on assumptions about campaigning that the activities and incentives of the campaign industry call into doubt. From *Buckley* forward, the Court has envisioned financial inputs being directly converted into speech

286. *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n*, 475 U.S. 1, 8 (1986) (plurality opinion); *Citizens United*, 558 U.S. at 361; *see also First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776–77 (1978).

287. *See, e.g.*, *Ortiz, supra* note 266, at 266.

288. Compare *Citizens United*, 558 U.S. at 341 (“The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.”), with *id.* at 466–67 (Stevens, J., concurring in part and dissenting in part) (observing that “corporations have no consciences, no beliefs, no feelings, no thoughts, no desires” and asserting that corporate expenditure regulations threaten “no one’s autonomy, dignity, or political equality”).

289. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1462 (2014) (Thomas, J., concurring in the judgment) (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. at 412 (Thomas, J., dissenting)). Justice Thomas wrote separately in *McCutcheon* to endorse strict scrutiny for contribution limits. *See* 134 S. Ct. at 1462–65 (Thomas, J., concurring in the judgment); *see also Nixon*, 528 U.S. at 412–18 (2000) (Thomas, J., dissenting); Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n, 518 U.S. 604, 636–37 (1996) (Thomas, J., concurring in the judgment); Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 55 n.70 (1997).

290. Richard Briffault, *The Uncertain Future of the Corporate Contribution Ban*, 49 VAL. U. L. REV. 397, 398 (2015); *see also McCutcheon*, 134 S. Ct. at 1445–46 (plurality opinion) (casting the standard applicable to contribution limits as similarly “rigorous” to the standard applicable to expenditure limits); Robert Yablon, *Campaign Finance Reform Without Law*, 103 IOWA L. REV. 185, 200–02 (2017) (discussing the Court’s growing skepticism of contribution limits).

outputs—especially into “expensive modes of [mass media] communication,” which the Court has called “indispensable instruments” of modern electioneering.²⁹¹ In reality, substantial sums end up in the pockets of campaign professionals, sometimes for services that clearly facilitate advocacy, but sometimes not.²⁹²

As detailed above, self-interested professionals have pushed capital-intensive campaign strategies—strategies that may be good for their bottom lines, but that do not necessarily maximize the quantity or quality of campaign discourse.²⁹³ While effective electioneering no doubt requires a nontrivial amount of money, campaigns are expensive in part because campaign professionals help to make them expensive.²⁹⁴ The industry relentlessly promotes its offerings and encourages campaigners to engage in relentless fundraising to pay for them.²⁹⁵ Analysts generally agree that, as spending levels increase, campaigners obtain diminishing marginal returns.²⁹⁶ Yet, from the perspective of profit-seeking professionals, the marginal value of campaign funds never declines.²⁹⁷ If anything, it increases, because a campaign organization flush with cash can afford to be more generous toward its service providers. For professionals, bringing money in the door is worthwhile even after the money stops meaningfully advancing discourse and improving clients’ electoral prospects.

Given these dynamics, campaign finance restrictions do not “necessarily reduce[] the quantity of [campaign] expression,” as the Court has long maintained.²⁹⁸ Reasonable contribution and expenditure limits might instead encourage campaigners to be more careful stewards of their funds and reduce some of the

291. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam); *see also* Wilson, *supra* note 3, at 685 (“A critical assumption of [the Court’s] free speech focus is the notion that the primary function of campaign funds is to buy communication. . . . Even proponents of spending limits who express concerns over equality and decry the ability of well-funded interests to ‘drown out’ the opposition often assume a simple correlation between money and message volume.”).

292. *See supra* notes 167–71 and accompanying text.

293. *See supra* Part II.

294. *See supra* notes 88–90, 233 and accompanying text.

295. *See supra* notes 233–34 and accompanying text.

296. *See, e.g.*, Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 140 n.480 (2004); *see also* Chris W. Bonneau & Damon M. Cann, *Campaign Spending, Diminishing Marginal Returns, and Campaign Finance Restrictions in Judicial Elections*, 73 J. POL. 1267, 1267 (2011).

297. *See* Bonneau & Cann, *supra* note 296, at 1268.

298. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam); *see also* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010) (endorsing *Buckley*’s view that expenditure restrictions are necessarily speech-limiting).

windfall that professionals now receive. Limits also might accelerate the shift away from expensive *Buckley*-era mass communication methods toward lower-cost alternatives like social media.²⁹⁹ Budget-conscious campaigns might even end up devoting more attention to old-fashioned “direct one-on-one communication,” which the Supreme Court has called “the most effective, fundamental, and perhaps economical avenue of political discourse.”³⁰⁰ Of course, limits could be set so low that the level of campaign advocacy really would suffer, and at that point, strict constitutional scrutiny may indeed be warranted. But at least above that amount, treating every additional dollar as a unit of speech entitled to maximal First Amendment protection becomes harder to justify.³⁰¹

This analysis may suggest that the Court’s contribution-expenditure distinction actually has things backwards. Recall that agency costs tend to be especially high when campaign professionals assist Super PACs and other independent-expenditure entities, as opposed to candidates and party committees.³⁰² Dollar for dollar, then, contributions to candidates or parties will typically generate more campaign advocacy than funds spent independently. Thus, to the extent the Court embraces a more-speech-is-better conception of the First Amendment, it ought to be relatively more skeptical of contribution limits that shift money away from candidates and parties and toward less accountable groups, and more amenable to limits on independent expenditures that seek to direct money back into more accountable channels.

Shifting from judicial doctrine to policy, accounting for the campaign industry offers a new perspective on campaign finance reform. In particular, recognizing the industry’s central and sometimes deleterious role in the political process may temper enthusiasm for two types of public financing schemes that are currently in vogue among campaign finance scholars and reformers—small-donor matches and vouchers. Matching fund programs use public money to multiply the impact of small private campaign contributions.³⁰³ Voucher programs give individual

299. See Hasen, *supra* note 187, at 201, 216; Sonja R. West, *The “Press,” Then & Now*, 77 OHIO ST. L.J. 49, 90 (2016).

300. Meyer v. Grant, 486 U.S. 414, 424 (1988).

301. Cf. Youn, *supra* note 266, at 155 (criticizing the view that “each dollar of political spending is a quantum of presumptively equivalent First Amendment value”).

302. See *supra* Part II.B.

303. See, e.g., Michael J. Malbin et al., *Small Donors, Big Democracy: New*

citizens a set sum of public money that they can then allocate to their chosen candidates or political groups.³⁰⁴ Both reforms aim to expand citizen participation and diminish the relative influence of wealthy mega-donors.³⁰⁵ In practice, however, they function in part as a subsidy for the campaign industry. According to one tally of money distributed through New York City's matching program, campaign professionals have been the largest financial beneficiaries.³⁰⁶ As a result, matching funds and vouchers may end up reinforcing at least some of the ills associated with the campaign industry. Perhaps the reforms still have a sufficient upside to make them worthwhile, but it is important to be clear-eyed about this unintended side effect.

More broadly, the campaign industry's dominance raises questions about the value of inducing more small donors to contribute to campaigns.³⁰⁷ Candidates sometimes make it a priority to attract small donors and boast that their broad funding base makes them less beholden to special interests.³⁰⁸ Grassroots funding strategies, however, rarely translate into truly grassroots campaigns. Small contributions—like big ones—tend to end up underwriting the work of campaign professionals, and those professionals sometimes reap windfalls from candidates' small-donor fundraising success.³⁰⁹ Senator Bernie Sanders' 2016 presidential campaign is a case in point. Sanders raised more than \$200 million, mostly from small donors, and spent the bulk of it on television, radio, and online advertisements, resulting in millions of dollars of commissions for his media and digital consultants.³¹⁰ Small donors, moreover, generally have limited

York City's Matching Funds as a Model for the Nation and States, 11 ELECTION L.J. 3, 4–5 (2012); Spencer Overton, *Matching Political Contributions*, 96 MINN. L. REV. 1694, 1696 (2012).

304. See, e.g., BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 142 (2004); HASEN, *supra* note 235, at 89–90.

305. See, e.g., HASEN, *supra* note 235, at 89–90.

306. See *Campaign Expenditures Revealed*, 10 CITYLAW 146 (2004) (citing N.Y.C. CAMPAIGN FIN. BOARD, CITY COUNCIL ELECTIONS: A REPORT BY THE CAMPAIGN FINANCE BD., at 25 (Sept. 2004)) (finding that consultants were the single largest line item).

307. Cf. Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 105–06 (2004) (advocating broader public participation in the funding of campaigns).

308. See Yablon, *supra* note 290, at 219–20.

309. See Clifton & Holland, *supra* note 159 (suggesting that it is “easier to run against the establishment and rail about its perfidy than it is to escape the habits of its campaign apparatus”).

310. See, e.g., *id.*; Gold & Narayanswamy, *supra* note 159.

incentives and ability to supervise campaign professionals, potentially giving professionals more control (and more opportunities for mischief) as campaigns become more diffusely funded.³¹¹ Again, the point here is not to condemn efforts to broaden the sources of campaign funds, but instead to identify some potential tradeoffs and limitations.

What about other reform options? If accounting for the campaign industry somewhat weakens the case for injecting new money from taxpayers or small donors into campaigns, it may somewhat strengthen the case for expenditure limits. Reasonable caps on donor and campaigner spending could incentivize more efficient campaigning and constrain profligate campaign professionals. Of course, expenditure limits are basically non-starters under existing judicial doctrine, and that is unlikely to change any time soon.³¹²

A potential alternative for reformers might be to redirect attention from public financing toward the creation of a public campaign infrastructure. Perhaps candidates could be given airtime, or access to media production capabilities, or polling data—assets that might reduce their reliance on paid professionals and thus their demand for campaign funds.³¹³ This is a possibility that commentators and policymakers have not fully explored. Additionally, reformers might consider making the campaign industry, rather than campaign money, the object of their regulatory efforts—an option examined in Part IV. First, however, the next Section turns from the campaign industry's implications for campaign finance to the industry's implications for political parties.

B. POLITICAL PARTIES

From the beginning, the story of the campaign industry has been bound up with the story of political parties. As recounted in Section I.A, the campaign industry emerged partly in response to legal changes that weakened traditional party organizations. The interplay between parties and the campaign industry continues to this day, with each influencing the other in an interde-

311. See *infra* notes 427–29 and accompanying text.

312. See *supra* notes 275–77, 285–90 and accompanying text.

313. Cf. Jeremy Paul, *Campaign Reform for the 21st Century: Putting Mouth Where the Money Is*, 30 CONN. L. REV. 779, 782 (1998) (suggesting mandatory joint appearances for competing candidates).

pendent fashion. Acknowledging the campaign industry thus refines existing accounts of the structure and status of modern political parties and informs ongoing discussions of party reform.

Because the campaign industry stepped in as the parties lost clout, commentators have traditionally cast the relationship between them as essentially zero sum and oppositional: declining parties created an opening for the campaign industry, and, over time, the industry's rise undercut the parties even more.³¹⁴ In other words, this classic account envisions the industry thriving at the parties' expense, and vice versa.

In reality, the relationship between the parties and the campaign industry is more nuanced, in large part because parties are complex and fluid entities—a point astutely made in recent work by Joseph Fishkin and Heather Gerken, Samuel Issacharoff, and Richard Pildes, among others.³¹⁵ Parties encompass and strive to accommodate an array of stakeholders through multiple organizational mechanisms. Over time, the influence of various players and constituent institutions may wax and wane, and a party may appear strong by some measures and weak by others.³¹⁶ The campaign industry affects and is affected by these internal party dynamics. The industry has not so much subverted the party system; instead, it has played a role in reconstituting it.

Taking this idea further, the campaign industry and the two major parties have arguably coevolved and coalesced into extensions of one another. As noted earlier, most campaign professionals and firms align themselves with the Democrats or Republicans and provide services exclusively for candidates and committees associated with that party.³¹⁷ They, therefore, appear to reside within what Fishkin and Gerken have called “the party writ large”—a phrase used to convey that parties encompass not just formal party organizations, but also a network of

314. See, e.g., SABATO, POLITICAL CONSULTANTS, *supra* note 1, at 286; Grossmann, *Going Pro?*, *supra* note 83, at 82; Martin & Peskowitz, *supra* note 175, at 444 (“The early literature on the party-consultant nexus contended that the rise of political consultants had weakened parties by creating a locus of campaign expertise that was independent of formal party structures.” (citing SABATO, POLITICAL CONSULTANTS, *supra* note 1)).

315. See Fishkin & Gerken, *The Party's Over*, *supra* note 22, at 177; Issacharoff, *supra* note 22, at 847; Pildes, *supra* note 31, at 829–30.

316. See Fishkin & Gerken, *The Party's Over*, *supra* note 22, at 177 (identifying key strengths and weaknesses of modern U.S. parties).

317. See *supra* note 130 and accompanying text.

unofficial confederates.³¹⁸ Indeed, outside political consultants often have close ties to the official party apparatus. Many once worked within it, and even those who did not have incentives to connect themselves to party officials who may direct business their way.³¹⁹ Accordingly, professionals and their firms may be better understood as participants within party networks rather than as outside threats to them.³²⁰ They are essentially the parties' powerful for-profit affiliates.

The campaign industry's clout thus helps to explain the present-day condition of the parties. Campaign professionals contribute to what others have recognized as the major parties' enduring source of strength—namely, their potent political brands.³²¹ The parties are more ideologically distinctive than in past decades, and each commands the loyalty of a large swath of the electorate.³²² Campaign professionals serve in part as brand managers for the party labels. This characterization may seem at odds with the oft-stated observation that campaign professionals run candidate-centered as opposed to party-centered campaigns.³²³ But it is not. As they work on behalf of individual candidates, professionals often seek to win over and mobilize partisans by aligning their candidates with the party brand—or by attempting to realign the brand to fit their candidates. The

318. Fishkin & Gerken, *The Party's Over*, *supra* note 22, at 177–78; see also Kang, *supra* note 33, at 595–96 (“The party writ large is a broad, far flung coalition of political actors that includes not only the formal party committees, officeholders, and candidates, but high-level party donors, party-allied interest groups, intellectual leaders and pundits, and even grassroots volunteers and sympathetic voters.”).

319. Thurber, *Portrait*, *supra* note 199, at 13 (“[T]he most common past experience or training cited by professional consultants was working for a national, state, or local party or party committee.”); see also Kolodny & Logan, *supra* note 130, at 156; Martin & Peskowitz, *supra* note 175, at 445. For more on the structure and function of modern party organizations, see Andrias, *Hollowed-Out Democracy*, *supra* note 186, at 48–51 (describing the national party committees as “function[ing] primarily as campaign service vendors”).

320. Kolodny & Logan, *supra* note 130, at 155–56 (contending that “the allied view” of consultant-party relationships depicts reality better than “the adversarial view”).

321. See, e.g., Fishkin & Gerken, *The Party's Over*, *supra* note 22, at 187 (“[A] party today is best understood as a loose coalition of diverse entities . . . organized around a popular national brand.”).

322. *Id.* at 183–84.

323. See, e.g., SHEINGATE, *supra* note 1, at 6–8 (contrasting party agents, who were hired by party leaders, with political consultants who work for individual candidates); Pildes, *supra* note 31, at 835 (referring to the “candidate-centered nature” of campaign systems).

brand serves as a sought-after prize.³²⁴ Consider recent intra-party contests that have been portrayed as battles for each party's soul.³²⁵ Moreover, in addition to their candidate work, some professionals take on explicit brand-building assignments on behalf of official party organizations.³²⁶

The campaign industry's branding success enables the parties to carry on despite their organizational weakness. Others have rightly described the modern Democratic and Republican parties as "hollowed-out," meaning that they are no longer meaningful sites of democratic engagement and contestation among ordinary citizens and activists.³²⁷ State and local party

324. See, e.g., Fishkin & Gerken, *The Party's Over*, *supra* note 22, at 211 (asserting that "party brands . . . are up for grabs in each election cycle, as different entities attempt to capture the party writ large"); Issacharoff, *supra* note 22, at 847 (discussing candidates' efforts during the 2016 presidential election to capture their parties' brands).

325. See, e.g., Molly Ball, *Who's Winning the Democrats' Civil War?*, TIME (May 22, 2018), <http://time.com/5286367/stacey-abrams-georgia-governor-democrat> (highlighting how the 2018 primary elections are viewed as wars over the soul of the Democratic Party); Ben Jacobs, *Battle for the Soul of the Republican Party Rages on in Alabama Race*, GUARDIAN (Sept. 25, 2017), <https://www.theguardian.com/us-news/2017/sep/25/battle-for-the-soul-of-the-republican-party-rages-on-in-alabama-race> (reporting on a U.S. Senate primary election in Alabama as the "latest proxy battle in the seemingly never-ending fight between the Republican establishment and the grassroots of the party"); R.G. Ratcliffe, *Texas Republicans Escalate Their War—on Each Other*, TEX. MONTHLY (Feb. 16, 2018), <https://www.texasmouthly.com/article/texas-republicans-escalate-war> (discussing the Texas primary elections and the divisions between Republican candidates along the spectrum of conservative views); Graham Vyse, *Massachusetts Is Ground Zero in the Battle for the Soul of the Democratic Party*, NEW REPUBLIC (Aug. 3, 2017), <https://newrepublic.com/article/144176/massachusetts-ground-zero-battle-soul-democratic-party> ("Massachusetts has become a microcosm of the divisions within the Democratic Party and the battle over its future."); David Weigel, *In Governors' Races, Candidates Battle Over What the Democratic Party Stands for*, WASH. POST: POWERPOST (Apr. 29, 2018), https://www.washingtonpost.com/powerpost/in-governors-races-candidates-battle-over-what-the-democratic-party-stands-for/2018/04/29/5418d174-4271-11e8-bba2-0976a82b05a2_story.html (describing different Democrats' campaign strategies and platforms).

326. See Sean A. Cain, *Political Consultants and Party-Centered Campaigning: Evidence from the 2010 U.S. House Primary Election Campaigns*, 12 ELECTION L.J. 3, 4–5 (2013) (distinguishing consultants working explicitly with parties from those working with candidates).

327. See, e.g., Fishkin & Gerken, *The Party's Over*, *supra* note 22, at 212 (expressing concern about "the parties being hollowed out and thereby losing their ability to serve as robust democratic arenas"); Fishkin & Gerken, *Two Trends*, *supra* note 22, at 47 (same); Issacharoff, *supra* note 22, at 847 (observing that, during the 2016 presidential election, "[t]he parties proved hollow vehicles that offered little organizational resistance to capture by outsiders").

entities have become especially marginalized.³²⁸ Rather than relying on the party's internal machinery, the campaign industry has channeled campaign activity through the mass media and, as necessary, developed more campaign-specific grassroots networks.³²⁹

By making it possible for the parties to retain their electoral salience without vesting significant responsibility in rank-and-file activists and party officials, the campaign industry has facilitated a power transfer within parties toward the elites at the top.³³⁰ Until recently, national party leaders were the beneficiaries of this shift. Today, however, the campaign industry is facilitating a power transfer to a new breed of elites—ones who exert influence primarily outside the parties' formal structures.³³¹ In particular, wealthy funders are enlisting campaign professionals to establish and operate Super PACs and other entities that aim to influence the official party apparatus and shape party brands.³³² The campaign industry is, practically speaking, what enables these new power centers to function.³³³ Sometimes dubbed “shadow parties,”³³⁴ such entities do not merely increase the sway of the plutocrats who provide the financing. They also aggrandize campaign professionals, since, as noted earlier, professionals often have significant leeway to direct these campaign vehicles in the manner of their choosing.³³⁵

328. See Fishkin & Gerken, *The Party's Over*, *supra* note 22, at 176 (“State parties . . . have become pale shadows of their former selves.”); Waismel-Manor, *supra* note 126, at 363 (“The second negative outcome of professionalization is its contribution to a further waning of local party organizations.”).

329. See, e.g., Samuel Issacharoff, *Market Intermediaries in the Post-Buckley World*, 89 N.Y.U. L. REV. ONLINE 105, 109–10 (2014), <http://www.nylawreview.org/issues/volume-89-online-symposium/response-market-intermediaries-post-buckley-world> (describing the Obama campaign’s creation of its own campaign structures for the 2008 and 2012 presidential races and its disregard of preexisting state-level party organizations).

330. See Fishkin & Gerken, *The Party's Over*, *supra* note 22, at 205 (“[T]he status of the party faithful within the party has eroded considerably in recent decades.”).

331. See *id.* at 176 (“‘Outside’ groups—groups that are neither official party entities nor candidate campaigns—have taken over a startling array of core party functions.”).

332. See *id.* at 191–92 (describing how funders try to steer parties).

333. See *id.* at 186 (observing that funders enlist big-name campaign professionals to help advance their agendas).

334. *Id.* at 177.

335. See *supra* notes 166–71 and accompanying text (describing the lack of oversight among Super PACs and similar organizations).

What does all this mean for party reform? Commentators have been debating proposals to reinvigorate official party structures, including by lifting caps on contributions to party organizations and allowing them to receive unlimited funds.³³⁶ Such deregulation of party financing seems unlikely to work a sea change because it would do little to change the incentives of the campaign industry. Campaign professionals would presumably continue to encourage the wealthy to support independent groups because such groups give their funders—and, not coincidentally, professionals themselves—maximum flexibility to pursue particular political objectives.³³⁷ To the extent that donors do direct more funds to official party organizations, the parties are likely to end up hiring the same professionals. Official party organizations may subject those professionals to somewhat closer supervision than independent groups, but because campaign consultants will be answering to national party elites, their work will almost certainly remain brand-oriented. They are unlikely to be tasked with revitalizing the parties from the bottom up.³³⁸

Loosening the grip of campaign professionals and their patrons on the parties is likely to require reforms that aim to rebuild party infrastructures from their local and state foundations and to bolster the in-house capacities of the parties to do their own campaigning. Some potential reforms along these lines may involve tradeoffs not worth making. For example, whatever the faults of our industry-dominated politics, it is far from clear that we would be better off returning to patronage and the spoils system.³³⁹ Instead, directing funds toward community-level party actors and reforming party rules to give those actors greater voice and responsibility may offer a more palatable path.

336. See, e.g., Kang, *supra* note 33, at 531 (discussing and critiquing such deregulation proposals).

337. Cf. Fishkin & Gerken, *The Party's Over*, *supra* note 22, at 197 (identifying reasons for large donors to establish their own organizational networks rather than contribute to official party entities, such as retaining authority over personnel and strategy).

338. Cf. Kang, *supra* note 33, at 536 ("It is difficult to believe that deregulating the parties to engage in the same type of courting and solicitation of the very wealthy as Super PACS will do much to mitigate the ongoing distributional shift of the campaign finance system toward the interests of the very wealthy.").

339. See Issacharoff, *supra* note 22, at 850 ("Party politics dominated by backroom deals, well-lubricated with funds of sketchy provenance and reinforced by public employment of oftentimes scant public interest, is hardly a normatively compelling account of a healthy democracy.").

IV. CONTEMPLATING REFORM

As the discussion in Part III indicates, campaign finance regulation and political party reform offer two potential mechanisms for checking the campaign industry. Such interventions could seek to stem the flow of funds that sustain the industry and establish alternative outlets for campaign activity. Another strategy is to pursue industry reform head-on. The campaign industry has long operated with strikingly little direct public or private oversight,³⁴⁰ although that may be beginning to change. In recent years, a smattering of state and local governments have begun regulating campaign professionals, or at least considered doing so—perhaps evincing a nascent trend. Still, compared to lobbyists, lawyers, and many other professional service providers, campaign professionals remain lightly superintended.

This Part does not develop detailed policy proposals nor advocate for a particular prescriptive path. Rather, it explores three categories of interventions that governmental and nongovernmental actors might pursue: first, substantive regulations on industry practices; second, regulations to promote transparency; and third, private ordering mechanisms. For each category, it identifies a range of possible correctives and offers preliminary reflections on attendant legal and practical issues.

Several considerations are likely to inform one's views about the need for and value of particular interventions. Among other things, observers may disagree about the severity and relative importance of the campaign industry's pathologies. They may have divergent visions of the campaign industry's proper role relative to other institutional actors, including party organizations and the media. They also may make different judgments about the constitutionality or political viability of various actions. This Article seeks to generate discussion of these matters, not settle the debate.

Before proceeding to specifics, one overarching word of caution: interventions in this area may well entail tradeoffs. Measures to protect candidates and donors from unscrupulous

340. See De Vries, *supra* note 85, at 23 (noting that campaign consultants are not “licensed, regulated, or made in any way to conform to standards of conduct generally associated with every other professional group. . . . All you have to do is say that you are one and then you are”); see also LATHROP, *supra* note 137, at 4, 120 (discussing the lack of democratic accountability for political consultants and their exclusion from rules governing lobbyists and elected officials); Zeng, *supra* note 3, at 439 (articulating the ambiguous definition of consultant).

professionals might address some real concerns about the campaign industry's conduct, but they also might improve the efficiency of campaign entities like Super PACs and thus help wealthy interests advance their electoral and policy goals. Conversely, some efforts to address the industry's systemic consequences could make campaign professionals less valuable to their clients. For example, barring candidates from paying victory bonuses to campaign staff and consultants might reduce professionals' incentives to fight dirty, but it also might diminish their will to win.³⁴¹ This does not mean that reform is necessarily a zero-sum endeavor. Reformers may well conclude that the benefits achieved on one front outweigh the costs imposed on another, and some measures may simultaneously produce improvements along multiple dimensions.

A. SUBSTANTIVE REGULATION

Perhaps the most obvious way to try to address ills associated with the campaign industry is by imposing regulatory constraints on the conduct of campaign professionals. This could include limitations on professionals' offerings, rates, or clients. For the most part, the campaign industry has not faced such direct regulation at any level—federal, state, or local.³⁴² But this is not entirely uncharted territory. As discussed below, a few past and present attempts at campaign industry regulation, as well as regulatory activity in analogous areas, such as lobbying, offer guidance about the types of measures that might be pursued.

Of course, this is an area in which the First Amendment casts a long shadow. The relationships between campaigners and campaign professionals involve core political association, and campaigners hire professionals in part to facilitate campaign discourse—that is, core political speech.³⁴³ As a result, regulations that would outright prohibit campaign professionals from serving campaigns are probably constitutional nonstarters. They would simply intrude too deeply on protected electoral advocacy. Direct regulation is more likely to be a tool to curb some

341. Cf. SABATO, POLITICAL CONSULTANTS, *supra* note 1, at 304 (suggesting that political consultants' desire for both victory and profit encourages a "win-at-all-costs philosophy").

342. See *supra* note 340 and accompanying text.

343. Cf. Buckley v. Valeo, 424 U.S. 1, 50 (1976) (per curiam) ("[L]egislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment.").

of the industry's excesses rather than to displace the industry entirely.

The Supreme Court's decision in *Meyer v. Grant* is instructive.³⁴⁴ At issue in *Meyer* was a Colorado law that barred anyone trying to get an initiative on the ballot from paying petition circulators to gather the necessary signatures.³⁴⁵ In other words, the law sidelined professionals and left a particular type of campaign-related activity exclusively in the hands of uncompensated volunteers.³⁴⁶ The Court unanimously invalidated the law.³⁴⁷ The First Amendment, the Court declared, guarantees initiative proponents the right "not only to advocate their cause but also to select what they believe to be the most effective means for so doing"—namely, hiring petition circulators.³⁴⁸ Applying strict scrutiny, the Court held that the state's asserted interests in ensuring that initiatives had grassroots support and in protecting the integrity of the initiative process did not suffice to justify the law.³⁴⁹ Other cases have similarly decried governmental interference with campaigning.³⁵⁰

344. 486 U.S. 414 (1988).

345. *Id.* at 417.

346. See *id.* at 423–26 (analyzing the law's effects on the ballot-initiative petition process).

347. *Id.* at 416.

348. *Id.* at 424. Courts have applied *Meyer*'s reasoning to invalidate laws that require signature gatherers to be local residents or registered voters in the state. See *Nader v. Blackwell*, 545 F.3d 459, 472–75 (6th Cir. 2008); *Lerman v. Bd. of Elections of N.Y.*, 232 F.3d 135, 146 (2d Cir. 2000); *Bernbeck v. Moore*, 126 F.3d 1114, 1116 (8th Cir. 1997); *Morrill v. Weaver*, 224 F. Supp. 2d 882, 899 (E.D. Pa. 2002). Courts have also struck down laws requiring disclosure of paid circulators' names and addresses. See *Wash. Initiatives Now v. Rippie*, 213 F.3d 1132, 1138 (9th Cir. 2000).

349. *Meyer*, 486 U.S. at 425–28; see also *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.").

350. See, e.g., *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011) ("[I]n a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the 'unfettered interchange of ideas—not whatever the State may view as fair.'"); *Buckley v. Valeo*, 424 U.S. 1, 57 (1976) (per curiam) ("In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.").

Although the First Amendment may preclude measures to put campaign professionals out of business, at least some constitutional space likely remains for more modest regulations on industry practice. Notably, some longstanding campaign finance rules already constrain campaign professionals in various respects. Federal law, for instance, bars professionals—and anyone else—from converting contributions to a candidate committee to personal use.³⁵¹ Officers and employees of political committees also may not knowingly accept contributions in excess of the legal limits applicable to their organizations,³⁵² or improperly coordinate the activities of a campaign committee and an independently financed group.³⁵³ Indeed, federal anti-coordination rules expressly consider whether a candidate and an outside group share a “commercial vendor.”³⁵⁴

Given that campaigners turn to professionals in part to help navigate election-related laws, one potential regulatory reform is simply to place additional responsibility for compliance on professionals. For example, reforms might broaden the circumstances in which liability for campaign finance violations and other malfeasance attaches not merely to campaign committees,

351. See 52 U.S.C. § 30114(b) (2016) (“A contribution or donation . . . shall not be converted by any person to personal use.”).

352. See *id.* § 30116(f) (“No officer or employee of a political committee shall knowingly accept a contribution . . . in violation of any limitation imposed . . . under this section.”). Similarly, federal law prohibits campaign professionals—and anyone else—from soliciting, accepting, or receiving improper contributions from foreign nationals. See *id.* § 30121(a)(2) (“It shall be unlawful for . . . a person to solicit, accept, or receive a contribution or donation . . . from a foreign national.”). It also provides that no agent of a federal candidate may “fraudulently misrepresent himself . . . as speaking or writing or otherwise acting for or on behalf of any other candidate . . . on a matter which is damaging to such other candidate,” and no person—agent or not—may engage in such fraudulent misrepresentations “for the purpose of soliciting contributions.” *Id.* § 30124(a), (b).

353. See *Campaign Manager Pleads Guilty to Coordinated Campaign Contributions and False Statements*, U.S. DEPT JUST. (Feb. 12, 2015), <https://www.justice.gov/opa/pr/campaign-manager-pleads-guilty-coordinated-campaign-contributions-and-false-statements> (“Campaign finance laws exist to guard against illegal activity such as coordinated contributions.”) (internal quotations omitted).

354. 11 C.F.R. § 109.21(h)(1) (2016). The rules establish a safe harbor if the vendor uses a firewall “to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing services to the candidate.” *Id.*; cf. *Shays v. Fed. Election Comm’n*, 528 F.3d 914, 929–30 (D.C. Cir. 2008) (rejecting an administrative law challenge to the validity of the firewall regulation).

but to professionals themselves.³⁵⁵ This could help align the incentives of professionals and their clients and encourage campaigns to heed existing law. Separately, Congress could take the straightforward step of broadening the ban on converting campaign funds to personal use. It currently applies only to candidate committees and does not cover misappropriations of funds donated to party committees, PACs, and other entities.³⁵⁶ This is a change that the Federal Election Commission has specifically recommended.³⁵⁷

Somewhat more ambitiously, reformers could pursue regulation to minimize potential conflicts of interest or influence peddling.³⁵⁸ In the world of lobbying, jurisdictions commonly impose anti-revolving door rules that require former government officials to wait a certain period of time before they may begin to lobby.³⁵⁹ Analogous waiting periods could be established for campaign professionals. A few already exist at the local level. Since 2004, for example, San Francisco, California has required campaign professionals to wait five years before lobbying municipal officials who have been their clients.³⁶⁰ Miami Beach, Florida recently adopted a measure precluding campaign professionals from lobbying local officials for one year after working on a municipal election campaign.³⁶¹ Similar measures have been considered but not enacted in New York State, Seattle, Washington,

355. Cf. Sean J. Miller, *More Scrutiny on Fundraisers? Some Practitioners Say It's About Time*, CAMPAIGNS & ELECTIONS (June 21, 2017), <https://www.campaignsandelections.com/campaign-insider/more-scrutiny-on-fundraisers-some-practitioners-say-it-s-about-time> (discussing the desire for increased federal scrutiny of scam PACs and bad actors in political fundraising).

356. See FED. ELECTION COMM'N, LEGISLATIVE RECOMMENDATIONS OF THE FEDERAL ELECTION COMMISSION 10 (2017), <https://www.fec.gov/resources/cms-content/documents/legrec2017.pdf> ("Congress should amend the Federal Election Campaign Act's prohibition of the personal use of campaign funds to extend its reach to all political committees.").

357. *Id.*

358. See SABATO, POLITICAL CONSULTANTS, *supra* note 1, at 310 ("Political consultant firms simply should not handle the accounts of groups that are lobbying officials the consultants have helped elect.").

359. See Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 207 (2012) (surveying state anti-revolving door provisions). But cf. David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507, 511, 546 (2013) (critiquing anti-revolving door regulations and highlighting benefits of the revolving door phenomenon).

360. S.F. Campaign & Governmental Conduct Code § 2.117 (2018).

361. Joey Flechas, *Miami Beach Bans Lobbying by Political Consultants for 12 Months After Elections*, MIAMI HERALD (June 29, 2017), <http://www.miamiherald.com/news/local/community/miami-dade/miami-beach/article158822309.html>.

and Portland, Oregon.³⁶² One practical difficulty with such revolving-door measures is that campaign professionals, like former government officials, may find ways to exert influence that do not fall within the definition of lobbying.³⁶³ At a minimum, jurisdictions could restrict individuals from serving simultaneously as a government official or staffer and as a paid political consultant. At the federal level, House and Senate ethics rules constrain this practice,³⁶⁴ but states and localities often fail to address it.³⁶⁵

Along similar lines, reformers could seek to slow the revolving door between campaign committees and outside consulting firms, or at least preclude individuals from holding an in-house campaign role while simultaneously maintaining a stake in an outside firm that does business with the campaign. In this regard, the Federal Election Commission recently encouraged Congress to “consider adding standards addressing payments to

362. The New York measure was first introduced in the state legislature in 2013 and most recently reintroduced in 2017. See S. 1449, 2017–2018 Reg. Sess. (N.Y. 2017), <https://www.nysenate.gov/legislation/bills/2017/s1449/amendment/original#>; Ken Lovett, *‘Firewall’ Bill vs. Lobbyists: Campaign Consultants Would No Longer Be Allowed to Turn Around and Lobby Those They Help Elect*, N.Y. DAILY NEWS (May 6, 2013), <http://www.nydailynews.com/new-york/firewall-bill-lobbyists-campaign-consultants-no-longer-allowed-turn-lobby-elect-article-1.1335975> (describing newly introduced bill and its would-be impact on consultants and lobbyists). Regarding Seattle and Portland, see Jim Brunner, *Seattle Mayoral Aide Sees Conflict of Interest in Lobbying by Political Consultants*, SEATTLE TIMES (Oct. 23, 2017), <https://www.seattletimes.com/seattle-news/politics/seattle-mayoral-aide-sees-conflict-of-interest-in-lobbying-by-political-consultants/>; Brad Schmidt, *Portland Weighing Rules on Lobbying by Political Consultants*, OREGONIAN (Sept. 21, 2015), https://www.oregonlive.com/portland/index.ssf/2015/09/portland_weighing_rules_on_lob.html.

363. Cf. Hasen, *supra* note 359, at 247–48 (observing that former officials structure their activities to avoid lobbying registration requirements); Janine R. Wedel, *Rethinking Corruption in an Age of Ambiguity*, 8 ANN. REV. L. & SOC. SCI. 453, 483 (2012) (discussing “shadow lobbyists” who “evade the legal requirements, such as registration, of the venues in which they operate”).

364. See H. COMM. ON STANDARDS OF OFFICIAL CONDUCT, U.S. House of Representatives, 110TH CONG., HOUSE ETHICS MANUAL 218 (2008) (prohibiting receipt of compensation for various consulting activities); S. SELECT COMM. ON ETHICS, U.S. SENATE, 108TH CONG., SENATE ETHICS MANUAL 71–74, 95–96 (2003) (providing examples of permissible and impermissible political activity).

365. Missouri recently banned state legislators from serving as paid political consultants. H.B. 1983, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016). A bill to extend the ban to legislative staff was recently introduced but has not passed. See Marshall Griffin & Jason Rosenbaum, *Ethics and Appointments Highlight First Day of Missouri 2018 Legislative Session*, ST. LOUIS PUB. RADIO (Jan. 3, 2018), <http://news.stlpublicradio.org/post/ethics-and-appointments-highlight-first-day-missouri-2018-legislative-session>.

vendors with financial relationships with the individuals who establish or operate political committees.”³⁶⁶ Lawmakers could also impose waiting periods or other constraints on corporate or international work (whether for foreign governments or on foreign campaigns). And to the extent they have concerns about campaign firms merging into global public relations or advertising conglomerates,³⁶⁷ they could seek to limit such restructuring. Measures such as these may help to minimize potential conflicts of interest without unduly hampering the campaign industry’s ability to operate. Rules addressing conflicts of interest in other contexts, such as lobbying, government employment and contracting, securities, or corporate governance, could offer guidance.³⁶⁸

Taking a slightly different tack, jurisdictions could place the onus for avoiding improprieties on officeholders rather than campaign professionals. Specifically, officeholders could be required to recuse themselves from matters in which their campaign consultants have a direct stake or lobbying role. San Jose, California has a rule along these lines. City council members must abstain when someone who acted as their campaign consultant within the twelve months before their election is a party, or represents a party, on a matter that comes before them.³⁶⁹ There may be constitutional limits, however, on how far recusal rules can extend. Justice Kennedy has suggested that barring an official “from voting on matters advanced by or associated with a political supporter” raises First Amendment concerns.³⁷⁰

366. FED. ELECTION COMM’N, *supra* note 356, at 7.

367. See *supra* notes 147–49 and accompanying text (describing the size and scope of political advertising conglomerates).

368. See, e.g., 18 U.S.C. §§ 203, 207, 208 (2016) (addressing conflicts of interest and self-dealing by federal officials); Ethics in Government Act of 1978, Pub. L. No. 95-521, §§ 501–02, 92 Stat. 1824 (disqualifying former government employees and public officials from certain activities due to conflicts of interest); TEX. GOVT CODE § 305.028 (2016) (delineating prohibited conflicts of interest for registered lobbyists and describing procedures for giving notice of conflicts and obtaining client consent); see also Claire Hill & Richard Painter, *Compromised Fiduciaries: Conflicts of Interest in Government and Business*, 95 MINN. L. REV. 1637, 1650–78 (2011) (surveying conflict of interest laws governing the corporate sector); Jonathan Macey, *The Nature of Conflicts of Interest Within the Firm*, 31 J. CORP. L. 613, 613 (2006) (highlighting the ubiquity of conflicts of interest in business and the need for correctives).

369. SAN JOSE, CAL., MUNICIPAL CODE §§ 12.22.210, 12.22.220, 12.22.300 (2000).

370. Nev. Comm’n on Ethics v. Carrigan, 564 U.S. 117, 131 (2011) (Kennedy, J., concurring). *Carrigan* involved a city council member who voted on a development project for which his campaign manager was a paid consultant and was

Additionally, reformers could attempt to curb industry abuses by regulating the rates and fees campaign professionals charge. Regulation could, for instance, cap or eliminate commission-based compensation arrangements in an effort to discourage professionals from overemphasizing those campaign activities that are most easily monetized. Similarly, reformers could consider whether to limit the use of incentives such as victory bonuses. While compensating professionals based in part on their clients' electoral success may usefully help align incentives, it can also tempt professionals to engage in unscrupulous conduct to improve their clients' prospects. Again, regulatory schemes that apply to other professionals, such as lobbyists and lawyers, could serve as models. Most states, for instance, bar lobbyists from receiving fees contingent on the passage of favorable legislation.³⁷¹ Moreover, some jurisdictions already regulate one narrow category of election-related compensation—namely, fees associated with signature gathering for ballot access. These jurisdictions restrict paying petition circulators based on the number of signatures they obtain out of concern that per-signature payments encourage fraud.³⁷² Such regulations are narrower

then censured by the Nevada Commission on Ethics for violating the state's general recusal law. *Id.* at 119–21. The Court rejected Carrigan's contention that he had a First Amendment right to cast the vote, but declined to consider whether the Commission's application of its recusal rule unlawfully burdened the associational rights of Carrigan and his supporters because the argument was not properly before it. *Id.* at 128–29.

371. See, e.g., Hasen, *supra* note 359, at 207 (reporting that forty-three states ban contingent-fee lobbying). Courts have upheld such contingency-fee restrictions. See Fla. League of Prof'l Lobbyists, Inc. v. Meggs, 87 F.3d 457, 457 (11th Cir. 1996) (holding that the First Amendment allows state prohibitions on contingency fees); see also Meredith A. Capps, Note, “*Gouging the Government? Why a Federal Contingency Fee Lobbying Prohibition Is Consistent with First Amendment Freedoms*,” 58 VAND. L. REV. 1885, 1891 (2005) (“Bans on contingency fee lobbying contracts . . . have generally withstood constitutional challenge in the courts.”). Some commentators, however, have questioned their constitutionality. See Stacie L. Fatka & Jason Miles Levien, Note, *Protecting the Right to Petition: Why a Lobbying Contingency Fee Prohibition Violates the Constitution*, 35 HARV. J. ON LEGIS. 559 (1998) (“[A] ban on contingency fee agreements unduly burdens one's First Amendment right to petition the government.”).

372. See, e.g., OR. CONST. art. IV, § 1b (“It shall be unlawful to pay or receive money . . . based on the number of signatures obtained on [a] . . . petition.”); N.Y. ELEC. LAW § 17-122(4) (2017) (prohibiting payment on a per-signature basis). A few states have limited additional rate regulation. Utah prohibits any person who receives expenditures from a candidate or campaign committee to charge rates that “exceed the charges made for comparable use to any other person considering the amount of use, frequency of use, and applicable discounts.” UTAH CODE § 20A-11-903 (2012). While the provision has been in place

than the categorical ban on paid circulators that the Supreme Court invalidated in *Meyer*.³⁷³

To be clear, the extent to which the First Amendment limits regulations of the sort described above remains an open question. The record in related contexts is mixed. Existing revolving-door rules for lobbyists, for example, have encountered limited resistance,³⁷⁴ although some observers have expressed concern that the Supreme Court's recent deregulatory orientation in campaign finance cases could call such regulations into question.³⁷⁵ Per-signature fee regulations have withstood constitutional challenge in three federal appellate courts,³⁷⁶ but they have been invalidated in a fourth and in several federal district courts.³⁷⁷ Meanwhile, the Supreme Court on several occasions has invalidated restrictions on charitable fundraising practices, articulating a fairly broad conception of the First Amendment rights at stake.³⁷⁸ Those rulings could be invoked to challenge

since 1995, it has never been invoked in reported litigation. New Jersey prohibits campaigns from paying workers in cash, perhaps in an effort to hinder vote-buying schemes. *See Campaign Contributions and Expenditures Reporting Act*, N.J. STAT. § 1944A-11.7 (1993) (requiring payment by check).

373. *See* 486 U.S. 414, 415–16 (1988) (striking down general prohibition on paying petition circulators).

374. *See, e.g.*, United States v. Nasser, 476 F.2d 1111, 1115–16 (7th Cir. 1973) (rejecting challenges to a revolving door law); Richard Briffault, *The Anxiety of Influence: The Evolving Regulation of Lobbying*, 13 ELECTION L.J. 160 (2014) (discussing revolving door regulation as one technique to regulate lobbying); Joseph P. Tomain, *Gridlock, Lobbying, and Democracy*, 7 WAKE FOREST J. L. & POL'Y 87, 134 (2017) (observing that revolving door restrictions are “generally considered legitimate”).

375. *See, e.g.*, Hasen, *supra* note 371, at 19. *But cf.* Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1194 (2016) (cautioning against conflating constitutional analysis of lobbying regulation and election regulation). In 2010, a federal district court invalidated an Ohio revolving door law, but that case may be aberrational, in part because the state conceded that the law was subject to strict scrutiny. *See* Brinkman v. Budish, 692 F. Supp. 3d 855, 861 (S.D. Ohio 2010) (noting Defendant's strict scrutiny concession); McKinley, *supra*, at 1195 (describing *Brinkman* as “an outlier case”).

376. *See* Person v. N.Y. State Bd. of Elections, 467 F.3d 141 (2d Cir. 2006); Prete v. Bradbury, 438 F.3d 949 (9th Cir. 2006); Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614 (8th Cir. 2001). At least one state high court has also upheld such a rule. *See* Busefink v. State, 286 P.3d 599 (Nev. 2012).

377. *See, e.g.*, Citizens for Tax Reform v. Deters, 518 F.3d 375 (6th Cir. 2008); Ind. Inst. v. Gessler, 936 F. Supp. 2d 1256, 1259 (D. Colo. 2013); On Our Terms '97 PAC v. Sec'y of State of Me., 101 F. Supp. 2d 19 (D. Me. 1999); Limit v. Maleng, 874 F. Supp. 1138 (W.D. Wash. 1994).

378. *See* Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 784, 792 (1988) (invalidating a state law that barred professional fundraisers from charging “unreasonable” or “excessive” fees for soliciting charitable contributions and describing “the State’s generalized interest in unilaterally imposing its notions

regulatory constraints on campaign professionals' financial arrangements with their clients.

Ultimately, proponents of industry regulation will need to convince courts that the measures they are defending do not burden speech or association so significantly as to trigger exacting scrutiny of the sort applied in *Meyer* and in recent campaign finance cases. They also will need to identify and defend the governmental interests that the measures are advancing. In this regard, they will presumably lean on cases that recognize the government's vital interests in ensuring the integrity of electoral and governmental processes.³⁷⁹ They could additionally contend that certain regulations actually facilitate speech and association rather than inhibit it by encouraging professionals to advocate for their clients more effectively and to spend funds on communication rather than on self-enrichment. Much will depend on whether courts are willing to credit these regulatory rationales

of fairness on the fundraising contract" as "constitutionally invalid"); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 950 (1984) (invalidating a state statute that presumptively precluded fundraisers from retaining more than twenty-five percent of the money they collected for charity); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 622 (1980) (invalidating a local ordinance that prohibited charitable organizations from soliciting contributions unless at least three quarters of funds obtained were used for "charitable purposes"). These cases do "leave a corridor open for fraud actions to guard the public against false or misleading charitable solicitations." *Ill. ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 617 (2003).

379. See, e.g., *John Doe No. 1 v. Reed*, 561 U.S. 186, 198 (2010) (explaining that "the State's interest in preserving electoral integrity is not limited to combating fraud," but "extends more generally to promoting transparency and accountability in the electoral process, which the State argues is 'essential to the proper functioning of a democracy'"); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008) (recognizing the government's interest in protecting "public confidence in the integrity of the electoral process," which "encourages citizen participation in the democratic process"); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("A State indisputably has a compelling interest in preserving the integrity of its election process. Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy" (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231, (1989))); *Storer v. Brown*, 415 U.S. 724, 730 (1974) (observing that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes"); *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973) (noting, in the context of upholding restrictions on political activities of public employees, the government's interest in maintaining "fair and effective government" and in "the impartial execution of the laws"); *United States v. Harriss*, 347 U.S. 612, 625–26 (1954) (noting, in the context of upholding lobbying disclosure regulations, that Congress acted "to maintain the integrity of a basic governmental process"—"a vital national interest").

or whether they instead cast the government's regulatory interests in narrower terms, as they have in the campaign finance context.³⁸⁰

B. TRANSPARENCY-ORIENTED REGULATION

Regulatory reforms that aim to make the campaign industry more transparent could serve as an alternative or complement to direct regulation. As previously discussed, the industry's operations are presently quite opaque, creating ripe conditions for misdeeds that clients and the broader public may not readily detect.³⁸¹ One potential response would be to revamp existing campaign finance or lobbying disclosure regimes to reveal more about the industry's activities. Another would be to craft a disclosure regime specific to campaign professionals. Again, a smattering of regulations along these lines is already on the books at the state and local levels. Those measures, described below, may offer models or lessons for reformers.

In terms of modifying the existing campaign finance disclosure regime, a few modest changes could shed real light on the campaign industry's activities. For instance, campaign committees could be required to disclose not just payments made directly to their primary vendors but also all payments that those vendors make to subvendors on the campaign's behalf. Massachusetts requires such subvendor disclosure,³⁸² and Texas recently enacted a similar rule.³⁸³ Campaign committees also could be required to identify their service providers' parent companies or affiliates.

Meanwhile, lobbying disclosure rules might be amended to identify instances in which campaign professionals attempt to sway clients or former clients on policy matters.³⁸⁴ Existing re-

380. See, e.g., *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1450 (2014) ("This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption. . . . Moreover, . . . Congress may target only a specific type of corruption—'quid pro quo' corruption.").

381. See *supra* Part I.B.

382. MASS. GEN. LAWS. ch. 55 § 18D (2018).

383. Tex. Ethics Comm'n Rule §§ 20.56, 20.61(b) (2017), https://www.ethics.state.tx.us/rules/adopted_Sep_2017.html; see also Ross Ramsey, *Texas Ethics Commission Chases "Campaign in a Box Spending,"* TEX. TRIB. (Aug. 15, 2016), <https://www.texastribune.org/2016/08/15/texas-ethics-commission-chases-campaign-box-spendi>.

384. For in-depth discussion of lobbying regulation, see, for example, Hasen, *supra* note 359; Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and*

gimes often require lobbyists to reveal certain campaign contributions or campaign fundraising activities.³⁸⁵ Lobbyists might likewise be directed to disclose any campaign services they provide, at least to officials whom they later lobby. Nevada is among the few jurisdictions that currently impose a requirement along these lines.³⁸⁶ New York City similarly requires lobbyists to disclose whether they have engaged in “political consulting activities,” and to specify “the candidate, public servant, or elected official to whom or on whose behalf” they performed those activities.³⁸⁷

Somewhat more ambitiously, jurisdictions could develop transparency rules specific to campaign professionals.³⁸⁸ A handful of these systems already exist. San Francisco has the most extensive and deeply-rooted regime.³⁸⁹ It requires campaign professionals to register with the city and publicly disclose an array of information, including the identity of their employees and clients, the amount of money they receive from clients, certain political contributions they make or facilitate, gifts they make to officeholders, economic consideration they receive from vendors and subvendors, and any city contracts they obtain.³⁹⁰ The city’s Ethics Commission oversees the system and shares the filings, as well as data analysis, on its website.³⁹¹ The disclosures for 2016 revealed that registrants received nearly five million dollars in payments for their work on behalf of local candidates and ballot proposition campaigns.³⁹² Although the system has been

Public Policy, 16 CORNELL J.L. & PUB. POL’Y 1 (2006); William V. Luneburg, *The Evolution of Federal Lobbying Regulation: Where We Are Now and Where We Should Be Going*, 41 MCGEORGE L. REV. 85 (2009).

385. See, e.g., 2 U.S.C. § 1604(d) (2012).

386. See NEV. REV. STAT. § 218H.210(4) (2018) (requiring registered lobbyists to identify “any current Legislator for whom” the registrant “has, in connection with a political campaign of the Legislator, provided consulting, advertising or other professional services since the beginning of the preceding regular session”).

387. See N.Y.C. ADMIN. CODE § 3-216.1 (2017).

388. See MEDVIC, POLITICAL CONSULTANTS, *supra* note 188, at 155 (suggesting that “consultants could be required to register with the Federal Election Commission and to report earnings from political work to the FEC”).

389. See S.F., CAL., CAMPAIGN AND GOVERNMENTAL CONDUCT CODE ch. 5, §§ 1.500–545 (2010).

390. *Id.* § 1.515.

391. See *Campaign Consultant Disclosure*, S.F. ETHICS COMM’N, <https://sfethics.org/disclosures/campaign-consultant-disclosure> (last visited Oct. 4, 2018).

392. This total—specifically, \$4,934,418.98—derives from a spreadsheet of

in place for more than two decades (the city's voters established it by ballot initiative in 1997),³⁹³ it has received virtually no scholarly attention.

Notably, New York recently enacted the first state-level campaign industry disclosure regime. New York's law, adopted in 2016 with little public fanfare, is more limited than San Francisco's scheme. It focuses on campaign professionals who also engage in policy advocacy.³⁹⁴ Administered by the Department of State's Division of Licensing Services, the law requires political consultants who have served elected officials or candidates in the State to register and file disclosures every six months if they have also represented clients with business before state or local government bodies or officials.³⁹⁵ Registrants must identify the officials and candidates for whom they worked, their clients with government business, and the nature of the services they provided to each.³⁹⁶ The law does not call for financial disclosures. Although implementation is at an early stage, several dozen consultants have registered.³⁹⁷ Portland, Oregon recently adopted a somewhat similar measure. It requires political professionals who offer services to elected city officials to register with the city auditor and identify their clients. Registrants, however, need not disclose financial arrangements or other details of their work.³⁹⁸

data compiled by the Ethics Commission. *Campaign Consultants – Client Payment Report*, DataSF, <https://data.sfgov.org/City-Management-and-Ethics/Campaign-Consultants-Client-Payment-Report/be6w-p8an/data> (last visited Oct. 4, 2018). The annual totals vary depending on the number and competitiveness of the local races. For 2015, registrants reported \$6,297,794.00 in receipts; for 2014, which featured a contentious and expensive ballot proposition campaign, the total was \$11,510,877.00. See *id.*; see also Heather Knight, *Soda Industry Spends \$7.7 Million to Defeat SF Sugar Tax – So Far*, S.F. CHRON. (Oct. 9, 2014), <http://www.sfgate.com/bayarea/article/Soda-industry-spends-7-million-to-defeat-SF-5807057.php>.

393. See DEPT OF ELECTIONS, CITY & CTY. OF S.F., CITY AND COUNTY OF SAN FRANCISCO VOTER INFORMATION PAMPHLET AND SAMPLE BALLOT, CONSOLIDATED MUNICIPAL ELECTION, 1997, 73–82 (1997) (describing the ballot measure).

394. See N.Y. Dep't St. Division Licensing Services, *Political Consultant Disclosure Statement*, <https://www.dos.ny.gov/licensing/politicalconsultant.html> (last visited Oct. 4, 2018).

395. N.Y. Exec. Law 6 § 109 (2016); 19 N.Y.C.R.R. § 153 (2017), <https://www.dos.ny.gov/licensing/pdfs/PoliticalConsultant.pdf> (implementing regulations).

396. 19 N.Y.C.R.R. § 153.3 (2017).

397. See *Political Consultant Filings: Beginning 2016*, N.Y. ST., <https://data.ny.gov/Transparency/Political-Consultant-Filings-Beginning-2016/tekz-xrvb> (last visited Oct. 14, 2018).

398. PORTLAND, OR., CODE ch. 2.14 (“Reporting by Political Consultants”); see also Brad Schmidt, *Political Consultants Must Disclose Clients Under New*

As a constitutional matter, transparency rules may fare better on the whole than substantive restrictions on campaign industry practice, although they will no doubt face objections. One prominent consulting firm in New York publicly declared its intention to flout that state's disclosure law, asserting that the State is not entitled "to monitor routine political activities and associations."³⁹⁹ The Supreme Court, however, has been relatively tolerant of campaign finance disclosure laws,⁴⁰⁰ and it long ago upheld disclosure requirements for lobbyists as well.⁴⁰¹ Although disclosure rules can no doubt become overly onerous or intrusive,⁴⁰² or can be drafted too vaguely,⁴⁰³ it seems likely that jurisdictions can lawfully require some form of meaningful campaign industry disclosure. That said, the practical difficulty of enacting such regulations and the risk of legal challenge make it important to consider whether and how the private sector might also help to achieve campaign industry reform—a subject to which the next Section turns.

C. PRIVATE ORDERING

As I have argued elsewhere, private interventions are an underappreciated option for achieving political reform.⁴⁰⁴ Private

Portland Rule, OREGONIAN (Apr. 21, 2016), http://www.oregonlive.com/portland/index.ssf?/2016/04/political_consultants_must_dis.html.

399. Bill Mahoney, *Consultant Registry Off to Slow and Confusing Start*, POLITICO (Jan. 13, 2017), <https://www.politico.com/states/new-york/albany/story/2017/01/consultant-registry-off-to-slow-and-confusing-start-108711>.

400. See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366–71 (2010) (upholding federal disclosure requirements and describing disclosure as "a less restrictive alternative to more comprehensive regulations of speech").

401. See *United States v. Harriss*, 347 U.S. 612, 625 (1954) (holding that requiring lobbyist disclosures does not violate the First Amendment). The Supreme Court has also been relatively amenable to disclosure requirements in the context of charitable solicitations. See, e.g., *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 795, 800 (1988) (indicating that states "may constitutionally require fundraisers to disclose certain financial information to the State" and may "publish the detailed financial disclosure forms it requires professional fundraisers to file").

402. Cf. *Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 202–04 (1999) (holding that certain state disclosure requirements for paid petition circulators violated the First Amendment).

403. Cf. Allen Dickerson & Zac Morgan, *Campaign Finance Advisory Opinions on the State Level*, 40 FORDHAM URB. L.J. 773, 774 (2016) (explaining that local campaign finance rules can often be ambiguous).

404. See Yablon, *supra* note 290, at 188–89 (2017).

action has the virtue of sidestepping both political and constitutional hurdles to government regulation.⁴⁰⁵ Private efforts to improve the campaign industry's conduct might come from at least two distinct sources. First, campaign professionals could themselves develop a system of industry self-regulation. Second, campaign funders could pursue measures to constrain and monitor professionals.

The campaign industry currently has only rudimentary self-regulatory mechanisms. Campaign professionals have not established a framework of private accreditation or oversight.⁴⁰⁶ Since 1969, they have had a national professional organization, the American Association of Political Consultants (AAPC),⁴⁰⁷ but the group has been more of a cheerleader for the industry than a standard-setter or disciplinarian. Membership is optional, and professionals need not possess any particular experience or credentials to join, nor do they need to satisfy any continuing education or other requirements to stay.⁴⁰⁸ The AAPC does require members to sign a Code of Professional Ethics,⁴⁰⁹ but the Code is vague and superficial. The Code directs signatories to "treat . . . colleagues and clients with respect," to "respect the confidence of . . . clients and not reveal confidential or privileged information," and to use client funds "only for those purposes invoiced in writing."⁴¹⁰ It says nothing, however, about conflicts of interest, self-dealing, duties of care, and the like.⁴¹¹ The Code also includes several precepts related to campaign communications. It instructs professionals to avoid appeals "based on racism, sexism, religious intolerance or any form of unlawful discrimination"; to "refrain from false or misleading attacks on an opponent"; to "document accurately and fully any criticism of an opponent"; and to be "honest . . . with the news media."⁴¹² While

405. *Id.* at 190–91.

406. In a moment of candor, longtime consultant Mark McKinnon opined that "[t]he problem with political consulting is you don't need a license or a degree. . . . It is the ultimate in hackery." Adam Nagourney, *Strategists as Stars*, N.Y. TIMES (July 15, 2007), <https://www.nytimes.com/2007/07/15/weekinreview/15nagourney.html>.

407. *About Us*, AM. ASS'N OF POLITICAL CONSULTANTS, <https://theaapc.org/about-us> (last visited Oct. 4, 2018).

408. The American Association of Political Consultants currently claims "over 1,350 members." *Id.*

409. *Code of Ethics*, AM. ASS'N OF POLITICAL CONSULTANTS, <https://theaapc.org/member-center/code-of-ethics-2> (last visited Oct. 4, 2018).

410. *Id.*

411. *Id.*

412. *Id.*

these sentiments are admirable, the provisions are at most hortatory and appear to be routinely flouted.⁴¹³ The Code lacks any associated protocols for securing compliance, identifying violations, or punishing violators.⁴¹⁴

The AAPC or a new organization could adopt substantive membership criteria and strengthen its code of conduct, borrowing ideas from other fields.⁴¹⁵ Lawyers, of course, have highly developed self-regulatory regimes, including detailed rules of professional responsibility.⁴¹⁶ Those rules, particularly as they pertain to lawyers' duties to their clients, may be instructive even if the campaign industry remains far less formalized than the legal profession.⁴¹⁷ Self-regulatory practices among professional lobbyists may similarly offer guidance. State-level lobbyist associations often have ethics codes more detailed than the AAPC's, and they sometimes specify procedures for filing complaints, investigating alleged misconduct, and imposing penalties.⁴¹⁸ Especially for the fundraising-related services that campaign professionals provide, the Code of Ethical Standards for

413. See e.g., Lee Goldman, *False Campaign Advertising and the "Actual Malice Standard*, 82 TULANE L. REV. 889, 892–95 (2008) (lamenting the volume of false or misleading campaign advertisements and offering a number of examples).

414. See *id.*; Thurber, *Portrait*, *supra* note 199, at 30; Mark R. Kennedy, *The Case for Certified Political Managers*, CAMPAIGNS & ELECTIONS (Sept. 18, 2012), <https://www.campaignsandelections.com/campaign-insider/the-case-for-certified-political-managers>.

415. Cf. Kennedy, *supra* note 414 (advocating for a certification scheme for campaign professionals).

416. See Am. Bar Ass'n, *Model Rules of Professional Conduct* (2016), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

417. For instance, the Model Rules require lawyers to “act with reasonable diligence and promptness in representing a client,” *id.* at Rule 1.3; to consult with clients and keep them reasonably informed, *id.* at Rule 1.4; to avoid unreasonable fees, *id.* at Rule 1.5; and to avoid client relationships that pose conflicts of interest, at least absent informed consent, *id.* at Rule 1.7.

418. See, e.g., *Code of Ethics*, FLA. ASS'N PROF. LOBBYISTS, <https://www.fapl.us/page/34> (last visited Oct. 4, 2018) (declaring that lobbyists should, *inter alia*, “devote the necessary time, attention, and resources to the interests of the client or employer;” “keep a client fully informed as to relevant events relating to that client;” “as appropriate, give the client meaningful and informed participation in the development and implementation of strategies;” and “have an agreement with the client regarding the engagement of the lobbyist’s services”); *FAPL By-laws*, Art. X, FLA. ASS'N PROF. LOBBYISTS, <https://www.fapl.us/page/35> (last visited Oct. 4, 2018) (detailing complaint and dispute resolution procedures related to alleged ethics violations); *Code of Conduct / Best Practices*, GA. PROF. LOBBYISTS ASS'N, <https://gpla.memberclicks.net/assets/gpla%20code%20of%20best%20practices.pdf>.

the Association of Fundraising Professionals might also serve as a model.⁴¹⁹ Among other things, the Code—which is backed by a formal enforcement process⁴²⁰—precludes members from accepting contingency fees and commissions.⁴²¹

Campaign professionals may well be amenable to at least some self-regulatory measures. Political science research suggests that professionals have developed some informal ethical norms, especially with regard to their relationships with clients.⁴²² According to one study, overwhelming majorities of political consultants view it as unprofessional to conceal conflicts of interests, take undisclosed kickbacks, prioritize their financial interests over client interests, and more.⁴²³ Professionals, moreover, sometimes express concern about excesses and abuses, particularly in recent years with respect to the Super PAC ecosystem.⁴²⁴ For principled professionals, norm-reinforcing rules and

20conduct-best%20practices%20-%20final%2012092011%20-%20update%201162012.pdf (last visited Oct. 4, 2018) (describing disciplinary procedures and penalties); *OLA Model Standards of Conduct*, OHIO LOBBYING ASS’N, <http://www.ohioloobby.org/aws/OLA/pt/sp/standards> (last visited Oct. 4, 2018) (providing that a lobbyist should, *inter alia*, “inform the client if any other person is receiving a direct or indirect referral or consulting fee from the lobbyist due to or in connection with the client’s work and the amount of such fee or payment,” “exercise loyalty to the client’s or employer’s interests,” and “keep the client or employer informed of the work being performed . . . and, to the extent possible, . . . give the client the opportunity to choose between various options and strategies”).

419. See ASS’N OF FUNDRAISING PROF’LS, CODE OF ETHICAL STANDARDS (2015), <http://www.afpnet.org/files/ContentDocuments/CodeofEthicsLong.pdf>.

420. Aggrieved individuals or entities can file complaints, which the organization’s Ethics Committee reviews and considers disciplinary action, including letters of reprimand or censure, suspension, or expulsion. See *id.* at 36–41; ASS’N OF FUNDRAISING PROF’LS, AFP ENFORCEMENT PROCEDURES FOR THE CODE OF ETHICAL PRINCIPLES AND STANDARDS, <http://www.afpnet.org/files/contentdocuments/ethicsenforcementprocedures.pdf> (last visited Oct. 4, 2018). Since 1992, the group has expelled about a dozen members. See, *Ethics Sanctions*, ASS’N OF FUNDRAISING PROFESSIONALS, <http://www.afpnet.org/Ethics/content.cfm?ItemNumber=3095&navItemNumber=541> (last visited Oct. 4, 2018).

421. ASS’N OF FUNDRAISING PROF’LS, *supra* note 419, at 30. The AFP also has detailed guidelines that elaborate on particular ethical standards. See *id.* at 6–35; see also ASS’N OF FUNDRAISING PROF’LS, PROFESSIONAL COMPENSATION: A POSITION PAPER (2016), <http://www.afpnet.org/files/ContentDocuments/2016ProfCompensationPositionPaper.pdf> (describing AFP’s rationale for prohibiting commission-based fundraising).

422. See, e.g., Grossmann, *Going Pro?*, *supra* note 83, at 99; Thurber, *Portrait*, *supra* note 199, at 27–31.

423. Grossmann, *Going Pro?*, *supra* note 83, at 98–99.

424. See, e.g., Eliza Newlin Carney, *Tangled Ties of Super PACs*, ROLL CALL (Jan. 13, 2012), http://www.rollcall.com/issues/57_79/Super_PACs_Family_Ties

enforcement mechanisms may be a welcome way to thwart unscrupulous competitors.⁴²⁵

Professionals may be wary of more ambitious attempts to reshape industry norms, particularly if they see a threat to their bottom lines.⁴²⁶ Rules restricting commissions or limiting the type or number of clients that professionals serve might therefore face long odds. That said, if the industry faces intensifying public scrutiny and criticism, or if calls for public regulation mount, campaign professionals could come to see robust private reform as a desirable preemptive step.

Separately, campaign funders could attempt to take matters into their own hands and use their clout to alter the campaign industry's conduct. Large donors likely have the strongest incentives and the most leverage to pursue change. Already, some of the biggest spenders have sought to contain agency costs and maximize the effectiveness of their funds. The Koch brothers' political network, for instance, reportedly conducts "corporate-style efficiency audits" of its groups' activities.⁴²⁷ After assessing how its money was spent during the 2012 election, the network introduced new "spending and contracting controls" and "sought to reduce [its] reliance on . . . outside consultants."⁴²⁸ Along similar lines, during the 2016 presidential primaries, several of Senator Ted Cruz's biggest financial backers attempted to use a

-211499-1.html (expressing concern regarding the lack of checks and balances in the world of Super PACs); Melanie Mason & Matea Gold, 'Super PAC' Leaders Profit from Lack of Oversight, L.A. TIMES (Feb. 22, 2012), <https://articles.latimes.com/2012/feb/22/nation/la-na-superpac-spending-20120223> (conveying concerns expressed by the AAPC's president about Super PAC self-dealing and oversight deficiencies).

425. See Grossmann, *Going Pro?*, *supra* note 83, at 99 ("Only 5 percent of consultants who responded to the survey said that their industry should not be held to ethical standards."); Thurber, *Portrait*, *supra* note 199, at 30–31 (finding that eighty-one percent of surveyed consultants "agreed that there *should* be a code of ethics" for the profession, and seventy percent "favored a censure sanction"); Jossey, *supra* note 170 (suggesting "voluntary standards or a privately run grading system" to address scam PACs).

426. Cf. Grossmann, *Going Pro?*, *supra* note 83, at 99 (finding that only a quarter of consultants surveyed "believe that political consultants should be held to a higher ethical standard than other business professionals, given their role in democratic politics").

427. Kenneth P. Vogel, *How the Koch Network Rivals the GOP*, POLITICO (Dec. 30, 2015), <https://www.politico.com/story/2015/12/koch-brothers-network-gop-david-charles-217124>.

428. *Id.*; see also Elspeth Reeve, *Koch Brothers Want to Know Why Their Money Was Wasted*, ATLANTIC (Feb. 20, 2013), <https://www.theatlantic.com/politics/archive/2013/02/koch-brothers-want-know-why-their-money-was-wasted/318169>.

novel organizational structure to retain more control over spending decisions.⁴²⁹

As more funders awaken to the potential for waste and abuse, monitoring and control arrangements will likely proliferate. To be clear, this development is not necessarily one to cheer. After all, minimizing agency costs may help big spenders exert even greater electoral influence. But perhaps similar techniques could be used to protect smaller donors. Although small donors may not individually have the capacity or leverage to change campaign industry practice, candidates and advocacy groups that rely on small donations—or seek to make themselves more attractive to small donors—might be in a position to act.

Entrepreneurial reformers could help to pave the way. A reform group could, for instance, take on a role akin to Charity Navigator, an organization that helps charitable donors identify reputable nonprofits.⁴³⁰ In addition to gathering and disseminating existing information about how campaign entities operate, such a group could urge campaigners to become more transparent about their expenditures and professional relationships, or even push them to adopt a set of best practices regarding their service providers. The group could then encourage donors to give to the most transparent and accountable campaign entities and avoid the rest. Armed with more information, individual contributors could conceivably even instruct that their funds not be used for certain purposes or seek to condition their contributions on retaining a right to claw back money in cases of mismanagement.⁴³¹

In sum, the existing practices and proclivities of the campaign industry are not inevitable. A variety of public and private mechanisms exist to reform the industry's conduct. None of these options will be a cure-all, but a sustained effort on multiple

429. See Patrick Svitek, *The Super PAC Experiment That Bankrolled Ted Cruz*, TEX. TRIB. (May 17, 2016), <https://www.texastribune.org/2016/05/17/cruz-super-pac-story>.

430. See generally *Overview*, CHARITY NAVIGATOR, <https://www.charitynavigator.org/index.cfm?bay=content.view&cpid=628> (last visited Oct. 14, 2018) (describing organization's efforts to assess performance of charities based on financial health as well as accountability and transparency to "show givers how efficiently we believe a charity will use their support").

431. Again, practices in the nonprofit sector may offer guidance. See generally Charlie Wells, *When Unhappy Donors Want Their Money Back*, WALL ST. J. (Dec. 14, 2014), <https://www.wsj.com/articles/when-unhappy-donors-want-their-money-back-1418619048> (describing a trend of charitable givers requesting their money back when they feel their funds have been misused).

fronts could usher in real changes to election campaigns and the democratic process.

CONCLUSION

While election law scholars have aptly analogized political processes to economic markets,⁴³² modern electoral politics is as much a literal market as a metaphorical one. Campaigns are not just occasions for democratic deliberation; they are also opportunities for economic exchange. To advance their electoral interests, campaigners enlist profit-seeking professionals, paying them with funds that those very professionals often help to raise. These arrangements have complicated consequences. Campaign professionals can significantly aid their clients, but they can exploit them as well. They can facilitate politicking, but they can also degrade our politics.

The campaign industry's rise is a classic election law story and is one that has for too long been overlooked. It is a story of actors adapting to institutional change in unanticipated ways and producing effects that have reverberated across our interconnected political system. It is a story that continues to unfold as the campaign industry and our politics reconfigure one another in an ongoing dialectic. Attending to the industry's origins and its modern ascendancy deepens our understanding of the practical realities of electioneering and suggests new directions for scholarship, policymaking, and jurisprudence. It is a topic ripe for further study.

432. See, e.g., Richard L. Hasen, *The "Political Market" Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719, 719 (1998); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644 (1998).