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ANALYSIS

Rethinking Campaign Finance: Toward a Pro-Democracy Jurisprudence

Brennan Center for Justice *at New York University School of Law*

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INTRODUCTION

Americans are deeply unhappy with the growing role of big money in elections. At a time of secret money and super PACs, when billionaires sponsor candidates like racehorses, the power of their voices are diminished. Strikingly, this view is held widely across partisan and ideological lines.[1] The current situation results, in considerable measure, from a series of misguided 5-4 U.S. Supreme Court decisions that struck down scores of campaign finance laws, to the point that what remains, in the words of Justice Breyer, is "a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve."[2]

Increasingly, leading legal scholars and others who study the Constitution have concluded that the Supreme Court's interpretation of the First Amendment and its proper role in campaign finance cases is simply wrong. In response to recent rulings, they have worked to flesh out alternative understandings of the law of democracy and the First Amendment that many believe are more consistent with the Constitution's true meaning. These approaches would allow for the restoration of many of the laws that this Court has struck down and prompt it to stand back and allow the democratically accountable branches to strike the proper balance on reform. Below, we discuss some of the most promising alternative understandings of the Constitution as it applies to regulation of money in politics. Each offers hope that a future Court will have the tools to ensure that American citizens can legally implement common sense regulation of money in our political system.

FOR MORE ON THE JURISPRUDENTIAL LANDSCAPE, SEE:

- MONEY, POLITICS, AND THE CONSTITUTION: BEYOND *CITIZENS UNITED* (Monica Youn ed., 2011)
- *Money in Politics 2030: Toward a New Jurisprudence,* 89 N.Y.U. L. REV. ONLINE (Oct. 2014)
- BRENNAN CTR. FOR JUSTICE, CONFERENCE SUMMARY: MONEY IN POLITICS 2030: TOWARD A NEW JURISPRUDENCE (2014)
- Yasmin Dawood, *Campaign Finance and American Democracy,* 18 ANN. REV. POL. SCI. 329 (2015)

BACKGROUND

In the five years since the Supreme Court's decision in *Citizens United*,[3] the landscape of campaign finance has been fundamentally reshaped. Corporations, labor unions, and other outside groups have spent almost $2 billion in federal elections, more than double the amount spent between 1990 and 2008.[4] In some competitive races, these outside groups have outspent both the candidates and parties.[5] Much of this money is funneled through "dark money" groups that aren't required to disclose their donors, making the funders — and the interests they represent — impossible to identify. Contributions from the super-wealthy have also skyrocketed, while giving by Americans of ordinary means has declined. In 2014, the top 100 donors to super PACs gave nearly as much as all 4.75 million small donors combined.[6]

While *Citizens United* is often blamed for ushering in this surge of spending, the legal basis for these recent developments was established decades earlier. In *Buckley v. Valeo*, a challenge to the post-Watergate Federal Election Campaign Act, the Supreme Court held that political campaign spending is a form of speech

protected by the First Amendment. In other words, for constitutional purposes, money equals speech.[7] The *Buckley* Court explained that the government can regulate political spending to prevent official corruption,[8] but not to promote political equality.[9] Consequently, the Court upheld limits on the amount of money that supporters can give to candidates, on the grounds that these payments could be corrupting, or at least could create the *appearance* of impropriety. But it struck down limits on other types of election spending, reasoning that money that does not flow directly to candidates, but instead is spent "independently" of candidates and their campaigns, is less likely to be corrupting. In doing so, it struck down long-established state and local laws limiting expenditures by candidates.[10]

Buckley was immediately and widely criticized. Nonetheless, for the next few decades, the Court defined "corruption" broadly enough to permit a range of limits on campaign spending. For example, in 1990, the Court upheld a Michigan state law restricting political spending by corporations in order to prevent "a different type of corruption," which it described as "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form. . . ."[11] As recently as 2003, the Court rejected a constitutional challenge to the federal Bipartisan Campaign Reform Act, explaining that the government's interest in preventing corruption is not limited to preventing the exchange of cash for votes, but rather "extend[s] to the broader threat from politicians too compliant with the wishes of large contributors."[12]

A few years later, however, two new justices joined the Court, which then began to change its view of corruption. Over the last decade, the new conservative majority, led by Chief Justice John Roberts, has aggressively relied upon *Buckley* to strike down a variety of federal and state regulations. The Court has expanded the ways in which corporations and labor unions can engage in political spending, increased the amount wealthy individuals can give to federal candidates and parties, and eliminated reforms designed to encourage public financing and make candidates of ordinary means more competitive in races against rich opponents.[13] In these cases, the Roberts Court has said that the government's *sole* interest in campaign finance regulation of political spending is fighting corruption and simultaneously has limited the scope of that interest to the narrow goal of preventing *quid pro quo* exchange. In other words, today's campaign finance regulation is basically limited to preventing bribery — the exchange of cash for favors or votes (although other measures, such as disclosure requirements and voluntary public financing systems are still permitted).

The Roberts Court has consistently predicted that its decisions would result in more speech, greater diversity in the political process, and (relying on the Internet) more prompt and useful disclosure of the identities of campaign contributors.[14] In fact, the opposite has happened. For the first time in decades, the number of donors (at least those whose identities have been disclosed) has fallen, as has the total amount contributed by small donors.[15] While spending by the wealthy has skyrocketed, the ability of ordinary citizens to make their voices heard through the political process has been diminished. And while the Court promised more transparency, we have never seen more spending by groups that do not disclose their donors.

This disconnect has spurred a broad and diverse group of scholars to conclude that the legal framework for campaign finance law since *Buckley* is fundamentally flawed. Today, a rich set of alternatives exists that would allow reasonable regulation of money in politics, consistent with the Constitution, American history, and democratic values. They represent different paths toward reclaiming a "democracy-friendly First Amendment."[16] We discuss four of the most promising alternatives below.

A. PROTECTING ELECTORAL INTEGRITY

In *McCutcheon v. Federal Election Commission,* the Court's most recent campaign finance case, the four dissenting Justices embraced the concept of "electoral integrity" to explain why the majority's current jurisprudence and narrow conception of corruption is wrongheaded, and to offer an approach that could break through the conceptual strictures imposed by *Buckley*.[17] Consistent with the Court's longstanding recognition of fair elections as crucial to the success of our democracy,[18] they suggested campaign finance rules and limits can be justified as part of an effort to ensure free and fair elections.

We care about corruption, Justice Breyer explained, not because it is a particularly offensive crime, but rather because it undermines faith in our public institutions. Protecting electoral integrity goes to the core of the First Amendment: "Where enough money calls the tune, the general public will not be heard [and] a free marketplace of political ideas loses its point."[19]

By recognizing the government's interest in protecting electoral integrity, the dissenters would put democracy at the center of the First Amendment. Refocusing our attention on the democratic function of elections would allow for regulations that ensure our elections pick people who answer to all Americans, not just a privileged few. It would also allow for regulations to combat the pervasive public cynicism spawned by the belief by most Americans that the fix is in. A majority of the Supreme Court, in an opinion authored by Chief Justice Roberts, recently endorsed a similar concept of judicial integrity in the context of a decision related to fundraising in judicial elections.[20] Although the Court's reasoning would seem to apply equally to other elected offices, the Court specifically limited the decision to judicial elections.

The *McCutcheon* dissent cited Yale Law School Dean Robert Post's 2014 book, *Citizens Divided*, which argues that the Constitution requires government be allowed to protect the integrity of elections. He explains that the First Amendment protects the rights to speak, publish, and organize in order to allow Americans to communicate with their elected representatives and participate in democratic self-government. But these rights are hollow if the electoral process doesn't result in the selection of officials who actually pay attention to their constituents.[21] Government regulations that limit the influence of wealthy donors are consistent with the First Amendment if they help protect the voters' faith in the integrity of our elections, and therefore, in our democracy.[22] According to Post, the Court's principal error in recent decisions was to "imagine electoral integrity as a matter of law, rather than of fact," and to refuse to assess whether or not the actuality or "appearance of influence or access" "cause[s] the electorate to lose faith in our democracy" and thus justifies legislative solutions.[23]

Professor Burt Neuborne of New York University School of Law goes a step further, arguing that the structure of the First Amendment, as well as the entire Bill of Rights, make democracy a structural principal of the Constitution, like separation of powers or federalism. Applying this reading of the Constitution, Neuborne concludes that political spending should be "demoted to a form of 'communicative conduct' entitled to significant First Amendment protection, but subject to good-faith regulation" aimed at making democracy work by reinforcing political equality and preventing corruption.[24]

FOR MORE ON ELECTORAL INTEGRITY AND DEMOCRACY, SEE:

- Robert Post, *Democracy and Equality*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 24 (2006)
- Richard H. Pildes, *Elections As a Distinct Sphere under the First Amendment, in* MONEY, POLITICS & THE CONSTITUTION: BEYOND *CITIZENS UNITED* 19 (Monica Youn ed., 2011)
- ROBERT POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION (2014)
- Justin Levitt, *Electoral Integrity: The Confidence Game,* 89 N.Y.U. L. REV. ONLINE 70 (2014)
- BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT (2015)
- Brennan Center for Justice, *Money in Politics and Electoral Integrity* (forthcoming)

B. RETHINKING CORRUPTION

In *Buckley*, the Supreme Court held that government can regulate campaign finance to prevent corruption and the appearance of corruption.[25] But there are many ways to define "corruption." Several prominent constitutional law scholars have argued that the Roberts Court's view of corruption is inconsistent with the purpose of the First Amendment and the goals of the Constitution. A broader definition of corruption could mean a very different constitutional law that would allow Congress and state legislatures to pass many laws the current Court would deem unacceptable.

One alternative, championed by Professor Lawrence Lessig of Harvard Law School, is that corruption occurs when our politicians become overly reliant on (and therefore overly responsive to) a small group of wealthy donors. Lessig argues that our democracy requires that elected officials are "dependent upon the People alone."[26] Therefore, even the slightest competing or conflicting loyalty is a corruption of the governing relationship.[27] In Lessig's view, campaign finance may be regulated to prevent elected officials from becoming dependent on funders rather than the American people.[28]

Lessig traces the government's interest in preventing this kind of "dependence corruption" back to the nation's founding.[29] "The Framers were well aware," Lessig explains, "that in republics, persons elevated from the mass of the community by the suffrages of their fellow-citizens to stations of great pre-eminence and power may find compensations for betraying their trust."[30] In other words, people elected to positions of political power would suddenly find themselves with wealthy friends. So the Framers tried to create a system of government that would be accountable to all of the people, not just a "favored class."[31] In Lessig's view, wealthy special interests pose precisely the type of threat to democracy that the Framers sought to address in the new Constitution.

Zephyr Teachout, Fordham Law Professor and author of *Corruption in America*, agrees that the nation's founders were "obsessed with corruption."[32] At the Constitutional Convention, George Mason of Virginia stated that "if we do not provide against corruption, our government will soon be at an end."[33] During the Convention, the problem of corruption was discussed more frequently than many other significant challenges facing the new country, such as factions, violence, and instability.[34] Based on her historical research, Teachout agrees with Lessig that the corruption that concerned the Framers was broader than bribery. The

Constitution's authors, she argues, were concerned "with corruption as a loss of political integrity, and systems that predictably create moral failings for members of Congress."[35]

Returning to this view of corruption, which is deeply embedded both in the Supreme Court's case law and in the nation's history and culture, would allow government to regulate political spending to ensure that elected officials can be responsive to the will of the voters, not just a handful of wealthy donors.

Professor Deborah Hellman of the University of Virginia School of Law offers another potentially fruitful avenue for exploration when it comes to corruption, which she explains is a "derivative concept."[36] In order to define corruption of an official or institution, one needs an account of how the official ought to act or the institution ought to function. "Legislative corruption thus depends on a theory of a representative's role in a democracy," she writes.[37] Drawing an analogy to apportionment and gerrymandering cases, she argues that issues that "address the foundational questions about the form of our democracy" provide a rationale for "judicial deference to legislative judgment."[38]

Other critiques of the Court's corruption rationale focus on the fact that its assertion in *Citizens United* and subsequent cases that independent expenditures cannot be corrupting is provably false. The Court's reasoning assumes that only an explicit, verbal agreement can mark improper conduct. But judicial doctrines from many other areas show that is not so: in antitrust laws, securities laws, and government contractor laws, among others, it is assumed that a decision maker can be improperly swayed by non-explicit but improper activities by another. Indeed, the Court has recognized that independent expenditures create an unacceptably high risk and appearance of bias and improper influence in the context of judicial elections, but has of yet refused to extend this reasoning to other elections. Renata Strause and Professor Daniel P. Tokaji of the Moritz College of Law have set out a research agenda to demonstrate that "a reasonable legislator [c]ould feel pressure to act in [a] way that is different from the preferences of her constituents or the public interest" even if that money is not directly given to a candidate.[39] This would enable the Court to embrace a broader definition of corruption that would allow for greater regulation of political spending.

FOR MORE ON CORRUPTION, SEE:

- Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003)
- Yasmin Dawood, *The New Inequality: Constitutional Democracy and the Problem of Wealth*, 67 MD. L. REV. 123 (2007)
- Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009)
- LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS – AND A PLAN TO STOP IT (2011)
- M. Patrick Yingling, *Conventional and Unconventional Corruption*, 51 DUQ. L. REV. 263 (2013)
- Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy,* 111 MICH. L. REV. 1385 (2013)
- Renata Strause & Daniel P. Tokaji, *Between Access and Influence: Building a Record for the Next Court,* 9 DUKE J. OF CONST. L. & PUB. POL. 179 (2014)

C. RESURRECTING POLITICAL EQUALITY

Another path to a new vision for money in politics is to move beyond the Court's current corruption fixation. Since *Buckley*, many prominent judges and academics have questioned whether the Court was right to prohibit federal and state governments from limiting electoral spending in order to promote political equality. The rejection of political equality seems inconsistent with the Court's other election law cases and core American values. As the evidence mounts that rich Americans have disproportionate influence on federal policy,[40] the time has come to reconsider whether the government's interest in campaign finance should be limited to preventing corruption.

One problem with the Court's rejection of political equality is that it was based on a misunderstanding of how campaign finance regulation affects the "marketplace of ideas." The *Buckley* Court thought that removing limits on political spending would expand the range of public debate and provide more information about important public issues.[41] In other words, the justices assumed that more money would lead to more and more varied speech.

Writing in response to *Buckley*, appeals court Judge J. Skelly Wright argued that the ideals of the First Amendment are best served by allowing the government to restrict spending, "so that the wealthiest voices may not dominate the debate by the strength of their dollars rather than their ideas."[42] Spending limits, he suggested, are like the rules of deliberation for town meetings. They prevent the "loud mouth and long talker" from taking over the conversation.[43] Judge Wright was careful to emphasize that the First Amendment does not allow any restrictions on "general discussion of political, economic, or social controversies," but does serve to keep any single person or powerful group from dominating the discussion.[44]

The Roberts Court has continued to invoke the marketplace metaphor to justify its rejection of a variety of national and state limits on campaign spending. But evidence from the real world suggests that removing spending limits has had the opposite effect. Since *Citizens United*, the number of disclosed donors has fallen, the total contributions of small donors have decreased, and the influence of "dark money" groups that are politically active but do not disclose their funders has risen. In some races, even the candidates and parties struggle to make themselves heard over the onslaught of advertising paid for by non-profits with unassuming names created to spend money in one election, and then dissolve without a trace.

The Supreme Court's current approach to the First Amendment also undermines its own case law on voting rights. The Court already recognizes that each citizen's vote must have "a proportionately equal opportunity to influence the outcome of the election."[45] But as Professor Edward Foley of Ohio State University Law School explains, elections aren't just about casting ballots. Long before the first ballot is cast, the issues to be decided are identified and public debates have occurred where voters have the opportunity to convince other voters of the merits of their positions.[46] Right now, the Court reads the Constitution to protect equality only in the final voting stage: the actual election. But the absence of equality in all other stages of an election "dilutes the power of the average voter," by denying her an equal opportunity to influence the conversation as it develops.[47]

Campaign costs are skyrocketing around the country. To be successful, candidates (and elected officials) must spend hours cultivating wealthy supporters. And increasingly, federal candidates must themselves have substantial means. These trends have enhanced the power of the super-wealthy in shaping electoral contests.

For instance, in March 2014 Republican hopefuls gathered in Las Vegas for the "Sheldon Primary," seeking the support of Sheldon Adelson and his wife, who together spent $92 million dollars in the 2012 presidential election.[48] Before a single vote has been cast in the 2016 election, the field of plausible Republican contenders will already have been narrowed to the few candidates who have been able to develop a following of wealthy donors, or are exceptionally wealthy themselves.

Resurrecting the government's political equality interest would allow the states and federal government to experiment with a range of solutions to reduce the cost of elections, enable Americans of ordinary means to be competitive candidates, and limit the time that candidates and elected officials must spend dialing for dollars. In other words, it would create the possibility of a level playing field, in which every American has the opportunity to meaningfully participate in our democracy.

FOR MORE ON EQUALITY, SEE:

- J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality*, 82 COLUM. L. REV. 609 (1982)
- David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236 (1991)
- Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994)
- Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273 (1993)
- Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599 (2008)
- Mark C. Alexander, *Citizens United and Equality Forgotten*, 35 N.Y.U REV. L. & SOC. CHANGE 499 (2011)
- Adam Lioz, *Breaking the Vicious Cycle: How the Supreme Court Helped Create the Inequality Era and Why a New Jurisprudence Must Lead Us Out*, 43 SETON HALL L. REV. 1227 (2013)
- MARK SCHMITT, NEW AM. AND BRENNAN CTR. FOR JUSTICE, POLITICAL OPPORTUNITY: A NEW FRAMEWORK FOR DEMOCRATIC REFORM (2015), *available at* https://www.brennancenter.org/sites/default/files/publications/A_New_Framework_for_Democratic_Reform.pdf
- Johanna Kalb, *J. Skelly Wright's Democratic First Amendment,* LOY. L. REV. (forthcoming 2015)
- RICHARD HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS (forthcoming 2016)

D. SEPARATING MONEY AND SPEECH

Each of the First Amendment theories described so far assumes that political spending deserves the same constitutional protection as pure speech, or at least do not challenge that assumption. But many judges and scholars have questioned whether this is appropriate. The *Buckley* Court equated spending with speaking because money is useful — even necessary — to ensure that ideas and arguments reach a broad audience.[49] But as Judge Wright explained in his early critique of *Buckley*, the Court hasn't always treated the tools of communication as equivalent to speech itself.[50] In 2006, then-Justice John Paul Stevens explained that limits on electoral spending restrict only a particular manner of speech, leaving citizens with myriad other means of using money to "amplify" their views on political issues.[51]

Reviewing the Court's case law in other areas, Professor Deborah Hellman of the University of Virginia School of Law explains that the Supreme Court has not extended the same protection to money used to extend other constitutional rights.[52] For example, the right to use contraceptives includes the right to buy them at pharmacy. But the right to sexual privacy does not include the right to prostitution. And the right to vote does not include the right to buy or sell votes.[53] Hellman concludes that the Court generally has allowed spending restrictions in connection with rights, so long as those rights can also be exercised in other ways.[54]

Americans of ordinary means use the full range of First Amendment activities to share their opinions and mobilize support for their ideas. In addition to making financial contributions to candidates and groups, they collect signatures on petitions, write letters to the editor, share articles on Twitter and Facebook, organize other supporters, and protest in the streets. All of these tools would still be available to wealthy Americans under a new constitutional theory that allows reasonable restrictions on political spending. The only difference would be that the influence of the wealthy would be determined by the power of their ideas, not the size of their wallets.[55]

FOR MORE ON THE DISTINCTION BETWEEN MONEY AND SPEECH, SEE:

- J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976)
- Deborah Hellman, *Money and Rights*, *in* MONEY, POLITICS, AND THE CONSTITUTION: BEYOND *CITIZENS UNITED* (Monica Youn ed., 2011)
- Deborah Hellman, *Money Talks But it Isn't Speech*, 95 MINN. L. REV. 953 (2011)

CONCLUSION

The Roberts Court's narrow and unpopular interpretation of the First Amendment in campaign finance regulation has prompted calls for a constitutional amendment. While that is one way forward, it is by no means the only path available. The current majority's constitutional vision is already on tenuous legal and factual footing. It is widely contested by legal experts and rejected by the American people. History has shown that the Court's thinking evolves to reflect the constitutional values of the people. Fortunately, a robust set of alternatives already exist that better reflect these values and can guide the Court and the country toward a more inclusive, democratic Constitution.

ENDNOTES

[1] Nicholas Confessore & Megan Thee-Brenan, *Poll Shows Americans Favor an Overhaul of Campaign Financing,* N.Y. TIMES, June 2, 2015, http://www.nytimes.com/2015/06/03/us/politics/poll-shows-americans-favor-overhaul-of-campaign-financing.html.

[2] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1465 (2014) (Breyer, J., dissenting).

[3] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[4] DANIEL I. WEINER, BRENNAN CTR. FOR JUSTICE, *CITIZENS UNITED* FIVE YEARS LATER 4 (2015).

[5] *See e.g.* IAN VANDEWALKER, BRENNAN CTR. FOR JUSTICE, ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE *CITIZENS UNITED* 5 (2015).

[6] Kenneth P. Vogel, *In 2014, the top 100 donors gave as much as all 4.75 million small donors combined*, POLITICO, Dec. 29, 2014, http://www.politico.com/story/2014/12/top-political-donors-113833.html. "Small donor" is defined a campaign contributor who gives $200 or less.

[7] Buckley v. Valeo, 424 U.S. 1, 16-23 (1976) (*per curiam*).

[8] *Id.* at 25-28.

[9] *See id.* at 48-49.

[10] As early as the 1920s, 35 states had laws limiting candidates' spending. *See* Michael J. Malbin & Peter W. Brusoe, *Campaign Finance Policy in the State and City of New York, in* THE OXFORD HANDBOOK OF NEW YORK STATE GOVERNMENT AND POLITICS 79, 81 (Gerald Benjamin ed., 2012) (citing EARL R. SIKES, STATE AND FEDERAL CORRUPT-PRACTICES LEGISLATION 284-291 (1928)).

[11] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990).

[12] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 143 (2003) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000)).

[13] David Earley & Avram Billig, *The Pro-Money Court: How the Roberts Supreme Court Dismantled Campaign Finance Law,* BRENNAN CTR. FOR JUSTICE, Apr. 2, 2014, http://www.brennancenter.org/analysis/pro-money-supreme-court.

[14] *See e.g. Citizens United*, 558 U.S. at 341, 360.

[15] Ross Choma, M*oney Won on Tuesday, But Rules of the Game Changed*, CTR. FOR RESPONSIVE POLITICS, Nov. 5, 2014, http://www.opensecrets.org/news/2014/11/money-won-on-tuesday-but-rules-of-the-game-changed/; *Donor Demographics*, CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/overview/donordemographics.php; *Donor Demographics*, CTR. FOR RESPONSIVE POLITICS, http://www.opensecrets.org/bigpicture/donordemographics.php?cycle=2012&filter=A.

[16] BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 76 (2015).

[17] *McCutcheon,* 134 S. Ct. at 1468 (Breyer, J., dissenting).

[18] *See, e.g.*, Doe v. Reed, 561 U.S. 186, 198 (2010); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189–90, 197 (2008); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 137, 187 (2003); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 383 (2000); Burson v. Freeman, 504 U.S. 191, 199–200, 206 (1992); Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983); Buckley v. Valeo, 424 U.S. 1, 26–27, 58 (1976).

[19] *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting).

[20] Williams-Yulee v. Florida Bar, ___ U.S. __, 135 S. Ct. 1656 (2015).

[21] ROBERT POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 7(2014).

[22] *Id.*

[23] *Id.* at 63.

[24] Neuborne, *supra* note 16 at 80.

[25] *Buckley*, 424 U.S. at 25–28.

[26] LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS – AND A PLAN TO STOP IT 128 (2011) (quoting THE FEDERALIST NO. 52 (Madison), ed. Henry Cabot Lodge (New York: G. P. Putnam's Sons, 1888), 328).

[27] *Id.* at 127–29.

[28]*Id.* at 264.

[29] Brief for Lawrence Lessig as Amicus Curiae Supporting Appellee at 5-10, , McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014) (No. 12–536), 2013 WL 3874388.

[30] *Id.* at 8 (quoting THE FEDERALIST NO. 22 (Hamilton), ed. Clinton Rossiter (1961), at 117 (internal quotation marks omitted)).

[31] *Id.* at 8 (quoting THE FEDERALIST NO. 39, at 209 (Madison), ed. Clinton Rossiter (1961) (internal quotation marks omitted)). Several scholars share Lessig's view that the Framers held a systemic view of corruption. Zephyr Teachout describes corruption as "the use of public forum to pursue private ends." Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 342, 382 (2009). Similarly, Robert G. Natelson explains that "[t]he term 'corruption' generally was understood at [the founding] to mean, not merely theft . . . but the use of government power and assets to benefit localities or other special interests . . . ." Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 48 (2003). *See also* M. Patrick Yingling, *Conventional and Unconventional Corruption*, 51 DUQ. L. REV. 263, 282–83 (2013) (identifying the Framers' conception of corruption as "the displacement of the public good by private interest") (internal quotation marks omitted); Yasmin Dawood, *The New Inequality: Constitutional Democracy and the Problem of Wealth*, 67 MD. L. REV. 123, 129–30 (2007) (comparing Madison's thought to that of philosophers who conceived of corruption as "the moral incapacity of citizens and rulers alike to make reasonably disinterested commitments that would benefit the common welfare").

[32] Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 342, 348 (2009).

[33] *Id.* (quoting Notes of Robert Yates (June 23, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 391, 392 (Max Farrand ed., rev. ed. 1966) (1937)) (brackets omitted).

[34] *Id.* at 352. Corruption concerns also underlay subsequent constitutional amendments, like the Seventeenth Amendment, one of the "principal purposes" of which was the "the reduction of the influence of money in selecting Senators." Terry Smith, *Race and Money in Politics,* 79 N.C. L. REV. 1469, 1505 n.178 (2001).

[35] *Id.* at 395.

[36] Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy,* 111 MICH. L. REV. 1385, 1391 (2013).

[37] *Id.* at 1421.

[38] *Id.*

[39] Renata Strause & Daniel P. Tokaji, *Between Access and Influence: Building a Record for the Next Court,* 9 Duke J. of Const. L. & Pub. Pol. 179, 181 (2014).

[40] MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012).

[41] Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 651 (2008) (quoting Brief of the Appellants at 68, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 and 75-437), 1975 WL 173792, at *82).

[42] J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality*, 82 COLUM. L. REV. 609, 638 (1982).

[43] *Id.* at 639.

[44] *Id.*

[45] *Id.* at 628.

[46] Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1226 (1994).

[47] Mark C. Alexander, *Citizen's United and Equality Forgotten*, 35 N.Y.U REV. L. & SOC. CHANGE 499, 518 (2011).

[48] Dan Balz, *'Sheldon Primary' Is One Reason Americans Distrust The Political System*, WASH. POST, Mar. 28, 2014, http://www.washingtonpost.com/politics/the-sheldon-primary-is-one-reason-why-americans-distrust-the-political-system/2014/03/28/765fbfdc-b67e-11e3-a7c6-70cf2db17781_story.html.

[49] *Buckley*, 424 U.S. at 19.

[50] J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005–10 (1976).

[51] Randall v. Sorrell, 548 U.S. 230, 276 (2006) (Stevens, J.,, dissenting) (quoting Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 508-509 (1985) (White, J., dissenting)).

[52] Deborah Hellman, *Money and Rights*, *in* MONEY, POLITICS, AND THE CONSTITUTION: BEYOND *CITIZENS UNITED* 57 (Monica Youn ed., 2011).

[53] *See* Deborah Hellman, *Money Talks But it Isn't Speech*, 95 MINN. L. REV. 953, 975–83 (2011).

[54] *Id.* at 983–86.

[55] Seth Endo & Liz Kennedy, *Citizens United, the Koch Brothers, Corruption, and Democracy,* GUERNICA, Feb. 24, 2015, https://www.guernicamag.com/daily/seth-endo-liz-kennedy-citizens-united-the-koch-brothers-corruption-and-democracy/.

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